

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

October 24, 2007

Room 514-S—Statehouse

Members Present

Tom Stacy, Chairman
Ed Klumpp, Vice-Chairman
Judge Christel Marquardt
Judge Richard Smith
Senator David Haley
Senator John Vratil
Representative Paul Davis
Representative Lance Kinzer
Michael Kaye
Tim Madden
Steve Opat
Kim Parker
Debra Wilson

Staff Present

Judge John W. White, Reporter
Brett A. Watson, Staff Attorney
Jerry Ann Donaldson, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Duston Slinkard, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes

Other Present

Helen Pedigo, Kansas Sentencing Commission

The meeting was called to order at 9:30 a.m. As Professor Stacy was absent from the morning session, Mr. Klumpp presided.

Professor Kaye reported on behalf of the fundraising subcommittee. He indicated that response to his requests for additional funding had been positive. He noted that the Pew Trust would be interested if the commission was concerned with prison incarceration issues. He stated that he

would follow up on this lead and draft a proposal based on the suggestions he received from a representative of the trust. He also noted that Ms. Spradling had asked to join the subcommittee.

Mr. Madden noted that the Kansas Department of Corrections got some money from the Pew Trust. He suggested that addressing the Vera report issues regarding distribution/manufacture would be attractive to the trust as well as other possible recommendations. He noted that the DOJ was giving away money for substance abuse issues and he suggested pulling other applications from previous DOJ grants as a helpful guide.

Senator Vratil noted that the DOJ was giving grants for work on proportionality, reentry etc. He noted that Senator. Brownback had previously indicated that the federal government was interested in issues regarding prisoner reentry.

Mr. Klumpp stated that Prof. Kaye should draft an application then return it to the commission for its consideration. He asked if there was a deadline for the application. Prof. Kaye responded that there was not but he would try to complete it as soon as possible.

Mr. Klumpp addressed the commission regarding future meetings. He gave the following dates: November 28, no meeting in December, January 9 and 30. He stated that the meetings would return to the regular schedule again in February.

Judge White addressed the commission. He stated that he thought they might have a speaker at this meeting because Deb Billingsley from the Kansas Board of Pharmacy had been invited to speak. He indicated that Mr. Watson had met with Ms. Billingsley and he invited Mr. Watson to talk about that meeting.

Mr. Watson said that he met with Ms. Billingsley at her office about two weeks ago. She was provided with a copy of the commission's drug code revision. When asked if she had any concerns about it she indicated that she had spoke with the Board of Pharmacy and their only concern was that Pharmacists in the State of Kansas should be able to know what laws applied to their profession and that no substantive changes would be made that affected pharmacists. She did not want to remove law relevant to pharmacists from Chapter 65. Mr. Watson explained to Ms. Billingsley that the commission was only interested in removing those provisions of Chapter 65 which are part of regular prosecution of crime, not those that regulate pharmacists. He explained that the commission was considering no substantive proposals that would affect professional pharmacists. Ms. Billingsley stated that she agreed and did not think the proposed revision would affect or concern pharmacists. Mr. Watson invited Ms. Billingsley to attend and speak at the next commission meeting, but she declined on the grounds that her input was unnecessary.

Senator Vratil stated that the minutes should reflect, in detail, the meeting between Mr. Watson and Ms. Billingsley including the fact that she was invited to address the commission and she had no objection to the revision.

Judge White began considering the latest draft of the drug code.

The Commission considered the table of contents. Judge White noted that the titles had been changed and new statute had been added. He noted that Prof. Stacy's memo, which had originally been part of the comment to the table of contents, would be revised and replaced in a future draft. Senator Vratil moved to approve the section subject to inclusion of Prof. Stacy's revised memo. The motion was seconded and passed unanimously.

The Commission considered 21-501. Judge White stated that the definitions from Chapter 65 that were inapplicable had been removed. Regarding the definition of manufacture, he noted that paragraph (2) from the current definition was missing and needed to be added. Regarding

possession, he also noted that definition needed to be revised to include the phrase “right to control” that is currently part of the case law. He noted that the definition of “school property” had been revised to remove reference to grade levels as per Rep. Kinzer’s suggestion at the last meeting.

