 December 3, 2008

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

July 23, 2008
Room 784—Docking State Office Building

Members Present

Professor Tom Stacy, Chairperson
Ed Klumpp, Co-Chairperson
Senator John Vratil
Representative Paul Davis
Judge Christel Marquardt
Judge Richard Smith
Professor Michael Kaye
Tim Madden
Steve Opat
Ed Collister
Debra Wilson

Staff Present

Judge John White, Reporter
Brett Watson, Staff Attorney
Kyle Smith, Consultant to the Commission
Sean Ostrow, Assistant to the Commission
Jason Thompson, Office of the Revisor of Statutes
Matt Todd, Office of the Revisor of Statutes
Jerry Donaldson, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department

Also Present

Tom Drees
Ed Britton

Preliminary Matters

The meeting began at 9:45 a.m. *Mr. Madden moved to adopt the minutes from the June 25, 2008, meeting. Ms. Wilson seconded, and the motion carried unopposed*.

Professor Kaye briefly discussed the continuing fundraising efforts. Professor Kaye said a letter to the JEHT Foundation was forthcoming, and the Commission was looking for funding from private law firms as well. He mentioned the need for a detailed letter of the financial status and expected budget constraints of the Commission.

Drug Quantity Memo

Mr. Watson and Mr. Smith introduced their memo, which was based on research that they had done on the issue of drug quantity thresholds. Mr. Smith talked about the threshold systems in other states; some states, such as Colorado, have a general system, while some states, including Missouri, have drug-specific statutes.

Mr. Smith said that the preliminary concern was determining how many quantity levels the Commission wanted to suggest to the legislature. He suggested that the Commission adopt a system of 4, 3, or 2 quantity thresholds. He said that any quantity level cutoffs could be considered somewhat arbitrary, but it was possible to make them based on levels dealing with the function of the dealer/distributor and their role in the drug production and distribution system. He said that one drawback to having multiple quantity levels was that this could result in more arbitrary or near-miss situations where someone has a quantity that is just barely above or below a threshold amount, causing this person to be either over or under-penalized.

Another way to treat the levels could be based on the dollar value of the drug. He noted that the Commission chose not to treat crack and powder cocaine differently, which would be reflected in the quantity thresholds the Commission chose to adopt.

Mr. Watson explained that some drugs like marijuana and cocaine could easily be measured using weight, but for some drugs like ecstasy and LSD, a different measurement would be more accurate. This measurement would be referred to as a “dosage unit,” which would generally amount to 1 mL = 1 dose. For crack, the measurement would be by weight, not dosage unit.

He said that there probably would not be much question as to which drugs should be measured by weight and which should be measured by dosage unit. He noted that currently Kansas statutes do not define “dosage units” but that this could easily be added. He also said current state tax stamp statutes recognize dosage units.

Cultivation

Mr. Smith talked about the issue of drug cultivation, which is essentially only relevant for marijuana production. He said there should be a distinction drawn between a smaller amount that is consistent with personal use, and large quantities indicative of large-scale operations.

He said that larger quantities could be treated as prima facie or rebuttable presumption evidence of intent to distribute. Judge Smith asked about the law enforcement stance on the proposed statute. He said he believed that aerial surveillance had the effect of eliminating most large marijuana fields. Mr. Smith agreed, saying that most large quantities were being supplied by Mexican operations, large scale indoor hydroponic operations, and a diminishing number of rural outdoor

fields. Mr. Klumpp said that many cultivators/distributors operated below the threshold amounts, which had the benefit of requiring more transactions of smaller amounts, and thus more opportunities for law enforcement to catch perpetrators.

Purity of Drugs

Judge White and Mr. Watson said that the issue of whether purity of a drug should be considered a relevant sentencing factor was discussed, but not voted upon, in a previous Commission meeting. *Mr. Klumpp moved to use weight, regardless of the purity of the drug, for purposes of sentencing calculation. Senator Vratil seconded this motion, which passed unanimously*.

An official vote was also needed on the issue of crack/cocaine sentencing. *Judge Smith moved to make no distinction between crack and cocaine, Mr. Klumpp seconded, and the motion passed unanimously*.

Quantity Thresholds – How Many?

