Approved:
Date 10-07-04

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 p.m. on February 17, 2004 in Room 241-N of the Capitol.

All members were present.

Committee staff present:
Jill Wolters, Revisor of Statutes Office
Jerry Ann Donaldson, Legislative Research Department
Becky Krahl, Legislative Research Department
Connie Burns, Committee Secretary

Conferees appearing before the committee:
Kyle Smith, KBI
Chris Scheider, Wyandotte County Asst. DA
Christi Cain, KS Methamphetamine Prevention
Randall Hodgkinson
J.P. Wheeler, Jr., Finney County Attorney
Representative Kathe Decker
Lt. John Eichkorn, Kansas Highway Patrol
Jan Satterfield, Butler County Attorney
Dennis Hill
Gina Hill-Eldredge
Patty Oberlechner
Melanie Laubhan

Others attending:
See Attached List

HB 2602 – Allowing more prosecutorial discretion for immediate intervention programs for juveniles.

Chairman Loyd opened the hearing on **HB 2602**.

John P. Wheeler, Jr., Finney County Attorney, testified in support of the bill. The bill removes certain of the restrictions disallowing certain juvenile offenders from consideration for immediate intervention programs. (Attachment 1)

Ann Swegle, Deputy District Attorney Eighteenth Judicial District, provided written testimony in favor of the bill. (Attachment 2)

Chairman Loyd closed the hearing on **HB 2602**.

HB 2777 – Manufacturing a controlled substance does not include compounding

Chairman Loyd opened the hearing on **HB 2777**.

Kyle Smith, KBI, appeared before the committee as proponent of the bill. The Supreme Court has stated since the word "compounding" appears in the definition of the word "manufacture" in KSA 65-4101 (n) and the word "compound" also appears in another statute, KSA 65-4161, that the two different statutes with different penalties cover the same activity. It would not be fair to have one person sentenced more severly than another, it would be an equal protection problem if these two statutes covered the same acts, so only the lower sentence could be imposed. A proposed amendment was presented. (Attachment 3)

Cristi Cain, State Corrdinator Kansas Methamphetamine Prevention Project, appeared in support of the bill. The KS Supreme Court ruling in State v. McAdam, which jeopardizes the sentences of hundreds of criminals convicted of meth manufacture and poses future sentencing problems throughout the state. (Attachment 4)

Randall Hodgkinson, appeared as a opponent of the bill. The bill is specifically aimed to counter a Supreme Court case interpreting statutes prohibiting manufacture of a controlled substance. He felt that the drug sentencing provisions; having manufacture, attempt to manufacture, and conspiracy to commit manufacture as severity level 1 drug offenses is grossly disproportionate and out of step with actual practice in the courts. (Attachment 5)

Tom Stanton, Reno County District Attorney Office, (Attachment 6) Chris Scheider, Wyandotte County Assistant District Attorney, (Attachment 7) and Ed Brancart, Ford County, (Attachment 8) provided written testimony in support of the bill.

The Bed Impact on this bill is -0- increase as it was already calculated to be a Level I. A subcommittee was assigned to review the bill:
Representative Owens – Chair
Representative Crow
Representative Ward
Representative Kassebaum
Representative Yoder

Chairman Loyd closed the hearing on **HB 2777**.

HB 2649 – Unlawful use of a controlled substance

Charman Loyd opened the hearing on **HB 2649**.

Representative Kathe Decker, spoke in favor of the bill. The bill is a prevention tool to help families fight drug addiction and would limit testing to arrests for child abuse, aggravated assault, battery, and domestic battery. (Attachment 9)

Lt. John Eichkorn, Kansas Highway Patrol, appeared as a proponent of the bill. The bill proposes to bar any person from using any controlled substances prohibited under KSA 65-4160 or 65-4162. (Attachment 10)

Jan Satterfield, Butler County Attorney, spoke in favor of the bill and offered to amend by adding a modifications to KSA 8-1567 expanding the drug DUI provisions to further define intoxication. (Attachment 11) Also provided was the drug balloon. (Attachment 12)

Dennis Hill, (Attachment 13) Gina Hill, (Attachment 14) Patty Oberlechner, (Attachment 15) and Melanie Laubhan (Attachment 16) spoke in favor of the proposed amendment to the bill due to a tragedy from a drug impaired driver.

Dr. Timothy Scanlan (Attachment 17) and Dr. Tim Rohrig (Attachment 18) provided research and written testimony in support of the proposed amendment.

Statements in support were provided from Kristie Hildebrand, Dickinson County Attorney, Ernie Richardson, Kiowa County Attorney, Pratt County Attorney, and Pratt City Attorney, and Chris Biggs, Geary County. (Attachment 19)

Kyle Smith, KBI, spoke in favor of the bill, but addressed some practical issues. Fiscal impact to provide this testing would require additional people, space, and equipment. (Attachment 20)

Larry Mann, KBI, Head of the Toxicology Division stood for questions.

Patricia Biggs, Kansas Sentencing Commission, stated after hearing the testimony that the Bed Impact on

the bill would be revised.

Chairman closed the hearing on **HB 2649**.

The meeting was adjourned at 3:25 PM. The next scheduled meeting is February 18, 2004.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 2-17-04

NAME	REPRESENTING
Tom Battenfield	Butler Co. Atty.
Mike Jennings	KCDAA
JOHN P. WHEELER, JR.	KCDAA, FINNEY CO. ATTY.
Gina Hill-Eldredge	Butler County
Patty Oberlechner	
Dennis Hiel	Butler County
Melanie Laubhan	Butler County
JOHN EICHKORN	KHP
Nathan Webb	
Korey A. Kaul	
Randall Hodgkinson	N/A
Sandy Barnett	KCSDV
Mark Gleeson	Judicial Branch
Wade Bowie	JJA
Christine Greber	Federico Consulting
Michael White	KCDAA
Kyle Smith	KBI / KPOA
Charlie Keller	Heln Law firm
Larry Mann	KBI Toxicology

Kansas County & District Attorneys Association

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To: House Committee on Corrections and Juvenile Justice

From: John P. Wheeler, Jr., Finney County Attorney

Re: House Bill 2602

Date: February 17, 2003

I thank the Chair for allowing me to supplement the record on House Bill 2602 with this written testimony. I am appearing here today on behalf of the Kansas County and District Attorneys Association to testify in support of this bill.

The purpose of House Bill 2602 is to amend K.S.A. 38-1635 to remove certain of the restrictions disallowing certain juvenile offenders from consideration for immediate intervention programs. As a matter of prevention of future juvenile misconduct there are times where immediate intervention programs better serve the needs of a child, rather than an adjudication as a juvenile offender. Under K.S.A. 38-1635 the prosecutor's discretion on use of intermediate intervention is unduly restricted.

In 1996, the legislature passed sweeping legislation to overhaul the juvenile justice system to be effective July 1, 1997. Prior to 1997, K.S.A. 38-1635 was titled "Diversion". It provided that diversion programs could be established by the local court by which a respondent child could avoid juvenile adjudication. With the availability of these programs, prosecutors had

the discretion to decide which juveniles should be given the opportunity to avoid adjudication as a juvenile offender by completing the diversion program. Even then, juveniles charged with off-grid or severity level 1, 2 or 3 non-drug crimes and severity level 1 or 2 drug offenses were ineligible for diversion. There were also restrictions on diversion for Driving Under the influence of alcohol of Drugs. Essentially, prior to 1997, the juvenile diversion statute mirrored the restrictions in the adult diversion statutes found at K.S.A. 22-2906 *et seq.*, except there was an additional prohibition that any juvenile with a prior adjudication for **any** juvenile offense was thereafter ineligible to participate in a diversion program.

In 1997, K.S.A. 38-1635 was re-titled "Immediate Intervention Programs". Any reference to or authority for "diversion programs" was eliminated. Further, a juvenile offender is now disqualified from participation in an intervention program if charged with an off-grid felony, **any person felony**, or any level of offense committed while in possession of a firearm. Restrictions or Driving Under the Influence of Alcohol or Drugs remain restricted, as well as the prohibition against any offender with a prior adjudication of any juvenile offense.

The legislature, in revamping the juvenile justice code, focused upon three (3) components: prevention, intervention and punishment. The new code requires all offenders coming into the system to undergo an intake and assessment evaluation. Prosecutors working in the juvenile justice field are acutely aware that not all juvenile offenders are not what some may commonly categorize as "criminals". The disparity between presented offenders is dramatic. For example, how does one compare a 10 year old to a 17 year old? When determining the best action to take on a juvenile offender, prosecutors will be considering more than just the crime charged. Family matters, school issues, peer groups, drug or alcohol use, mental issues and prior law enforcement contact are all matters to consider. That was and remains the intent behind the

created Juvenile Justice Authority. I respectfully suggest that local prosecutors, courts and youth services are in the best position to evaluate the needs of the child and make the balancing decisions for the protection of our communities.

The legislature has given prosecutors and courts valuable tools to effectively deal with the problematic issue of juvenile crime. The ability to certify a child to stand trial as an adult, with a presumption in favor of the State for children 16 and older, as well as the valuable tool of extended juvenile jurisdiction is among those tools afforded prosecutors in dealing with the serious or violent offenders. Yet the restrictions set forth in K.S.A. 38-1635 present undue obstacles to effective utilization of immediate intervention programs for those children who can benefit before their entry into the chronic or violent levels of criminal activity. Essentially, what we are asking you to approve is making the availability of access to juvenile immediate intervention program the same as adults now have in requesting and accessing the adult diversion programs found at K.S.A. 22-2906 *et seq*. Why should we be treating our youth differently?