Representative Kinzer asked where in the statute prohibiting distribution was the act of cutting covered. Further, he asked how the definition of distribution covered the act of cutting.

Ms. Wilson said that it was a step toward preparation for sale, rather than an act that produced the drug itself.

Judge White suggested that clarifying cutting and distribution could be done in a comment or the statute itself.

Judge Smith asked if this created another possible *McAdam* issue by subjecting the same act to the possession of paraphernalia statute and the distribution statute. He suggested rewording the distribution statute to include cutting agents and remove them from the definition of drug paraphernalia.

Mr. Opat explained that diluents were substances added to drugs in order to increase their quantity. He agreed with Judge Smith and suggested deleting cutting agents from the definition of paraphernalia to avoid the *McAdam* problem.

Judge Smith suggested that crack cocaine requires addition of a diluents. It’s addition is used to manufacture the substance.

Mr. Klumpp suggested that crack cocaine was different because the actual chemical structure of the substance was changed. The chemical structure is not changed through cutting.

Ms. Parker stated that manufacture means mixing products together and distributing means hading products over. She suggested that cutting makes sense as part of the manufacturing process.

Mr. Klumpp asked if cutting belongs in 21-509(b).

Judge Smith said that cutting more a part of distribution than manufacture.

Senator Vratil asked what is current law. He also asked where people cut for their own consumption.

Mr. Opat stated that he never had a case of cutting for consumption. He said he only encountered a case involving cutting once and it involved a large quantity of drugs.

Mr. Klumpp asked under what statute would a person be prosecuted now for cutting.

Ms. Wilson suggested that possession of a cutting agent is used as evidence of an intent to distribute.

Senator Vratil suggested that this definition might be better as a recommendation instead of a revision.

Mr. Klumpp agreed and stated that the cutting exception should be removed from the definition.

Judge Smith reminded the commission of taking care to avoid creating a new *McAdam* issue.

Ms. Wilson suggested the definition of manufacture was more of an editing function, not a policy decision. In order to avoid the *McAdam* situation problem the precise nature of manufacturing should be defined. She stated that the commission would not help the legislature very much if all it does is clean up the statutes.

Senator Vratil stated that the commission must indicate that it is a change in law. The legislature must be allowed to decide whether it wants to make the change.

Judge Smith pointed out that the definition section refers to the uniform controlled substances act. He stated that these references should be removed.

Ms. Wilson suggested adding the drug schedules in chapter 21 in order to avoid the necessity of having two statute books.

Judge White noted that including the street names of drugs was discussed at the last meeting.

Mr. Klumpp and Senator Vratil both expressed a concern that adding the street names to the statute would be problematic because as the street names change the statutes would have to be revised.

Judge Smith stated that he understood the need to get rid of the technical definitions but they were absolutely necessary to establish the precise substances in issue. Anything other than the technical chemical definitions would cause ambiguity.

Mr. Klumpp asked what moving the schedules would do to Chapter 65.

Ms. Wilson suggesting duplicating them as a matter of convenience.

Ms. Wolters stated that if that was done there would have to be revisions in two locations every time the schedules were changed.

Ms. Wilson asked if the schedules changed often.

Mr. Klumpp suggested that they could be added to Chapter 21 as an appendix.

Judge White suggested that he would need to review cutting and determine where it should be placed.

Judge Smith moved adopt the section and revise the definition of manufacture to conform to current law. The motion was seconded and passed unanimously.

Ms. Parker said that the definition of possession is so fluid that it is constantly changing. She suggested listing factors in the definition was unwise because courts will often defer only to the list even if the statute says other factors may be considered. She suggested that there should be a comparison to federal law.

Judge White explained that he, Mr. Watson, Mr. Klumpp, Prof. Kaye and Prof. Stacy met prior to the commission meeting and discussed the draft. He claimed that future meetings of this group would be held in advance of the full commission meeting so that any necessary changes to a draft could be made before the draft is distributed.