Tom Drees, who has served as a prosecutor in Hays, Kansas for nearly 20 years, spoke about his experience with drug dealers and users in his jurisdiction. He said that everyone who habitually used drugs became a dealer at some point as a means to support their habit or help make drugs available to others. He brought up the example of a woman who sold a joint to a friend and was prosecuted the same as if she was a large-scale exporter. He said that such a problem was common, and highlighted the need to have properly delineated quantity thresholds in place to properly punish offenders based on the size of their crimes. He said that one punishment level is not appropriate for punishing the broad range of drug offenders, and would lead to serious inequities.

He advocated using the system of 4 quantity thresholds, because this system was capable of more narrowly tailoring the punishment to the crime. He also said it was important for the state to have a quantity level tailored to “super-dealers”, who dealt with the largest quantities of drugs. He said that although federal prosecution usually handled such large-scale dealers, the state should have a parallel punishment level in case federal prosecution for some reason did not adequately handle the situation.

Mr. Drees also wanted to make all drug distribution crimes person crimes, because frequently people down the line are seriously affected by violence and other negative effects of the drug trade and drug use. Mr. Watson replied that the proposed statutes had been drafted based on treating drug distribution crimes as person crimes.

Mr. Klumpp moved to adopt the 4 quantity level approach, and Ms. Wilson seconded.

Mr. Collister said that the Commission should contemplate the role of judicial discretion in drug sentencing, as oftentimes judges can better assess a proper punishment than a steadfast level threshold. Mr. Smith said that the legislature is unlikely to allow that much flexibility in sentencing, and would not likely advocate that sort of judicial discretion in drug sentencing.

After this discussion, the vote was taken and the motion carried unanimously.

Senator Vratil asked what the Commission intended to do regarding the recommendation to use 4 quantity levels. Mr. Klumpp said they could either make this part of the proportionality recommendation to the legislature, or they could single this issue out, as it goes beyond the initial recodification task. Senator Vratil said that he would prefer that the legislative recommendations

originate in this Commission, which he felt is better situated for this task than the Sentencing Commission. He said that he would like to see the proportionality issue dealt with as a whole, based on the Commission's own findings. He acknowledged that there would be some issues that the Commission would encounter that would extend beyond pure recodification, but these issues could still be addressed and couched as recommendations to the legislature.

Quantity Levels – How Much?

Mr. Watson asked if anyone cared to make a motion on the quantity levels on page 5 of the memo. *Mr. Opat moved to adopt the weight thresholds listed on page 5 for all future drafts concerning drug quantities, and Ms. Wilson seconded*. Judge Smith asked where the cutoff point for finding intent to distribute should be placed. Mr. Smith said that they also had to determine whether to treat amounts at a level deemed to be intent to distribute as prima facie evidence or rebuttable presumption of the intent to distribute.

Mr. Drees then said that he disagreed that 25 grams should be the cutoff point for the marijuana threshold, because a true ounce is actually 28 grams, and the legislature will be more likely to approve this. Mr. Smith replied that this was done in order to catch smaller dealers, who frequently deal in quantities that are somewhat less than what they are held out to be. So, for example, on the street an ounce of marijuana often weights out about 25 grams. Professor Stacy then added that he would like to ensure that the quantity levels are closely tailored to the culpability involved, which should be measured by the harm done by dispensing drugs into the marketplace, and also the level of the person in the distribution scheme. He noted that the federal system penalizes conspiracy more than possession with intent to distribute, but that under Kansas law possession with intent to distribute is penalized more than conspiracy.

Amid this discussion and the uncertainties surrounding the proposed quantity levels, *Mr. Opat amended his motion to simply adopt the proposed classification types, ie weight, dosage units, and marijuana weight, but not adopt the specific weight numbers proposed on page 5. Ms. Wilson seconded this motion, and it passed unanimously*.

Mr. Watson said the Commission would still have to determine what quantity levels they should adopt for each of the types listed on page 5. Professor Stacy reasserted his desire to keep the punishments as close as possible in proportion to the harms and the weight of the effects of the crime. Mr. Drees said that he thought the marijuana level should be a full 28 gram ounce, not 25 grams. Mr. Smith explained his rationale for the slightly lower threshold, and said that this is preferable because it catches borderline dealers at the higher level, due to the common practice of "shorting" marijuana weights. Furthermore, forensic experts use grams to measure, and would not have any trouble calculating with this slightly altered measurement. He then noticed that this marijuana threshold was intended to be set at 100 grams, not 25 grams. Mr. Drees decided that this was an acceptable approach in light of Mr. Smith's explanation.