I appreciate the opportunity to appear before the committee and for your time and attention in listening to both my views and the views of my organization, the Kansas County and District Attorneys Association.

John P. Wheeler, Jr.
Finney County Attorney
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OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT

NOLA FOULSTON
District Attorney

SEDGWICK COUNTY COURTHOUSE
535 N. MAIN
WICHITA, KANSAS 67203

(316) 383-7281
FAX: (316) 383-7266

February 17, 2004

Testimony re House Bill 2602
Submitted by Ann Swegle, Deputy District Attorney
On behalf of Nola Foulston, District Attorney
Eighteenth Judicial District
Committee on Corrections and Juvenile Justice

Chairman Loyd and Members of the Committee:

House Bill 2602 proposes to amend K.S.A. 38-1635, the statute that provides for an intermediate intervention or diversion program for juvenile offenders, to broaden the pool of juvenile offenders who may be eligible for such a program. In essence, the amendment would place juvenile offenders on an equal footing with adult offenders in terms of eligibility for a diversion program.

Diversion/intermediate intervention is a privilege granted to certain offenders when doing so serves the interests of justice, the offenders and the community. Diversion programs serve the public interest by allowing qualified individuals to be held accountable for their offenses but be spared the lasting undesirable consequences of an adjudication or conviction if they successfully complete their diversion contracts and have their charges dismissed. They assist in the conservation of judicial resources by diverting cases from court dockets. Prosecutors are allowed to create and implement programs that meet the needs of their communities.

We support this bill. There are no substantial public policy reasons to differentiate between juvenile and adult offenders in regard to diversion eligibility. Under current law, a juvenile who entered into an open garage, attached to a residence, and stole a basketball would not be eligible for diversion/intermediate intervention because the entry into the garage would be classified as a residential burglary, a person felony. An adult who did the same acts would be eligible for

diversion. House Bill 2602 would eliminate the restriction on person felonies being diversion/intermediate intervention eligible but would make the most serious offenses ineligible for diversion – the same restriction faced by adult offenders.

Current law also makes ineligible any juvenile who has previously been adjudicated as a juvenile offender. Adults do not face such a restriction though an offender's prior participation in a diversion program or other criminal history is to be considered in determining an offender's suitability for such a program. This bill would remove the bar of a previous adjudication, allowing prosecutors flexibility in weighing all relevant factors to determine what is best for their own communities using the framework already established by the Kansas Legislature.

Diversion/intermediate intervention should be a favored disposition in appropriate cases. It makes sense to enable more juvenile offenders - who are likely to be more amenable to rehabilitative efforts than adult offenders - to experience the benefits of a diversion program. The bar should not be higher for them just because they are children.

Based on the foregoing, I respectfully request you support the enactment of House Bill 2602.

Respectfully submitted,

Ann Swegle

Ann Swegle
Deputy District Attorney
Eighteenth Judicial District

(3)

Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

Before the House Corrections and Juvenile Justice Committee
In Support of HB 2777
Kyle G. Smith, Special Agent
Director of Public and Governmental Affairs
Kansas Bureau of Investigation
February 17, 2004

Chairman Lloyd and Members of the Committee:

I appreciate the Committee's prompt action in holding this hearing on an urgent problem with serious consequences. On January 30, 2004, the Kansas Supreme Court issued an opinion in *State v. McAdams* which basically makes Kansas have the weakest anti-methamphetamine laws in the country. Add that decision with last year's SB 123, the *State v. Frazier* opinion, and our reduced funding for the Methamphetamine Prevention Project and we have a recipe for disaster.

This Committee has studied and knows the devastating impact of methamphetamine: The children who have been injured and killed, the lives devastated by the addiction, the explosions and fires, the threat the chemicals pose to new tenants, the soil and water which has been poisoned and of course the officers who risk their lives every day in trying to control this scourge.

We can not afford to encourage meth production in Kansas by having weak laws. The legislative history of our manufacturing statute, K.S.A. 65-4159 clearly shows the

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intent over the years to penalize these ultimate producers of illegal controlled substances harsher than mere dealers. In 1990 in a report I helped prepare for Attorney General Bob Stephan on needed changes to our drug laws, it was proposed to make manufacturing its own separate criminal offense with higher penalties. The legislation was passed and manufacturine was made a Class B felony under the old sentencing structure, the second highest penalty we had. In 1999 we again appeared before the legislature and testified about the growing meth crisis and how our penalties had fallen behind those of surrounding states, again making Kansas an attactive destination for these criminals. (See my attached testimony from 1999) Again the legislature responded and help protect Kansas by making manufacture a level 1 drug with a special rule doubling the sentence on second and subsequent convictions.

In *State v. McAdams* the Kansas Supreme Court reviewed an issue, for the first time on appeal whether the term "compound" as used in KSA 65-4161 could also be interpreted to mean the same as the definition of manufacture contained in KSA 65-4101(n) which also uses the word "compounding". That this was raised for the first time on appeal is important. It was never argued at trial where witnesses are available to testify and explain the legislative history nor the scientific difference between compounding and manufacturing. The conflict and ambiguity resulted in a decision that viewed the two crimes as the same and required Mr. McAdam be sentenced under the lower penalty in 65-4161 thus reducing the minimum possible sentence from 12 years and 3 months to 4 years, 7 months. While prosecutors are working on preparing cases with better records in hopes that the Supreme Court will recognize the legislature's intent and reverse or restrict the holding in *McAdam,* there is a substantial possibility

that the *McAdam* decision will result in reduced sentences and early release for hundreds of methamphetamine producers currently in prison or awaiting trial or sentencing.

There were good public policy reasons for imposing these severe penalties. The damage inflicted by methamphetamine cooks deserves severe punishment and we also need to deter other manufacturers from coming to Kansas – we need to make Kansas an unfriendly place to cook methamphetamine.

So how do we fix this problem and reinstate the legislative will? Basically, the Supreme Court said that since the word "compounding" appears in the definition of the word "manufacture", in KSA 65-4101(n) and the word "compound" also appears in another statute, KSA 65-4161, that the two different statutes with different penalties cover the same activity. Since it would not be fair to have one person sentenced more severely than another, it would be an equal protection problem if these two statutes covered the same acts, so only the lower sentence could be imposed.

Clearly the legislature intended to severely penalize manufacture and the historical splitting of the criminal statutes, but not the definition, has created confusion and ambiguity. As such, we need to clarify that K.S.A. 65-4159 covers the manufacture of controleld substances and have it the only one statute that criminalizes this particular activity.

As I requested, and as drafted, HB 2777 would strike the word "compounding" from the definition "manufacture". However, I have been approached by Deb Billingsly, Executive Director of the Kansas Board of Pharmacy, who pointed out that the Kansas Controlled Substances Act not only contains the criminal statutes regarding misuse of

controlled substances, but it is also their administrative law act, and the definition of "manufacture", including compounding, is still needed by them for taking administrative action against pharmacists and others who break different parts of the Uniform Control Substances Act. As such, she requested that rather than deleting the word "compounding" we consider deleting the other use of the word and strike the word "compound" from KSA 65 4161. Further, I think it essential that we make this bill as clear as possible that any and all parts of the manufacturing process are illegal. Chris Schneider an assistant district attorney from Wyandotte county also suggested that it would be, in fact, tactically better to strike the word "compound" from KSA 65 4161, to prevent defendants from claiming that they were merely "compounding" not "manufacturing" and requesting a lesser included defense instruction. Therefore I am requesting the attached amendment be introduced that would accomplish the exact purpose of the bill, to clarify what is manufacturing and punish it appropriately but do so without interfering with the Board of Pharmacy's needs. I've also added language to try and make it clear that this is merely clarifying what the legislature always thought the law said and that this change should be applied retroactively to minimize the number of meth producers who would benefit from McAdam.

While methamphetamine is almost exclusively the only drug illegally manufactured in Kansas, there have been two LSD labs and a fentynal lab in my memory of the last quarter century. Those drugs are covered by the other main controlled substances statute, K.S.A. 65-4163, and as such I am suggesting the same striking of 'compound' from that statute.

This is an extremely serious problem. We need this bill as amended and we need it through the Legislature as quickly as possible.

If you have any questions I would be happy to answer them.

Proposed Amendment to HB 2777

AN ACT concerning controlled substances; relating to clarifying compounding; amending K.S.A. 65-4161 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Whereas the Kansas Supreme Court in *State v McAdam*, No. 88,139, decided January 30, 2004, has noted a conflict and ambiguity in the relationship of statutes, legislative intent and criminal activities covered by K.S.A. 65-4159 and K.S.A. 65-4161, the legislature finds that additional clarification will be helpful to the courts and improve public safety. Further, to the extent allowed by law, it is the legislature's intent that this clarification of existing law be applied retroactively.

Section 2. K.S.A. 65-4161 is hereby amended to read as follows: 65-4161
(a) Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver or distribute; prescribe; administer; deliver; distribute; ***or*** dispense ~~**or compound**~~ any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as provided in subsections (b), (c) and (d), any person who violates this subsection shall be guilty of a drug severity level 3 felony.
(b) If any person who violates this section has one prior conviction under this section or a conviction for a substantially similar offense from another jurisdiction, then that person shall be guilty of a drug severity level 2 felony.
(c) If any person who violates this section has two or more prior convictions under this section or substantially similar offenses under the laws of another jurisdiction, then such person shall be guilty of a drug severity level 1 felony.
(d) Notwithstanding any other provision of law, upon conviction of any person for a first offense pursuant to subsection (a), such person shall be guilty of a drug severity level 2 felony if such person is 18 or more years of age and the substances involved were possessed with intent to sell, deliver or distribute; sold or offered for sale in or on, or within 1,000 feet of any school property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.
Nothing in this subsection shall be construed as requiring that school be in session or that classes are actually being held at the time of the offense or that children must be present within the structure or on the property during the time of any alleged criminal act. If the structure or property meets the description above, the actual use of that structure or property at the time alleged shall not be a defense to the crime charged or the sentence imposed.
(e) It shall not be a defense to charges arising under this section that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance.