Ms. Wilson suggested that the term "propagation" should be removed. Even though it is not the same as cultivation, it should be removed for clarity.

Judge White suggested that cultivation seems to be part of manufacturing, but that issue can be considered later.

Mr. Klumpp asked for approval of the minutes from the September meeting. Any questions or corrections.

Mr. Opat stated that on page 6 of the minutes, his comment should reflect that he said that a person who distributes small amount of cocaine should be as culpable as a person who distributes a large amount of marijuana.

Mr. Madden stated that on page 6 of the minutes, his comments should reflect that he did not believe Apprendi would be a problem if weighs were used as part of the drug code.

Representative Kinzer moved to approve the minutes subject to corrections. The motion was seconded and passed unanimously.

Judge White stated that in the future the document would be numbered with the individual statute reference at the foot of the document so as to avoid confusion. He also stated that he would return to the practice of making a table that compared the revisions with current statutes.

The commission considered 21-502. Judge White explained that the retroactivity provisions had been removed. He also noted that the revision should only include language in lines 6-7 and 10-11 regarding the effective date and this change would be made in a future revision.

Mr. Klumpp moved to adopt the section striking the language Judge White had mentioned. The motion was seconded and passed unanimously.

The commission considered 21-503. Judge White stated that the only change was to remove the marijuana distinction from the last draft and slightly amend the language, changing "community work service" to "community service work." Senator Vratil moved approval the section. The motion was seconded and passed unanimously.

The commission considered 21-504. Judge White noted that no changes were made. Mr. Klumpp moved to approve the section. The motion was seconded and approved unanimously.

The commission considered 21-505. Judge White noted that the recidivism provisions from the current law had been returned to the current draft, the term cultivate was added and the marijuana distinction had been removed.

Representative Davis asked if cultivation is currently a drug level III felony. Mr. Watson said yes.

Mr. Klumpp stated that manufacture of drugs is treated more severely because it is more dangerous. He moved to approve the section with revisions. The motion was seconded and passed unanimously.

Ms. Parker suggested that the definition of cultivate should be considered so as to exclude those who's acts are authorized by law.

Mr. Watson said he would do research to determine if there are lawful acts of drug cultivation. He cited peyote as a possible example, which may lawfully be possessed under state law by

members of the Native American church.

Judge Smith suggested that Judge White considered the definitions of inherently dangerous felonies as they would be implicated by revision of the drug code.

Ms. Wolters stated that such changes would be made as “add ons” at the end of a bill.

The commission considered 21-506. Judge White stated that the recidivism provision in subsection (c) was restored. He also stated that the title had been changed. He recognized that the term marijuana needed to be added.

Judge Marquardt moved to adopt the section with Judge White’s revisions. The motion was seconded and passed unanimously.

The Commission considered 21-507. Judge White noted that it was moved from KSA 65-4141, but no substantive change was made. Judge Marquardt moved to adopt the section. The motion was seconded and passed unanimously.

Ms. Wolters asked the Commission to look back to 21-506. She asked if the language regarding a “city resolution” in the current statute should be added to the recidivism provision of subsection (c). The Commission generally agreed and Judge White made a note of the needed change.

The Commission considered 21-508. Judge White explained that it combined KSA 21-4214 and 21-4215 into one statute but no other change was proposed.

Judge Marquardt asked if “mid-level practitioner” should be defined somewhere.

Mr. Klumpp noted that subsection (d)(1) referred to Chapter 65 for defining many terms. He moved to approve the section. The motion was seconded and passed unanimously.

Judge Smith asked the Commission to return to 21-508. He moved that a recommendation be made to move the penalty to the drug grid. The motion was seconded and passed unanimously.

The Commission considered 21-509. Judge White noted that the previous distinction regarding marijuana had been removed.

Mr. Klumpp asked if the draft should drop reference to subsections in other statutes. He stated that he was concerned that these would have to be changed whenever the referenced statute was amended.

Ms. Wolters stated that it was best to just reference the statute and not subsections within the statute.

The Commission adjourned for lunch. The Commission reconvened at 1:30 p.m..