Professor Stacy moved to adopt the quantity amounts in the proposed statute, found on pages 10-11 of the memo. This motion was meant to include the change made to line 47 of page 10; the marijuana amount was supposed to be 100 grams, not 25. *Ms. Wilson seconded, and the motion to adopt the quantity levels passed unanimously*. Mr. Madden expressed concern that it wasn't clear enough whether a type of drug would be measured by weight or by dosage unit, and thought that it might be necessary to list which drugs would be measured by each method. Mr. Smith said he thought it was sufficiently clear because part of the statute clearly spelled out that marijuana was to be weighed in grams. Judge Smith agreed with Mr. Madden that it might be necessary to make it clear that drugs like crack, for example, would be measured in grams and not dosage units. Mr.

Smith pointed to the definition of "dosage unit," saying that this should suffice to clarify what the term was referring to.

Mr. Watson began talking about cultivation, and how the same threshold issues as the drug possession statutes would come into play here. He promoted a framework with three quantity distinctions. The first distinction would be between that of a personal use grower, who had less than 5 plants, and a large-scale operation, which would be defined as anyone possessing 5 or more plants. There would also be a super-grower level for those offenders with 100 or more plants. Mr. Smith likened a grower to a distributor of drugs, the only real difference being the method of procurement. *Judge Marquardt moved to approve the levels as suggested on page 11 of the memo, and Ms. Wilson seconded*. Judge Smith noticed that subsection (5)(a), line 22 of page 11, should be a level 4 person felony to keep the punishments consistent. *Judge Marquardt accepted this as an amendment to her motion, which passed unanimously*.

Mr. Watson then re-raised the question of whether quantity should be considered prima facie evidence of intent to distribute in itself, or whether it should be merely a rebuttable presumption. Mr. Smith said the object of such a clause would be to take the question out of the jury's hands. Mr. Drees said that he liked the statute because it lessened the evidentiary burden on the prosecution and streamlined the process, because they would no longer have to call witnesses to prove something that he considered fairly evident on its face. Mr. Opat referenced Kansas case law, which currently says that quantity alone is insufficient to prove the intent to distribute; at least one other element of evidence of intent must be present. This suggestion would eliminate the need for that other additional piece of evidence.

Senator Vratil pointed out that the practical effect of a prima facie statute would be to prohibit the defense from crossing a witness on the issue of quantity. Ms. Wilson said that such a change in the burden of proof would be unconstitutional, and Mr. Opat quickly disagreed. Professor Stacy said that he found it problematic to take the decision out of the jury's hands, but he did like the fact that the change would streamline the adversarial process in many cases. He endorsed the rebuttable presumption approach, which was somewhat of a compromise. Mr. Opat and Mr. Drees said that the courts wouldn't have trouble handling such an instruction regarding a rebuttable presumption. *Judge Marquardt moved to change the words "prima facie evidence" to "rebuttable presumption" in the draft statute and Professor Stacy seconded. The motion passed, with Mr. Collister, Ms. Wilson, and Mr. Madden dissenting*.

Mr. Watson then turned the discussion towards deciding what quantity the rebuttable presumption should apply to. He said there is a large gray area between personal possession and possession with the intent to distribute. Judge Smith said that he sees many cases where there are only small quantities of drugs, but the jury nonetheless finds intent to distribute based on the presence of other evidence, such as packaging materials. *Judge Smith then moved to enact the rebuttable presumption for use in the two highest quantity levels. Judge Marquardt seconded, and the motion carried unopposed*.

Mr. Watson then began addressing the draft proposals for the purpose of clarifying the changes that the Commission had agreed upon up to this point. He noted that all the proposed statutes are based on the proportionality subcommittee's recommended severity levels, which are based on the new proposed grid. He said that all of the drug crimes are now person felonies.