(f) For purposes of the uniform controlled substances act, the prohibitions contained in this section shall apply to controlled substance analogs as defined in subsection (bb) of K.S.A. 65-4101 and amendments thereto.
(g) The provisions of this section shall be part of and supplemental to the uniform controlled substances act.

Section 3. K.S.A. 65-4163 is hereby amended to read as follows: 65-4163
(a) Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with the intent to sell, deliver or distribute; cultivate; prescribe; administer; deliver; distribute; ***or*** dispense ~~**or compound**~~: **. . .**

Section 4. K.S.A. 65-4161 and K.S.A. 65-4163 are hereby repealed.

Section 5. This act shall take effect and be in force from and after its publication in the Kansas register.

Senate Judiciary Committee
March 24, 1999
Testimony of Kyle G. Smith
Assistant Attorney General and Special Agent
Kansas Bureau of Investigation
Proponent House Substitute for HB 2469

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Carla Stovall and KBI Director Larry Welch, I ask for your support of House Substitute for HB 2469. The safety of the people of Kansas is threatened by an epidemic. The plague is the production of methamphetamine. While manmade, this epidemic is no less deadly than any bacteria known to medical science. Meth labs are multiplying across our state at an incredible rate, spreading death and destruction. Clandestine laboratories producing methamphetamine are causing fires, explosions and hazardous waste contamination. The people and children of Kansas are not only becoming addicts and dying from its use, but also are being poisoned and injured unknowingly when their neighbors operate these laboratories.

Chemicals involved include acids, anhydrous ammonia, red phosphorus, lye and acetone. These deadly chemicals are being handled by offenders with no chemistry background, no respect for pollution controls, no respect for life. In short, these criminals are contaminating our state and killing our citizens.

The 'cooks' at clandestine laboratories are willing to expose their own children to these deadly fumes and explosions in pursuit of satisfying their need for profits and a need to fill their addiction. In one case in Kansas, a neighbor observed the operators of a methamphetamine laboratory risking their lives to repeatedly enter their burning trailerhome to recover their precious equipment and drugs while their children were still trapped in inside.

The drug itself is extremely addictive and has a pharmacological side effect of making a person paranoid. In addition, these individuals operate in an underworld where rip-offs are common, competitors are armed and law enforcement is constantly searching for them. Not surprisingly labs are sometimes booby-trapped and meth dealers are frequently heavily armed. A new dangerous turn is for meth cooks to finish their process on deserted country roads or in public parks to avoid the danger of explosion and fire in their homes. Innocent Kansas citizens traveling those roads, enjoying our parks, are at risk to being shot and killed if they interrupt these operations. After a meth cook has been completed, these hazardous chemicals are dumped on the ground, in street gutters or down waterlines, creating hazardous waste sites and polluting ground water. The cost for the cleanup of these sites runs to the hundreds of thousands of dollars.

This committee heard me testify last year on SB 667, a chemical control act, that this was the most serious challenge facing public safety in the 17 years that I've been in law enforcement. You heard Assistant Attorney General Katina Kypridakes of California warn this committee that the problem will worsen if decisive action wasn't taken. SB 667 died on the house side and I have to report we were both right, the problem is worse.

In **1994** there were **4** clandestine laboratories seized in Kansas.

In **1995** that number rose to **7**.

In **1996** it skyrocketed to **71**, a ten-fold increase.

In **1997** there were **99** clandestine laboratories seized.

Last year, **1998** there were **189**.

As of March 20, there had been 116 meth labs seized in Kansas. If that pace continues, our law enforcement officers will be risking their lives in **over 500** labs in **1999**! In just 5 years we have a hundred times as many meth labs. We can not afford to let this plague continue to run unchecked. Attached are maps showing the numbers and locations of meth labs seized in 1998 and 1997 as well as the labs so far this year. You can see the spread of this epidemic for yourselves.

Kansas, Missouri, Iowa and California are reported by the DEA to be the top producers of methamphetamine in the nation. Last year Missouri took steps in their legislature to reverse this trend. Numerous initiatives were adopted by the Missouri legislature trying to attack this epidemic on every possible front. While we applaud Missouri's efforts, the real effect on Kansans is that it makes our state even more attractive to these purveyors of death, because of the increased difficulties and penalties now found in our neighbor to the east. It is imperative that Kansans take strong, decisive action in meeting the threat to our safety posed by methamphetamine.

The proposed legislation is comprehensive in its efforts to make Kansas the least desirable place in the nation to manufacture methamphetamine. We owe it to our children, ourselves and our land to make every effort to stop this plague.

I have three requested amendments to the substitute bill. They are: (1) give all licensed practitioners the same right to distribute controlled chemicals, (2) remove the exemption for safe harbor products from the requirement that retailers and distributors report suspicious transactions, and (3) reinstate the authority of the secretary of Health and Environment to enter illegal lab sites to carry out their duty to clean them up.

There is attached a comparison between the original bill and the substitute version. As you can see the House Judiciary was not willing to enact a chemical control act that required registration of distributors and retailers or would limit the number of packages of the precursor ephedrine alkaloids that a person could buy at one time. I hope the substitute bill will be effective in addressing the crisis. If not, I'm afraid we'll be back here next year with still worse statistics, to try again.

If you have other questions please contact me at your convenience.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 88,139

STATE OF KANSAS,

Appellee,

v.

BRIAN KEITH McADAM,

Appellant.

SYLLABUS BY THE COURT

1. When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

2. A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime. No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a coconspirator.

3. Where two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision.

4. Interpretation of a statute is a question of law, and an appellate court's review is unlimited.

Review of the judgment of the Court of Appeals in 31 Kan. App. 2d 436, 66 P.3d 252 (2003). Appeal from Anderson district court; JAMES J. SMITH, judge. Judgment of the Court of Appeals affirming the district court on the limited issues subject to our grant of review is affirmed in part and reversed in part. Judgment of the district court on these issues is affirmed in part, the sentence is vacated, and the case is remanded with directions. Opinion filed January 30, 2004.

Randall L. Hodgkinson, deputy appellate defender, argued the cause, and *Kristen L. Chowning*, assistant appellate defender, was with him on the briefs for appellant.

Frederick B. Campbell, county attorney, argued the cause, and *Carla J. Stovall*, former attorney general, and *Phill Kline*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

ALLEGRUCCI, J.: Brian Keith McAdam was convicted by a jury of conspiracy to unlawfully manufacture methamphetamine, attempted theft, attempt to unlawfully possess anhydrous ammonia, and

conspiracy to unlawfully possess anhydrous ammonia. He was sentenced to 173 months in prison. The Court of Appeals affirmed the convictions of conspiracy to unlawfully manufacture methamphetamine and attempted theft, reversed the convictions of attempt to unlawfully possess anhydrous ammonia and conspiracy to unlawfully possess anhydrous ammonia, remanded for resentencing in accordance with reversal of those convictions, and affirmed the drug severity level 1 felony penalty for conspiracy to unlawfully manufacture methamphetamine. *State v. McAdam*, 31 Kan. App. 2d 436, 66 P.3d 252 (2003). This court granted McAdam's petition for review and denied the State's cross-petition for review. Therefore, our review is limited to the issues of determining the sufficiency of the evidence to support McAdam's convictions of conspiracy to unlawfully manufacture methamphetamine and attempted theft and whether McAdam was illegally sentenced for conspiracy to unlawfully manufacture methamphetamine.

McAdam was staying at the home of his friend, Marcus Maley, who lived with his girlfriend. Maley and McAdam agreed to manufacture methamphetamine. When they had made methamphetamine before, Maley had helped McAdam by doing tasks like removing ephedrine pills from blister packaging and poking holes in cans of ether.

On this occasion, they had everything they needed to make methamphetamine except anhydrous ammonia. Before Maley and McAdam left Maley's residence to steal anhydrous ammonia from the Kincaid Co-op, they were joined by Casey Carter. Also before leaving Maley's house, they placed the materials that they were going to use for manufacturing methamphetamine into the trunk of Maley's girlfriend's vehicle because Maley would not allow the manufacturing to be done where he lived. They were going to use his girlfriend's vehicle rather than Maley's because his was well known in the area.

At approximately 9:30 or 10 p.m., Maley, McAdam, and Carter drove to the Kincaid Co-op to get anhydrous ammonia. Maley drove his vehicle, Carter sat in the front passenger seat, and McAdam sat in the back. Maley and McAdam brought along two water jugs to carry the anhydrous ammonia and a large cooler. They also had a couple of scanners, some night vision goggles, and walkie-talkies. According to Maley, McAdam had no particular responsibility during the trip, but Maley testified that the three were working together and he went to the Co-op because that was part of the agreed-on plan. When they arrived at the Kincaid Co-op, Carter got out of the vehicle to steal the anhydrous ammonia.