Mr. Klumpp reminded the Commission that deviations from current law should be made as recommendations.

Prof. Stacy was present for the afternoon session of the meeting. Judge White explained to him the discussion the Commission previously had regarding cutting agents.

Prof. Stacy stated that the definition brings manufacture into line with current charging practices. The rationale for the distinction, that manufacture brings the drug into existence, doesn’t

apply to cutting the drug. He concluded that current charging practices, which treat cutting agents as part of distribution, are correct.

Rep. Kinzer stated that by just looking at definitions, he did not see exactly where cutting agents fit. He stated that he was concerned about a potential *McAdam* issue.

Prof. Stacy stated that he disagreed with removing the cutting exception from the definition of manufacturing. He claimed that the code is now incoherent and the definition solved this problem.

Judge Marquardt said it seems like a change in the law that would be better as a recommendation.

Prof. Stacy noted that Kyle Smith did not have a problem with the revised definition and he recognized that the current definition comes from a civil code that was not meant for substantial criminal prosecution.

Senator Vratil said that the Commission should steer away from substantive changes in the law, even if it is bad substantive law or it doesn't reflect charging practices because those are policy decisions for the legislature.

Ms. Parker asked where did the Commission get the idea that cutting agents are charged as a distribution offense rather than manufacturing.

Prof. Stacy said the prosecutors on the 3R committee had made that observation including Mike Jennings.

Ms. Parker suggested that how the crime is charged would depend on the facts of each case.

Prof. Stacy said the issue seems similar to packaging and repackaging. Almost all distribution involves packaging and repackaging. He asked, do we want to have a code that is an artifact of pharmaceutical law and is never or almost never followed by prosecutors, and is inconsistent with the rationale of subjecting the manufacturer to more severe punishment.

Senator Vratil said that none of the Commission members want a code that is non-sensible, but it is the legislature's role to make policy decisions. We don't want to jeopardize the work of the Commission.

Mr. Opat said that sections 509, 510, and 512, all represent a dramatic change in the law.

Senator Vratil said that if they substantially depart from Kansas law he would be opposed to them.

Mr. Opat stated that they reflect the concern over pseudoephedrine. The revisions respond to the *McAdam* problem. He asked, is that a substantive change.

Senator Vratil said that he did not think the legislature thought this Commission would try to solve problems created by appellate court decisions. Every legislature that he had spoke to felt the same way.

Representative Davis suggested that the Commission could have it both ways. We need a true recodification, without substantive changes, and a list of proposed policy changes. He said, so long as the two are separate there should not be a problem.

Prof. Stacy stated that he disagreed about what the law was and that charging practices are

part of Kansas law. He asked if it was really not part of the Commission's charge to consider charging practices.

Senator Vratil stated that a county attorney could not change the substantive law by enacting charging practices that contradict the plain language of the law.

Prof. Stacy asked Mr. Opat if repackaging or cutting is charged as manufacturing. Mr. Opat said that his office does not unless it is simultaneous with the act of manufacture.

Ms. Parker state that the issue was not a question of charging practices because the charge revolves around particular facts and circumstances of each case.

Representative Kinzer stated that he saw a logical link between cutting and distribution.

Ms. Wilson stated that there was no *McAdam* issue under the revision because there is no longer a possession of paraphernalia statute.

Mr. Madden stated that the next three statutes all deal with paraphernalia. He noted that the paraphernalia statutes can be separated into two classes, those that deal with auxiliary items and those that deal with precursors. He stated that if the Commission were to remove reference to the precursors then there would be no more *McAdam* problem.

Senator Vratil state that the separate statue on anhydrous ammonia was added three years ago for a very good reason, because there was a big increase in it use. The statute was a message to prosecutors and the public that the state was concerned about the problem. He stated, there is a political motivation for keeping that statute even if it falls under a different theft statute.

Mr. Madden stated that the anhydrous ammonia issue can still be prosecuted under the intent to manufacture statute. However, this is where *McAdam* issues arise.

Senator Vratil said that he did not disagree, but there were political reasons for the statute.