Mr. Madden asked what practical difference this change would create. Mr. Drees said that it would properly penalize multiple convictions and recidivist activity. Mr. Smith agreed, saying that the current statute doesn't logically differentiate between drugs which have higher penalties for subsequent offenses and those that don't. *Professor Stacy moved to approve all aspects of the draft*

proposal on pages 10-11, including the severity levels and the change to make them person felonies. Judge Marquardt seconded, and the motion carried unanimously.

Mr. Watson briefly revisited the dosage unit issue, asking if anyone had any further concerns. Judge Smith wanted to ensure that the Commission had in fact voted to approve the new grid as proposed by the proportionality subcommittee. *He moved to recommend to the legislature that they adopt the new grid as proposed by the recodification Commission. Professor Stacy seconded, and the motion passed unanimously*. Finally, Judge Smith wanted to ensure that the proposed "dosage unit" section of the statute was abundantly clear on the unit of measurement that each drug would be subject to. Mr. Smith said that he would work to clarify that for the next meeting.

Meth Manufacturing Statutes

Mr. Watson called the Commission's attention to the proposed manufacturing offense draft, which was on page 5 of the manufacturing memo. He said that there would be a difference between meth manufacturing and other drugs. There was also interest in creating an aggravated manufacturing statute, which was numbered 21-503a, and was also found on page 5. Many of the aggravating factors were borrowed from Illinois law, and the Kansas statute would also include quantity thresholds.

Mr. Smith asked the Commission about the threshold, which was currently set at "capable of producing 100 grams in a single batch." He said this could be problematic because it is easily avoidable and somewhat arbitrary. He suggested that "has produced 100 grams" would be a more workable standard that would eliminate many loopholes manufacturers may try to take advantage of.

Mr. Watson said that the subcommittee had previously adopted the recommendations of the proportionality subcommittee regarding making meth manufacture a severity level 3 while all other drug manufacturing would be a level 5. However, the addition of the aggravated manufacturing statute had not previously been considered. The question became whether to leave regular meth manufacture as a level 3 and make the aggravated offense a 2, or whether to drop meth manufacture to a 4 and make aggravated meth manufacture a 3.

Professor Stacy recommended including a section in the statute which would make aggravating factors that are also separate and distinct crimes, required to be served consecutively with a manufacturing offense. He said this would have the same practical effect as classifying these crimes as aggravating factors. Judge Marquardt asked if Kansas has ever definitively defined the "attempt" in attempted manufacture. She said this has been the subject of much conflict and litigation, without a clear outcome. Mr. Drees said that generally an attempt was penalized at two severity levels lower than a successful Commission of the same crime. But there are still difficulties determining an attempt from "mere preparation."

Mr. Smith said that it was important to make the scope of the aggravating factors as large as possible, as this would make the statute more appealing to the legislature, and thus more likely to be adopted. Senator Vratil pointed out that subsection (a)(7) of the aggravated offense did not have a counterpart in the non-aggravated offense, which would be problematic. Professor Stacy said that the actions covered in (a)(7) could be covered by an aiding and abetting theory, which would have the same practical effect. Senator Vratil also mentioned that the term "person with a disability" in (a)(3) of the aggravated statute was far too broad and needed to be more carefully considered and defined.

Professor Stacy said he was troubled by the fact that many of the aggravating factors in the statute were also independent crimes; so much overlap could create confusion and difficulty sustaining the aggravated sentence. He said that he thought judges would be very likely to charge concurrent sentences for the crimes that were aggravating factors but were also able to stand alone as separate offenses. Mr. Smith requested that he be given time to redraft the aggravated statute based specifically on quantity thresholds, and attempt to more narrowly define potential aggravating factors. Professor Stacy said he liked the idea of encapsulating potential danger as an aggravating factor, but was concerned that it would be difficult and likely to run afoul of other independent crimes and reasons for upward departure. Judge Marquardt suggested that Mr. Watson and Mr. Smith spend some more time redrafting this statute for next month's meeting. Senator Vratil also mentioned that use of the word "or" on line 20 of page 6 should be corrected or rethought. Professor Stacy thanked Mr. Drees for speaking to the Commission, and thanked Mr. Watson and Mr. Smith for their work on the memos.

At 4:00 the meeting adjourned.

Prepared by Bret Watson

Approved by Commission on:

August 27, 2008
(Date)