Deputy Max Skelton was at the Kincaid Co-op checking on the anhydrous ammonia tanks when he smelled anhydrous ammonia and saw a man running away from the tanks toward the trees. As Skelton was driving to the road to cut the man off, he saw a vehicle's headlights come on. The vehicle was driven slowly toward the deputy, who turned around and stopped it. Maley was driving the vehicle, and McAdam was in the back seat.

A second officer, Undersheriff Darin Dalsing, got consent from Maley to search the vehicle. In the trunk, there was an ice chest containing a single water jug that smelled of anhydrous ammonia and a margarine container with an orange powder residue. It smelled of ether and later tested positive for methamphetamine. There were scanners, a list of scanner frequencies, a walkie-talkie, and night vision goggles in the passenger compartment.

In an effort to stay out of jail, Maley told Dalsing that he could give him McAdam's methamphetamine lab. Maley gave the officers consent to search his residence and his girlfriend's vehicle. In the trunk of her vehicle, the officers found a shotgun, starting fluid, coffee filters, a face mask, lithium batteries, rock salt, drain opener, a weed sprayer, propane bottles, a heater, a 2-liter bottle full of ether, a digital scale, rubber gloves, and 10 bottles of ephedrine tablets. A few days later, a Kincaid Co-op employee found two water jugs, one of which was half full of anhydrous ammonia, in some trees in the vicinity of the anhydrous ammonia tanks.

We first determine if there was sufficient evidence from which a rational factfinder could find McAdam guilty of conspiracy to commit manufacture of methamphetamine.

K.S.A. 21-3302(a) provides:

"A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime. No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a co-conspirator."

In this case, the jury was instructed that the following claims had to be proved in order to establish the charge of conspiracy to commit unlawful manufacture of methamphetamine: (1) McAdam agreed with another person to manufacture methamphetamine, (2) he did so with the intent to manufacture methamphetamine, and (3) McAdam "or any party to the agreement acted in furtherance of the agreement by attempting to steal anhydrous ammonia."

McAdam contends that it was not shown that McAdam or another party to the agreement committed an overt act in furtherance of the agreement to manufacture methamphetamine. When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Beach*, 275 Kan. 603, Syl. ¶ 2, 67 P.3d 121 (2003).

The Court of Appeals disregarded the cases relied on by McAdam for the proposition that the overt act must extend beyond mere preparation, *State v. Chism*, 243 Kan. 484, 759 P.2d 105 (1988), and *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985), because they involved overt acts for the crime of attempt rather than conspiracy. 31 Kan. App. 2d at 441. The Court of Appeals cited *State v. Hill*, 252 Kan. 637, 642, 847 P.2d 1267 (1993), in which the court quoted the following definition of overt act from Black's Law Dictionary 1104 (6th ed. 1990):

"An open, manifest act from which criminality may be implied. An outward act done in pursuance and manifestation of an intent or design. An open act, which must be manifestly proved.

. . . .

"An overt act which completes crime of conspiracy to violate federal law is something apart from conspiracy and is an act to effect the object of the conspiracy, and need be neither a criminal act, nor crime that is object of conspiracy, but must accompany or follow agreement and must be done in furtherance of object of agreement. [Citation omitted.]"

See 31 Kan. App. 2d at 441. The Court of Appeals' discussion of this issue continued:

"Here, there was sufficient evidence that the act of attempting to steal anhydrous ammonia was done in furtherance of the parties' agreement and plan to commit the unlawful manufacture of methamphetamine. Evidence existed that McAdam and Maley had agreed to manufacture methamphetamine. All they lacked was anhydrous ammonia. Thus, the act to acquire the anhydrous ammonia was in furtherance of their agreement. Because the State did not have to demonstrate that this act extended beyond mere preparation, McAdam's argument fails." 31 Kan. App. 2d at 442.

McAdam also argues that there was insufficient evidence to show that Carter, who stole the anhydrous ammonia, was a party to the agreement to manufacture methamphetamine. In this regard, the Court of

Appeals stated:

"The jury drew a reasonable conclusion that because Carter had joined Maley and McAdam in their quest to obtain anhydrous ammonia, he had agreed to help them manufacture methamphetamine. Because Maley drove Carter to the Kincaid Co-op and because McAdam was checking scanner frequencies in the backseat of Maley's vehicle, it was reasonable for the jury to conclude that Carter was a coconspirator. A conviction of even the gravest offense may be sustained by circumstantial evidence. *State v. Penn*, 271 Kan. 561, 564, 23 P.3d 889 (2001). Thus, there was sufficient evidence to support the inference that Carter had agreed to the conspiracy." 31 Kan. App. 2d at 441.

McAdam has added nothing to his arguments on this issue in this court, and we agree with the Court of Appeals.

We next consider whether there was sufficient evidence from which a rational factfinder could find McAdam guilty of attempted theft.

McAdam contends in his petition for review that there was no overt act to support his conviction of attempted theft of anhydrous ammonia. On this issue the Court of Appeals stated the following:

"McAdam argues that the evidence shows only that he was riding along in Maley's car on the night of the incident. However, Maley's testimony at trial went further than that. McAdam told Maley that anhydrous ammonia was the only ingredient they were lacking to produce methamphetamine. McAdam was part of the discussion regarding who was going to get the anhydrous ammonia and how they would do it. McAdam had one two-way radio in the back seat with him, and Carter had the other. As a result, sufficient evidence existed that McAdam had performed an overt act in furtherance of his attempt to take anhydrous ammonia from the Kincaid Co-op and possess it in an unapproved container." 31 Kan. App. 2d at 442.

It is McAdam's position that Carter was the only one to commit any overt act toward the theft of anhydrous ammonia. He further contends that there is no evidence that he intentionally aided, abetted, advised, or counseled Carter to commit the crime. He cites *State v. Scott*, 250 Kan. 350, 362, 827 P.2d 733 (1992), for the proposition that mere association with persons who commit a crime or mere presence in the vicinity of a crime does not provide a sufficient basis to establish guilt of aiding and abetting. In *Scott*, the court also stated that """when a person knowingly associates himself with the unlawful venture and participates in a way which indicates he willfully is furthering the success of the venture, such evidence of guilt is sufficient to go to the jury."' [Citations omitted.]" 250 Kan. at 362. In this case, the manufacture of methamphetamine was the objective. McAdam had the necessary equipment and ingredients except anhydrous ammonia to make methamphetamine. McAdam was the person who was going to make methamphetamine, he knowingly associated himself with Maley and Carter in order to obtain the anhydrous ammonia that was necessary to make methamphetamine, and he went with Maley and Carter to the Kincaid Co-op for the purpose of stealing anhydrous ammonia.

The Court of Appeals stated that his overt act was having a walkie-talkie in the back seat with him while Carter had the other, the implication being that McAdam could communicate with Carter to further the success of the theft. The evidence supporting the Court of Appeals was Maley's testimony that they took two walkie-talkies with them to the Co-op and that Carter had one of them. When the officers searched Maley's vehicle, one walkie-talkie was found in the back seat, where McAdam had been sitting. From this evidence and evidence of the circumstances, the jury reasonably could find that McAdam knowingly associated himself with the theft of anhydrous ammonia and participated in a way that indicated his intentional furthering of the theft. We find no merit in McAdam's argument and affirm his

convictions.

McAdam also argues that he was illegally sentenced for conspiracy to unlawfully manufacture methamphetamine when he was sentenced for violation of K.S.A. 65-4159(a), a drug severity level 1 felony, rather than for violation of K.S.A. 65-4161(a), a drug severity level 3 felony.

A conspiracy is an agreement with another person to commit a crime. K.S.A. 21-3302(a). The crime that McAdam was charged, convicted, and sentenced of conspiring to commit was the unlawful manufacture of methamphetamine. See K.S.A. 65-4159(a). He argued in the Court of Appeals that he was illegally sentenced under K.S.A. 65-4159(a) and that he should have been sentenced under K.S.A. 65-4161(a). He did not raise the issue of his sentence in the trial court. The Court of Appeals considered the issue pursuant to K.S.A. 22-3504(1), which allows the appellate court to correct an illegal sentence. 31 Kan. App. 2d at 445. This court has said that a sentence that does not conform to the statutory provision is an illegal sentence. *State v. Johnson*, 269 Kan. 594, 600, 7 P.3d 294 (2000). Upon granting McAdam's petition for review, this court reviews the decision of the Court of Appeals. See Rule 8.03(g)(1) (2003 Kan. Ct. R. Annot. 58).

K.S.A. 65-4159(a) provides: "Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture any controlled substance or controlled substance analog." Methamphetamine is a controlled substance. K.S.A. 65-4101(e); K.S.A. 65-4107(d)(3). The penalty for violation of 65-4159(a) is a drug severity level 1 felony. K.S.A. 65-4159(b).

K.S.A. 65-4161(a) provides:

"Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver or distribute; prescribe; administer; deliver; distribute; dispense or compound any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as provided in subsections (b), (c) and (d), any person who violates this subsection shall be guilty of a drug severity level 3 felony."

Methamphetamine is a stimulant designated in 65-4107(d)(3).

The Court of Appeals stated that 65-4159(a) and 65-4161(a) "address the same offense, the compounding of methamphetamine." 31 Kan. App. 2d at 446. The Court of Appeals continued:

"Although K.S.A. 65-4159(a) and K.S.A. 65-4161(a) contain identical elements as applied to this case, K.S.A. 65-4161(g) states: 'The provisions of this section shall be part of *and supplemental to the uniform controlled substances act*.' (Emphasis added.) Thus, it seems that K.S.A. 65-4161 was intended to fill the gaps in the Uniform Controlled Substances Act.