Representative Kinzer stated that each year the legislature has reconsidered the paraphernalia statute. There is always a desire by law enforcement to make changes to it. He expressed concern that to change the statute in a significant way would energize opposition in these groups that have sought so many changes.

Mr. Madden noted that last year's changes to the paraphernalia statute dealt with auxiliary items. He stated that he would like to focus on the precursors.

Mr. Klumpp stated that he agreed with Representative Kinzer and stated that the Commission does not have the benefit of hearing what the legislature hears when it changes the law. He moved to revise the code to conform as close to existing law as possible and address changes through a document on recommendations. The motion was seconded. Prof. Stacy proposed a friendly amendment to keep the definition of manufacture in the Recodification as it is in the current statute and address changes in a separate recommendation. The motion passed, with all members present voting yes except Ms. Wilson.

Prof. Stacy explained that 21-509 was meant to clarify Kansas case law. He state that it is impossible to manufacture drugs without possession precursors; therefore, it not sensible to criminalize both separately.

Senator Vratil stated that the Commission's task was to make policy changes only in the form of recommendations. If they were made as part of the Recodification it would be rejected.

Mr. Klumpp moved to remove 21-509, make it a recommendation, and include the current paraphernalia statute.

Judge Smith, stated that this issue should be considered exception, as it is not a substantial change in the law, but rather, a response to the *McAdam* issue. He addressed Senator Vratil and stated that *McAdam* is still a difficult issue in his district court and he wanted to avoid another such issue if possible.

Senator Vratil state that the legislature addressed the specific problem of the Frazier case in the last legislative session.

Prof. Stacy stated that there are several *McAdam*-like problems in the code. He claimed that there is no legislative fix for the relationship between certain offenses.

Ms. Wilson said that 21-509 is a global fix for these issues.

The Commission voted of Mr. Klumpp's motion. It passed unanimously.

Mr. Madden stated that overt act approach of 21-509 could be helpful for establishing road marks for attempted manufacture. He recommended changing the paraphernalia statute and anhydrous ammonia statute.

Ms. Wilson asked Mr. Madden if he was suggesting incorporating just the precursors. He replied, yes, only the precursors should be removed from the paraphernalia statute and the auxiliary items should remain.

Ms. Wilson said that the point of 21-509 was to replace possession of paraphernalia and just turn it into attempt. She claimed that would take care of multiple statutes defining a similar criminal act.

Mr. Madden asked what was the difference between 21-509 and 21-510. Prof. Stacy said that 21-510 deals with purveyors of drug paraphernalia, 21-509 deals with possession of paraphernalia with intent to distribute, manufacture, or possess controlled substances. He added that 21-510 follows existing law.

Mr. Madden asked if a methamphetamine manufacturer is guilty of violating 21-510(a) because they distribute methamphetamine that has a precursor in it. He said that if the Commission recommends 21-509 it should remove precursors from 21-510, otherwise there would be a *McAdam* problem. A paraphernalia statute that conflicts with the manufacture statute. We should propose deleting precursors and treat them all as an attempt to manufacture.

Mr. Klumpp said that recommendation made sense, otherwise the code would treat the same act two different ways.

Judge Smith said that he read 21-510 as the sale of specific items and 21-509 as the possession of those items with the intent to manufacture.

Mr. Klumpp said the phrase "drug product containing ephedrine" could mean the end product of a methamphetamine manufacturing process.

Mr. Madden said the code requires knowledge that the defendant knows or should know that the precursor shall be used to manufacture drugs.

Prof. Stacy said that under current law you cannot prosecute a store clerk for manufacture, attempt or conspiracy, because they do not have the requisite intent. That is why the paraphernalia statute is necessary.

Mr. Madden asked what was the difference between 510(a) and (c).

Prof. Stacy said that subsection (a) deals with meth; (c) deals with other drugs.

Judge Marquardt asked if the phrase drug product could be removed from 21-510. Judge Smith said the term seemed unnecessary. Ms. Parker said that the phrase was useful because it protected retailers that sold batteries or other such products that could be used in the methamphetamine manufacturing process.

