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Thomas R. Stanton
District Attorney

TO: The Honorable Representatives of the Committee on Corrections and Juvenile Justice

FROM: Thomas R. Stanton
Reno County District Attorney

RE: House Bill 2705

DATE: March 3, 2022

Chairman Owens and Members of the Committee:

Thank you for allowing me to submit testimony regarding House Bill 2705.

The purpose of this bill is to replace the term “rebuttable presumption” in K.S.A. 21-5705(e) with the term “permissive inference,” and add language to make it clear that the evidence presented by the State at a jury trial supports the jury’s consideration of the permissible inference.

In 2012, the legislature enacted legislation which created an inference that possession of a certain quantity of controlled substances suggested the drugs were possessed for sale rather than personal use. In doing so, the term “rebuttable presumption” was used to establish the inference as an applied to those specific quantities of controlled substances. The quantities established by the legislature depended on the specific controlled substance, how that controlled substance was used, and the detrimental effect resulting from use of specified substances. For example, the presumptive quantity for sale for methamphetamine was 3.5 grams based on its instantly addictive properties and the amounts normally used by the individual user. The presumption for cocaine was set at 100 grams, and the presumption for marijuana was set at 450 grams. As a prosecutor who has spent the majority of my 30-year career prosecuting drug cases, I believe those inferences remain indicative of clear intent to distribute the various drugs.

The statute has recently come under a constitutional attack from appellate defense counsel

because of the use of the term “rebuttable presumption” in the statute. I recently argued a case before the Kansas Supreme Court (*State v. Dominic Holder*, No. 120,464) in which this constitutional issue was raised. The argument presented by defense is that the term “rebuttable presumption” carries with it an implication that the defendant must present evidence to rebut the presumption. Justices of the Kansas Supreme Court expressed concern that the use of that term creates a shifting of the burden in a criminal case, resulting in an unconstitutional application of law. Another aspect of this issue is that the pattern jury instruction for the presumption was written in a manner that is more consistent with a permissive inference than with a rebuttable presumption. So, while the instruction read to the jury would not suggest shifting the burden, the statute itself may very well carry that implication.

The Supreme Court in my case did not reverse the defendant’s conviction for possession of marijuana with intent to distribute because the amount he possessed for distribution (approximately 40 pounds) was really not affected by statute or the jury instruction at trial. The defendant failed to preserve the issue for review, and the Supreme Court found that there was no real possibility the jury would not have convicted based on the evidence presented at trial. However, it became clear to me during arguments before the Supreme Court that the language in the statute needed to be modified from “rebuttable presumption” to “permissive inference” because the Court is likely to find the statute unconstitutional if the issue is properly preserved for appeal, and the evidence could support either possession for sale or possession for personal use.

In consultation with other prosecutors, we also determined that it would be best to add a phrase to make it clear that the inference had to be supported by evidence presented at trial. This bill would also add the language we thought appropriate to accomplish that goal.

It is my belief, and the belief of the prosecutors with whom I have discussed this issue, that this change in language is required to preserve the constitutionality of the statute previously promulgated by this body. I urge the passage of this legislation.

Respectfully submitted,

/s/ Thomas R. Stanton
Thomas R. Stanton
Reno County District Attorney