"'General and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling. [Citation omitted.]' *In re Estate of Antonopoulos*, 268 Kan. 178, 189, 993 P.2d 637 (1999). Furthermore, although criminal statutes should be interpreted in favor of the accused, 'judicial interpretation must be reasonable and sensible to effect legislative design and intent. [Citation omitted.]' *State v. McGill*, 271 Kan. 150, 154, 22 P.3d 597 (2001). The language in K.S.A. 65-4161(g) indicates it was the legislature's intent to make K.S.A. 65-4151 a general statute, which only applies when no other statute will.

"K.S.A. 65-4159 clearly applies to the unlawful manufacture of methamphetamine. Because there is no conflict between K.S.A. 65-4159(a) and K.S.A. 65-4161(a), the trial court appropriately sentenced McAdam under the special statute, K.S.A. 65-4159. See *State v. Luttig*, 30 Kan. App. 2d 1125, 54 P.3d 974, *rev. denied* 275 Kan. ___ (2002) (holding defendant was properly sentenced under special statute that conflicted with general statute). Thus, McAdam's argument fails." 31 Kan. App. 2d at 446-47.

The State contends that the Court of Appeals reached the right decision for the wrong reason. According to the State, 65-4161(a) and 65-4159(a) are not identical and K.S.A. 65-4161(a) does not apply to McAdam's conduct. The State's position is that methamphetamine is not made by compounding, which is the conduct prohibited by K.S.A. 65-4161(a), but rather is made by a chemical synthesis called reduction. The State seems to expect the court to take it on faith that methamphetamine is not made by compounding and, because not made by compounding, it is made by manufacturing within the meaning of K.S.A. 65-4159(a). The State provides molecular diagrams and descriptions but nothing that would assist a layperson in distinguishing between compounding and manufacturing.

The State has not provided the court with enough information to evaluate the merits of the scientific argument on distinguishing compounding from manufacturing, and the State's common-sense and legal arguments are less than convincing. Moreover, the State fails even to mention the intent of the legislature, which is the critical issue, in wording 65-4159(a) and 65-4161(a) as it did. The interpretation of a statute is a question of law, and this court's review is unlimited. *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003). At oral argument the State conceded that if compounding is synonymous with manufacturing then the State loses the argument. The statutory definition of "manufacture" is:

"'Manufacture' means the production, preparation, propagation, *compounding,* conversion or processing of a controlled substance either directly or indirectly or by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container . . . ." (Emphasis added.) K.S.A. 65-4101(n).

Based on compounding's being included in the definition of manufacture, the State would have the court conclude that compounding is a type of manufacturing, as apple is a type of fruit, and that compounding is a more specific term than manufacturing. If the statutory definition is to be interpreted so that compounding is a particular subdivision of manufacturing rather than a synonym of manufacturing, then it seems that production, preparation, propagation, conversion, and processing also ought to be particular types of manufacturing rather than synonyms. It is not apparent that they are, and, in fact, "production" is defined as including the manufacture of a controlled substance. K.S.A. 65-4101(w). By definition compounding is manufacturing, and the State loses this argument.

The State also condemns the Court of Appeals' decision in *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied* 274 Kan.___ (2002), as a misapplication of *State v. Nunn*, 244 Kan. 207, 229, 768 P.2d 268 (1989), which held that "[w]here two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision." In *Frazier*, the Court of Appeals concluded that possession of ephedrine or pseudoephedrine under K.S.A. 2001 Supp. 65-7006(a) and possession of drug paraphernalia under K.S.A. 2001 Supp. 65-4152(a)(3) are identical offenses so that only the lesser penalty could be imposed on Frazier. 30 Kan. App. 2d at 405-06. In the present case, the Court of Appeals distinguished *Frazier* as not involving a statute that was part of and supplemental to the Uniform Controlled Substances Act. 31 Kan. App. 2d at 446. Based on its perception that 65-4161 was a gap filler, the conclusion drawn by the Court of Appeals was that the statute was a general statute, "which only applies when no other statute will." 31 Kan. App. 2d at 447. The Court of Appeals further reasoned that K.S.A. 65-4159(a) "clearly applies to the unlawful manufacture of methamphetamine" and

therefore concluded that McAdam was appropriately sentenced "under the special statute, K.S.A. 65-4159." 31 Kan. App. 2d at 447.

Under the particular facts of this case, we agree with McAdam's contention that 65-4161(a) and 65-4159 (a) are identical and thus he can be sentenced only under the lesser penalty provision of 65-4161(a). See *Nunn*, 244 Kan. at 229.

The key difference between McAdam's position and the reasoning of the Court of Appeals is that the Court of Appeals treated the analysis applicable to identical statutes as if it could be combined with the analysis applicable to g

eneral and specific statutes. McAdam, on the other hand, treats the two concepts as separate and separately analyzed. The Court of Appeals characterized K.S.A. 65-4159(a) and K.S.A. 65-4161(a) as identical and then applied the general and specific analysis to them. By doing so, the Court of Appeals created a hierarchy with the general and specific analysis trumping the analysis for identical provisions.

In *Nunn*, the court considered two criminal offenses with identical essential elements but different penalties. The defendant contended that the trial court erred in not instructing the jury on the offense with the lesser penalty as a lesser included offense. The court rejected defendant's contention and quoted from *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), where the same argument already had been turned down:

"'Where identical offenses are involved, the question is not truly a matter of one being a lesser included offense of the other. Each has identical elements and the decision as to which penalty to seek cannot be a matter of prosecutorial whimsy in charging. As to identical offenses, a defendant can only be sentenced under the lesser penalty. Here, it would have been the better practice to have instructed on indecent liberties with a child, but the error could have been remedied by sentencing defendant as having been convicted of a class C felony rather than a class B felony. Accordingly, the sentence imposed herein must be vacated.' 241 Kan. at 83." 244 Kan. at 229.

The governing principle, as stated by the court in *Nunn*, is: "Where two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision." 244 Kan. at 229.

In *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), the court considered two criminal offenses that, although dealing with the same subject, did not have identical essential elements. Williams was charged with one count of indecent liberties with a child, K.S.A. 1991 Supp. 21-3503, for the alleged sexual molestation of his step-granddaughter. The court concluded that he should have been charged with the more specific offense of aggravated incest, K.S.A. 21-3603, which had the additional essential element of kinship. The governing principle, as stated by the court in *Williams*, is: "When there is a conflict between a statute dealing generally with a subject and another statute dealing specifically with a certain phase of it, the specific statute controls unless it appears that the legislature intended to make the general act controlling." 250 Kan. 730, Syl. ¶ 3.

The statutory provisions either have identical elements or they do not, and the analysis for statutes with identical elements differs from the analysis applicable where statutes do not have identical elements. Thus, if K.S.A. 65-4159(a) and K.S.A. 65-4161(a) have identical elements, the proper analysis is that set out in *Nunn*. As we have seen, the elements of K.S.A. 65-4159(a) and K.S.A. 65-4161(a) are identical, as the Court of Appeals noted, "as applied to this case." 31 Kan. App. 2d at 446. For example, in other circumstances, the essential elements of a violation of K.S.A. 65-4161(a) could be that the defendant

sold opium. For this reason, a decision that McAdam's conduct was prohibited by K.S.A. 65-4161(a) as well as by K.S.A. 65-4159(a) so that he may be sentenced only under the lesser penalty provision of K.S.A. 65-4161(a) is limited to the facts of this case. We, therefore, vacate McAdam's sentence for violation of K.S.A. 65-4159(a) and remand to the district court for resentencing McAdam to a drug severity level 3 felony as provided for a violation of K.S.A. 65-4161(a).

Judgment of the Court of Appeals affirming the district court on the limited issues subject to our grant of review is affirmed in part and reversed in part. Judgment of the district court on these issues is affirmed in part, the sentence is vacated, and the case is remanded with directions.

BEIER, J., not participating.

LARSON, S.J., assigned.[1]

[1]**REPORTER'S NOTE:** Judge Judge Edward Larson was appointed to hear case No. 88,139 vice Justice Beier pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616.

END

 | Keyword | Name » SupCt - CtApp | Docket | Date |

Comments to: WebMaster, kscases@kscourts.org.
Updated: January 30, 2004; revised: February 3, 2004.
URL: http://www.kscourts.org/kscases/supct/2004/20040130/88139.htm.

(4)

TESTIMONY
Submitted to the House Committee on Corrections and Juvenile Justice
Kansas House of Representatives
February 17, 2004

Cristi Cain
State Coordinator
Kansas Methamphetamine Prevention Project

The Kansas Supreme Court ruling in State v. McAdam, which jeopardizes the sentences of hundreds of criminals convicted of meth manufacture and poses future sentencing problems is very disturbing for communities throughout the state, especially in a year when agencies that deal with methamphetamine are already facing budget crises.

The success rate of treatment for meth addiction based on national research is 3-7%. When combined with the fact that the state prison system has limited substance abuse treatment available, it is logical to conclude that when those convicted of meth manufacture are released, they are highly likely to return to manufacturing of meth in order to supply their addiction.