Judge White said that 21-510 is current law, subsection (b) has been returned. Mr. Klumpp moved to approve the section. The motion was seconded and passed unanimously.

The Commission considered 21-511. Judge White noted that there was no change except the title. Mr. Opat moved to approve the section. The motion was seconded and passed unanimously.

The Commission considered 21-512. Judge White noted that there were no changes proposed from the last draft except typographical and grammatical changes. Mr. Klumpp suggested that it should be separated into subparts. Mr. Opat moved to approve the section, subject to revision. The motion was seconded and passed unanimously.

The Commission considered 21-513. Judge White, explained that the phrase "fumes of toxic vapors" had been simplified to "toxic vapors" as a vapor is a fume. Judge Marquardt moved to approve the section. The motion was seconded and passed unanimously.

Ms. Wolters asked about the style of the revision and whether the Commission wanted to use a form where the offense was defined in one subsection then the penalty imposed in the other subsection. Mr. Klumpp stated that he and Judge White had discussed this issue as it relates to the KBI's computer system. He explained that the way in which some statutes are drafted makes it difficult for some offenses to be tracked by the KBI's database. He suggested that Judge White confer with Mr. Dave Sim at the KBI.

The Commission considered 21-514. Judge White noted that the title was changed. Judge Marquardt noted that it should be divided into subparts similar to 21-512. She moved to approve the section subject to revision. The motion was seconded and passed unanimously.

The Commission considered 21-515. Judge White, stated that he had discovered an unpublished Kansas Court of Appeals case that says a person may be convicted under theft by deception even despite the argument that the KSA 65-4155 is more specific. The court disagreed and held that it was not a more specific statute. Judge White also stated that he discovered a Utah case with opposite reasoning. He suggested a recommendation to amend the statute or eliminate it.

Mr. Klumpp stated that theft by deception covers selling the noncontrolled substance, but not giving it away. Mr. Watson explained that he had met with Kyle Smith at the KBI and was told that the statute was originally passed because of a problem known as "turkey dope." Often caffeine pills were given away and represented as amphetamines or other drugs. The taker would use several at a time to get a sufficient high. Then when they encountered actual amphetamines, they would expect to need as much as they had before and would overdose. Mr. Klumpp noted that this problem still persists, especially amongst children.

Judge Marquardt, moved to approve the revision and discuss the issue later as a recommendation. The motion was seconded and passed unanimously.

The Commission considered 21-516. Judge White state that it was incorporated from Chapter 21 without change. Prof. Stacy moved to approve the revision. The motion was seconded and passed unanimously.

The Commission considered 21-517. Judge White noted that no change was proposed. Representative Kinzer moved to approve the revision. The motion was seconded and passed unanimously.

The Commission considered 21-518. Judge White noted that no change was proposed. Judge Marquardt moved to approve the revision. The motion was seconded and passed unanimously.

The Commission considered 21-519. Judge White noted that subsection (a)(3) needed to be removed as it was duplicative of another section. Mr. Klumpp, moved to approve the revision subject to Judge White's proposed change. The motion was seconded and passed unanimously.

The Commission considered 21-520. Judge White noted that no change was proposed. Mr. Klumpp moved to approve the revision. The motion was seconded and passed unanimously.

Judge White explained that he had considered moving the drug tax stamp provision from Chapter 79 but decided against it because it would involve using the complicated and idiosyncratic definitions used in Chapter 79 and it would be the only criminal tax provision from Chapter 79 to be incorporated in Chapter 21. Mr. Klumpp moved to leave those provisions in Chapter 79. The motion was seconded and passed unanimously.

Judge White stated that a memo would be prepared for the next meeting regarding the use of weight in severity levels. He also stated that he meet members of the 1990 criminal revision committee. He mentioned that at some point he would like Matt Lynch and Mike Malone to be invited to address the Commission.

Prof. Stacy stated that the next agenda would include drug recommendations, property offenses, and the drug code revision.

The meeting was adjourned at 4:00 p.m.

Prepared by Brett Watson

Approved by Committee on:

November 28, 2008

(Date)