The State v. McAdam ruling will have serious impact on communities throughout the state. Repercussions of the ruling will include:

- Increased availability of methamphetamine in communities throughout the state. With increased availability, more Kansans would use methamphetamine, a highly addictive drug. Kansas has had an 82% increase in residents who have sought treatment for meth addiction over the past 5 years. Additionally, the average age of admission for meth addiction treatment has decreased significantly. In FY 2003, 37% of residents seeking treatment for meth addiction were 24 or under. Of additional concern is the research demonstrating teens can become addicted after just two uses of meth. With increased availability, more teens will experiment with meth.
- Many communities have fewer law enforcement officers because of budget constraints. The release of convicted meth manufacturers would be a significant strain on enforcement resources.
- Clean-up resources would be insufficient to handle the increased number of manufacturers released. Looking at just the 375 manufacturers who will possibly receive drastically reduced sentences due to the Supreme Court ruling, if it is

assumed that 90% of them would return to manufacturing, the clean-up costs to handle just these labs would be approximately $365,000, which is Kansas Department of Health and Environment's entire annual budget for meth lab clean-ups.

- The following are risks Kansas communities already face due to meth use and manufacture in our communities: domestic violence, increased crime including theft, auto accidents, fires and explosions, child abuse and neglect, sexually transmitted diseases, hazardous waste, murders, suicides, dangers to law enforcement and other first responders, and effects on children including birth defects and diseases related to chemical exposure. These risks would increase with more meth manufacturers in our communities due to reduced sentences.

The Kansas Methamphetamine Prevention Project supports legislative action that would correct the discrepancies between K.S.A. 65-4159 and K.S.A. 65-4161. Methamphetamine is a very serious problem in Kansas. It is very important that those convicted of the manufacture of meth receive long sentences in order to protect communities and deter manufacturers from other states, such as Missouri, from coming to Kansas.

(5)

700 Jackson, Suite 900
Topeka, KS 66606

Testimony of

Randall L. Hodgkinson, Deputy Appellate Defender[1]

Before the House Committee on Corrections and Juvenile Justice

RE: HB 2777

February 17, 2004

Chairman Loyd and Members of the Committee:

I am testifying regarding my concerns about House Bill 2777 ("HB 2777"). My name is Randall Hodgkinson and I am a Deputy Appellate Defender here in Topeka. I am not testifying in my capacity as Deputy Appellate Defender and I have no authority to speak on behalf of any organization or agency; but my experience in the criminal justice system has caused me to have some personal concerns regarding this subject.

Specifically, HB 2777 aims to counter a Supreme Court case interpreting statutes prohibiting manufacture of a controlled substance. I have no qualms about clarifying the laws to resolve the conflicts as found by the court–that is the Legislature's role.

But I would suggest that this is an appropriate time to step back and look at the results of the drug sentencing provisions and their practical impact. In my opinion, having manufacture, attempt to manufacture, and conspiracy to commit manufacture as severity level 1 drug offenses is grossly disproportionate and out of step with actual practice in the courts.

Which is worse: making meth for personal use or selling it at a school?

The *McAdam* case held that, by definition, manufacture is identical to compounding a controlled substance, which is prohibited by the same statute as that which prohibits *selling* or *distributing* drugs; this offense is a severity level 3 drug offense, resulting in a presumptive sentence of between 14 and 51 months depending on criminal history. K.S.A. 21-4705; 65-4161(a). If a person sells or distributes drugs *to children at a school*, the offense is classified as a severity level 2 drug offense, resulting in a presumptive sentence of between 46 and 83 months, depending on criminal history. K.S.A. 21-4705; 65-4161(b).

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[1]This testimony is not necessarily the position of the Kansas Appellate Defender Office or of the Kansas Board of Indigent Defense Services. This testimony constitutes the personal opinions and conclusions of the witness.

But, under the classification urged by the proponents of HB 2777, a person who manufactures some methamphetamine for personal use or even agrees to help someone get the materials necessary to make methamphetamine for personal use would be guilty of a severity level 1 drug offense and would be subject to a sentence of no less than *138 months in prison*– more if the person had any criminal history. My question is simple: which is worse, selling drugs to children at school or making methamphetamine at home for personal use? To me the answer is simple: distributing and selling drugs is worse. But the classification that would result from HB 2777, reflects exactly the opposite.

Which Is Worse: Making Meth for Personal Use or Voluntary Manslaughter?

Additionally, these sentences are disproportionate with nondrug offenses. For comparison sake, a severity level 1 drug offense mandates a greater presumptive sentence than a severity level 3 nondrug offense for all except the two highest criminal history categories. Severity level 3 nondrug offenses include aggravated robbery, kidnapping, aggravated indecent liberties with a child, voluntary manslaughter, and attempted second-degree murder. Again the question is: which is more serious? Again, to me the answer is apparent, but the laws as recommended by the proponents of HB 2777 would reflect exactly the opposite.

Severity level 1 drug classification is out of step with practice in district court

I believe that actual experience under classification of manufacture as a drug severity level 1 offense reflects this inequity. The general trend with regard to departures in severity level 1 drug offenses is illustrative. I have attached copies of a table from the Sentence Commission report for fiscal year 1998, 1999, 2000, 2001, and 2002. As would be expected, before 1999, there were actually very few severity level 1 drug sentences, three in FY 1998 and six in FY 1999. But beginning in 2000, the number began growing and reached 84 in FY 2001 and 193 in FY 193.

In FY 2001, for all offenses 15.5% of sentences were downward departures and 27.6% of drug offenses were downward departures. But, for severity level 1 drug offenses, 81.7% (or more than 4 in 5) of offenders sentenced for severity level 1 drug offenses received downward durational departures, while only 3.7% received upward departures and only 14.6% received standard sentences. In FY 2002, this disparity remained steady, In FY 2002, for all offenses, while the downward departure rate for nondrug offenses remained relatively steady, 40.7% of drug offenders received downward departures, including 80.3% of those persons sentenced for drug severity level 1 offenses. This is compared with other nondrug felony classifications where the percentage of upward and downward departures is either relatively equal or upward departures are granted more often than downward departures. The conformity to the Guidelines, or lack thereof for severity level 1 drug offenses is clear from this evidence. The expressed intent of the Legislature in passing the Guidelines was to have the vast majority of cases sentenced within presumptive ranges. But experience under the previous sentencing scheme shows that standard sentences for severity level 1 drug offenses are disproportionate and trial judges recognize that fact (as do prosecutors when they enter into plea agreements for downward departures).

A real alternative

I understand the price that the scourge of methamphetamine exacts upon persons and upon the State of Kansas as a whole. I have a front-row seat to witness the effects of methamphetamine and I understand that methamphetamine production is destructive to the environment and costly to the government that is often left holding the bill for cleaning up. I am not suggesting that manufacture and its related offenses should not be crimes or even that they should not be serious felonies. But I am suggesting that, by itself, in relation to other drug and nondrug offenses, first-time manufacture and related offenses should not be classified as a severity level 1 drug offense.

I urge the Committee to take this opportunity to deliberately review the drug sentencing scheme and its practical effects as illustrated by courtroom experience since 1999. As it stands, pursuant to *McAdam*, persons convicted of manufacture related offenses will be sentenced using drug severity level 3, which depending on criminal history can result in a significant prison sentence. Combined with multiple charges that frequently are brought in such cases, offenders will not be "getting off easy." And if a person commits a manufacture related offense today and has prior convictions for sale, distribution, or manufacture, pursuant to *McAdam*, offenders will be sentenced using drug severity level 2 or drug severity level 1.

I know that this Committee and the Legislature are continuing to study and consider drug enforcement policy and appropriate sanctions, especially in light of budgetary restrictions. I hope that this Committee will really consider whether throwing people in prison on first time personal use manufacture charges for ten, twenty or more years at a cost of hundreds of thousands of dollars to the state is the best use of limited resources.

Thank you for this opportunity to provide some input in this process. If any of the Committee members would like to follow up on this information, please feel free to contact me.

Table 24: Conformity Rates by Severity Level - Incarceration Sentences

Severity Level	N	Within Guidelines (%)				Departures (%)		
						Durational		Dispositional
		Agg	Stand	Miti	Box	Upward	Downward	Upward
D1	193	1.0	5.7	7.8		5.2	80.3	
D2	89	6.7	25.8	18.0		11.2	38.2	
D3	149	1.3	13.4	5.4	64.4	4.0	11.4	
D4	161	1.2	23.6	10.6	24.2	6.2	21.7	12.4
Subtotal	**592**	**2.0**	**15.5**	**9.5**	**22.8**	**6.1**	**40.7**	**3.4**
N1	56	12.5	21.4	8.9		26.8	30.4	
N2	37	10.8	21.6	10.8		29.7	27.0	
N3	209	6.7	24.4	20.6		25.8	22.5	
N4	64	10.9	31.3	21.9		21.9	14.1	
N5	198	6.1	15.7	11.1	40.9	8.6	17.7	
N6	40	5.0	30.0		7.5	32.5	7.5	17.5
N7	153	2.0	17.6	7.2		10.5	9.2	53.6
N8	75	6.7	22.7	4.0		4.0	5.3	57.3
N9	152	3.9	32.2	7.9		3.9	9.2	42.8
N10	42	2.4	21.4	11.9			2.4	61.9
Subtotal	**1,026**	**5.9**	**23.0**	**11.6**	**8.2**	**14.5**	**15.0**	**21.7**
TOTAL	**1,618**	**4.5**	**20.3**	**10.8**	**13.5**	**11.4**	**24.4**	**15.0**

Table 25 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated 14.4% downward dispositional departures for sentences, which should have been presumptive incarceration, while only 6% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders did when their severity levels and criminal history categories fell within the border boxes (33.3% versus 4.7%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences: the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past seven years.

Table 26: Conformity Rates by Severity Level - Incarceration Sentences

Severity Level	N	Within Guidelines (%)				Departures (%)		
						Durational		Dispositional
		Agg	Stand	Miti	Box	Upward	Downward	Upward
D1	82	1.2	4.9	8.5		3.7	81.7	
D2	54	5.6	16.7	20.4		25.9	31.5	
D3	143	1.4	4.2	1.4	77.6	7.7	7.7	
D4	145	2.1	19.3	10.3	28.3	6.9	15.2	17.9
Subtotal	**424**	**2.1**	**11.1**	**8.3**	**35.8**	**9.0**	**27.6**	**6.1**
N1	70	11.4	11.4	14.3		42.9	20.0	
N2	34	5.9	26.5	14.7		26.5	26.5	
N3	182	12.6	17.6	23.1		31.9	14.8	
N4	45	17.8	26.7	17.8		22.2	15.6	
N5	195	6.7	19.0	6.7	38.5	14.4	14.9	
N6	24	4.2	25.0	8.3	8.3	20.8		33.3
N7	178	3.9	11.8	3.9		8.4	3.4	68.5
N8	64	1.6	9.4	6.3		3.1	1.6	78.1
N9	130	0.8	16.2	6.9		5.4	4.6	66.2
N10	53	1.9	18.9	5.7			1.9	71.7
Subtotal	**975**	**6.7**	**16.6**	**10.6**	**7.9**	**16.8**	**10.3**	**31.2**
TOTAL	**1,399**	**5.3**	**14.9**	**9.9**	**16.4**	**14.4**	**15.5**	**23.6**

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated 12% downward dispositional departures for sentences, which should have been presumptive incarceration, while only 6.3% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders did when their severity levels and criminal history categories fell within the border boxes (35.5% versus 4%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences: the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past six years.

Table 26: Conformity Rates by Severity Level - Incarceration Sentences

Severity Level	N	Within Guidelines(%)				Departures(%)		
						Durational		Dispositional
		Agg	Stand	Miti	Box	Upward	Downward	Upward
D1	24			16.7		4.2	79.2	
D2	76	5.3	19.7	15.8		11.8	47.4	
D3	143	1.4	6.3	2.8	77.6	7.0	4.9	
D4	106	0.9	14.2	9.4	33.0	3.8	15.1	23.6
Subtotal	**349**	**2.0**	**11.2**	**8.6**	**41.8**	**6.9**	**22.3**	**7.2**
N1	46	15.2	13.0	8.7		30.4	32.6	
N2	46	6.5	17.4	8.7		32.6	34.8	
N3	166	6.6	27.7	17.5		31.3	16.9	
N4	42	7.1	35.7	7.1		28.6	21.4	
N5	160	6.3	16.9	8.1	40.6	11.3	16.9	
N6	33	9.1	24.2	24.2	9.1	15.2	9.1	9.1
N7	123	0.8	17.1	4.9		8.1	3.3	65.9
N8	69		10.1	8.7		7.2	5.8	68.1
N9	122	3.3	16.4	1.6		0.8	1.6	76.2
N10	39	5.1	15.4	12.8				66.7
Subtotal	**846**	**5.2**	**19.4**	**9.5**	**8.0**	**15.6**	**12.8**	**29.6**
TOTAL	**1,195**	**4.3**	**17.0**	**9.2**	**17.9**	**13.1**	**15.6**	**23.0**

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated 9.2% downward dispositional departures for sentences which should have been presumptive incarceration, while only 6% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders did when their severity levels and criminal history categories fell within the border boxes (32.9% versus 3.6%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences; the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past five years.

Table 26: Conformity Rates by Severity Level - Incarceration Sentences

Severity Level	N	Within Guidelines(%)				Departures(%)		
						Durational		Dispositional
		Agg	Stand	Miti	Box	Upward	Downward	Upward
D1	6	16.7	16.7				66.7	
D2	59	5.1	25.4	15.3		8.5	45.8	
D3	165	1.2	4.8	4.2	80.0	1.8	7.9	
D4	106		17.0	11.3	28.3	7.5	20.8	15.1
Subtotal	**336**	**1.8**	**12.5**	**8.3**	**48.2**	**4.8**	**19.6**	**4.8**
N1	44	11.4	27.3	11.4		34.1	15.9	
N2	40	7.5	17.5	17.5		20.0	37.5	
N3	157	11.5	33.1	16.6		24.2	14.6	
N4	48	27.1	31.3	8.3		20.8	12.5	
N5	173	1.7	15.6	11.0	49.1	8.7	13.9	
N6	45	8.9	28.9	4.4	6.7	15.6	13.3	22.2
N7	129	3.9	10.9	7.8		10.9	3.9	62.8
N8	65	1.5	13.8	9.2		3.1	6.2	66.2
N9	125	5.6	17.6	7.2		5.6	3.2	60.8
N10	31	3.2	6.5	9.7		19.4	3.2	58.1
Subtotal	**857**	**7.0**	**20.2**	**10.6**	**10.3**	**14.2**	**11.1**	**26.6**
TOTAL	**1,193**	**5.5**	**18.0**	**10.0**	**21.0**	**11.6**	**13.5**	**20.5**

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated a 11.3% downward dispositional departures for sentences which should have been presumptive incarceration, while only 4.6% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders did when their severity levels and criminal history categories fell within the border boxes (32.7% versus 3.1%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences; the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past four years.

Table 26: Conformity Rates by Severity Level - Incarceration Sentences

Severity Level	N	Within Guidelines(%)				Departures(%)		
						Durational		Dispositional
		Agg	Stand	Miti	Box	Upward	Downward	Upward
D1	3					33.3	66.7	
D2	43	2.3	18.6	20.9		16.3	41.9	
D3	155	1.9	5.8	3.2	75.5	3.2	10.3	
D4	79	0.0	17.7	10.1	31.6	7.6	17.7	15.2
Subtotal	**280**	**1.4**	**11.1**	**7.9**	**50.7**	**6.8**	**17.9**	**4.3**
N1	16	6.3	18.8	0.0		25.0	50.0	
N2	60	15.0	8.3	6.7		36.7	33.3	
N3	163	11.7	32.5	17.2		25.8	12.9	
N4	59	13.6	23.7	15.3		28.8	18.6	
N5	164	5.5	25.0	12.8	34.8	8.5	13.4	
N6	39	5.1	25.6	7.7	23.1	12.8	12.8	12.8
N7	120	3.3	13.3	6.7		4.2	2.5	70.0
N8	60	6.7	18.3	5.0		6.7	10.0	53.2
N9	111	5.4	13.5	9.0		2.7	4.5	64.9
N10	37	0.0	18.9	5.4		0.0	13.5	62.2
Subtotal	**829**	**7.5**	**21.1**	**10.6**	**8.0**	**14.0**	**12.8**	**26.1**
TOTAL	**1,109**	**6.0**	**18.6**	**9.9**	**18.8**	**12.2**	**14.1**	**20.6**

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated a 8.3% downward dispositional departures for sentences which should have been presumptive incarceration, while only 4.7% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders when their severity levels and criminal history categories fell within the border boxes (36.5% versus 2.7%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences; the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past three years.

SENTENCING RANGE - NONDRUG OFFENSES

Category → / Severity Level ↓	A 3 + Person Felonies	B 2 Person Felonies	C 1 Person & 1 Nonperson Felonies	D 1 Person Felony	E 3 + Nonperson Felonies	F 2 Nonperson Felonies	G 1 Nonperson Felony	H 2 + Misdemeanors	I 1 Misdemeanor No Record
I	653 / 620 / 592	618 / 586 / 554	285 / 272 / 258	267 / 253 / 240	246 / 234 / 221	226 / 214 / 203	203 / 195 / 184	186 / 176 / 166	165 / 155 / 147
II	493 / 467 / 442	460 / 438 / 416	216 / 205 / 194	200 / 190 / 181	184 / 174 / 165	168 / 160 / 152	154 / 146 / 138	138 / 131 / 123	123 / 117 / 109
III	247 / 233 / 221	228 / 216 / 206	107 / 102 / 96	100 / 94 / 89	92 / 88 / 82	83 / 79 / 74	77 / 72 / 68	71 / 66 / 61	61 / 59 / 55
IV	172 / 162 / 154	162 / 154 / 144	75 / 71 / 68	69 / 66 / 62	64 / 60 / 57	59 / 56 / 52	52 / 50 / 47	48 / 45 / 42	43 / 41 / 38
V	136 / 130 / 122	128 / 120 / 114	60 / 57 / 53	55 / 52 / 50	51 / 49 / 46	47 / 44 / 41	43 / 41 / 38	38 / 36 / 34	34 / 32 / 30
VI	46 / 43 / 40	41 / 39 / 37	38 / 36 / 34	36 / 34 / 32	32 / 30 / 28	29 / 27 / 25	26 / 24 / 22	21 / 20 / 19	19 / 18 / 17
VII	34 / 32 / 30	31 / 29 / 27	29 / 27 / 25	26 / 24 / 22	23 / 21 / 19	19 / 18 / 17	17 / 16 / 15	14 / 13 / 12	13 / 12 / 11
VIII	23 / 21 / 19	20 / 19 / 18	19 / 18 / 17	17 / 16 / 15	15 / 14 / 13	13 / 12 / 11	11 / 10 / 9	11 / 10 / 9	9 / 8 / 7
IX	17 / 16 / 15	15 / 14 / 13	13 / 12 / 11	13 / 12 / 11	11 / 10 / 9	10 / 9 / 8	9 / 8 / 7	8 / 7 / 6	7 / 6 / 5
X	13 / 12 / 11	12 / 11 / 10	11 / 10 / 9	10 / 9 / 8	9 / 8 / 7	8 / 7 / 6	7 / 6 / 5	7 / 6 / 5	7 / 6 / 5

LEGEND

Presumptive Probation

SENTENCING RANGE - DRUG OFFENSES

Category → / Severity Level ↓	A 3 + Person Felonies	B 2 Person Felonies	C 1 Person & 1 Nonperson Felonies	D 1 Person Felony	E 3 + Nonperson Felonies	F 2 Nonperson Felonies	G 1 Nonperson Felony	H 2 + Misdemeanors	I 1 Misdemeanor No Record
I	204 / 194 / 185	196 / 186 / 176	187 / 178 / 169	179 / 170 / 161	170 / 162 / 154	167 / 158 / 150	162 / 154 / 146	161 / 150 / 142	154 / 146 / 138
II	83 / 78 / 74	77 / 73 / 68	72 / 68 / 65	68 / 64 / 60	62 / 59 / 55	59 / 56 / 52	57 / 54 / 51	54 / 51 / 49	51 / 49 / 46
III	51 / 49 / 46	47 / 44 / 41	42 / 40 / 37	36 / 34 / 32	32 / 30 / 28	26 / 24 / 23	23 / 22 / 20	19 / 18 / 17	16 / 15 / 14
IV	42 / 40 / 37	36 / 34 / 32	32 / 30 / 28	26 / 24 / 23	22 / 20 / 18	18 / 17 / 16	16 / 15 / 14	14 / 13 / 12	12 / 11 / 10

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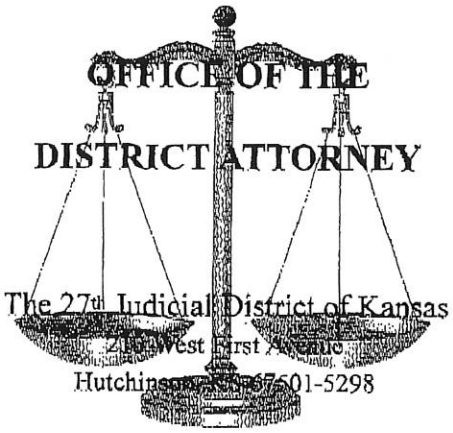

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February 17, 2004

TO: Representatives of the Corrections and Juvenile Justice Committee

TESTIMONY REGARDING HOUSE BILL 2777

Thank you for the opportunitY to submit testimony to you regarding House Bill 2777. In 1973 the Kansas Legislature passed what is known as the Uniform Controlled Substances Act. This Act was intended to control and manage the use and distribution of controlled substances. Controlled substances include many prescription drugs as well as drugs that have no medicinal value and are primarily designed to alter the user's perception of the world. These drugs include hallucinogenics such as marijuana, as well as "harder" drugs such as heroine and methamphetamine. Since that time, several issues involving illegal activity in the distribution and use of controlled substances have caused this body to promulgate new statutes to deal with the real problems caused by the illegal use and distribution of controlled substances. One of the most important of these statutes is K.S.A. 65-4159, which forbids the manufacture of controlled substances.

In the late 1980s Kansas and other states saw a dramatic increase in the amount of crime related to the manufacture of controlled substances, primarily methamphetamine. Methamphetamine "laboratories" began to be a problem that the Uniform Controlled Substance act was not equipped to handle. These labs are not laboratories in the sense that they are pristine, organized, scientific laboratories using state-of-the-art equipment and safety measures. These laboratories are found in motel rooms, cars, residences, the fields of farmers and many other public places. These labs are dangerous in that the chemical reactions are uncontrolled and produce hazardous by-products which can be deadly to not only the persons involved in the manufacturing process, but any innocent citizen who might happen to come into contact with them.. Many of the items used to manufacture methamphetamine are, in themselves, hazardous. Acids, sodium and lithium metals which spontaneously combust if they come into contact with water, even moisture in the air, ether, which is a highly explosive chemical, and anhydrous ammonia which can sear the lungs are used in the manufacturing process. This process has become a scourge to the people of Kansas.

In 1990 you enacted legislation to make the manufacture of methamphetamine a serious drug offense. At that time you made the crime a level 2 felony drug offense. Your subsequent review of the facts

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surrounding these "laboratories" convinced you that a crime committed in violation of the statutes should be punished as a level 1 drug offense. You have recognized the danger that methamphetamine labs pose to the State of Kansas.

In enacting K.S.A. 65-4159 the legislature did not recognize that the definition of manufacture included the word "compounding" and that the word "compound" was also present in the definition of crimes under K.S.A. 65-4127(a). Since that time, K.S.A. 65-4127(a) has been divided into statutes now numbered K.S.A. 65-4160 and K.S.A. 65-4161. The term "compound" remained in K.S.A. 65-4161. It was never the legislature's intent to have this statute control over K.S.A. 65-4159. However, in a very recent supreme court case, the Kansas Supreme Court has determined that because of the presence of the word "compound" in K.S.A. 65-4161, your intent to punish this crime as a level 1 drug offense should be given no effect. This has the effect of reducing the sentence that this body intended for these crimes for a minimum of more than eleven years to a minimum of fourteen months. The result could be the release of many persons who impose a significant threat to the people of the State of Kansas. These people will be manufacturing methamphetamine like never before if steps are not taken to ensure your original legislative intent is followed.

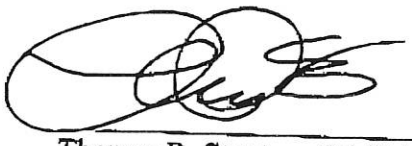
It is imperative that this body act to respond to the judicial action that has determined that these crimes should not be punished as intended by this body. In 2003 the Reno County District Attorney's Office filed 84 criminal cases in which the primary charge in the complaint was for manufacture of methamphetamine, attempted manufacture of methamphetamine, or a drug severity level 1 connected with the manufacture of methamphetamine such as possession of pseudoephedrine with the intent to manufacture. The recidivism rate for those charged with this crime is unusually high. It seems that many of the persons that are released on bond by the courts for the manufacture of methamphetamine return within days or weeks with new charges for the same crime. At the same time, methamphetamine is destroying our communities. The Reno County District Attorney's Office filed 184 methamphetamine-related cases in 2003. I am on a pace to file over 100 methamphetamine lab-related cases this year. If the sentence is reduced, I will be at a point where I cannot keep up with the manufacture of methamphetamine cases. The effect that the Supreme Court's decision in State v. McAdam has at this point will be to completely overload my office with manufacturing cases. I am asking this body to take immediate corrective action regarding this situation and remove the word "compound" from K.S.A. 65-4161.

I urge this body to refrain from making your decision on this important issue based on bed space. The safety of Kansas citizens and the ability to attack the methamphetamine problem must take precedence over funding issues. Methamphetamine labs hurt not only persons involved in manufacturing methamphetamine, but also children who are subjected to the methamphetamine manufacture process and innocent citizens who stay in hotel/motel rooms where methamphetamine has been produced leaving a hazardous waste sight. More and more studies show that children are being harmed by the residual effects of the manufacture of methamphetamine without the knowledge of their parents. A family should feel free to rent a motel room in Kansas without being concerned

whether or not it has been used to manufacture methamphetamine. The drivers of Kansas should feel free to travel the roads of Kansas without fear that they might be in an accident with a vehicle carrying a methamphetamine lab. We have had cases where cooks are driving down the road hanging jugs of anhydrous out the window as they drive trying to keep from inhaling the chemical, and I know of at least one head-on collision in Reno County that I believe was the direct result of manufacturing activity. Please remember how dangerous you believed these labs were when you enacted K.S.A. 65-4159 and made the penalty a severity level one drug felony. You must act promptly in dealing with this issue. I ask that any legislation that you pass be effective at the earliest date possible in order to give prosecutors the power to continue to protect the welfare of the citizens of their communities.

I thank you for the opportunity to come before you and to discuss with you my concerns regarding the recent developments involving these statutes. Thank you for your attention to this issue.

Respectfully submitted,



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(7)

Remarks of Christopher L. Schneider, Assistant Wyandotte County District Attorney, Concerning H.B. 2777

Before the Committee on Corrections and Juvenile Justice of the Kansas House of Representatives
February 17, 2004

Mr. Chairman and members of the committee:

I appear before the committee to request legislation to remedy the effects of the decision of the Supreme Court of Kansas in the case of *McAdam vs. State*, which the court handed down January 30, 2004. In that decision, the court ruled that the crime of Manufacture of a Controlled Substance, in violation of K.S.A. 65-4159, which is a Level I felony on the drug sentencing grid, could only be sentenced as a Level III felony on the drug sentencing grid. The rationale for the decision is that the definition of manufacture, as set forth in K.S.A. 65-4101(n), includes "compounding". K.S.A. 65-4161(a), which is a level III drug grid felony, also proscribes "compounding". The Supreme Court has thus held that a person convicted of manufacturing a controlled substance can only be sentenced as if they were convicted of the less serious crime.

H.B. 2777, as drafted, is only a partial solution to the problem of methamphetamine and other controlled substances "cooks" receiving inadequate sentences. The legislation would remove the word "compounding" from K.S.A. 65-4101(n). This alone does not solve the problem. The drafter of this legislation, along with many others who deal with this issue on a daily basis, know that "compounding" is a word that has a specialized meaning to pharmaceutical chemists. In that context, "compounding" is the mixing or blending of pharmaceuticals for use to treat patients. This explains why the definition of "manufacture" currently found in K.S.A. 65-4101(n) is identical to that contained in K.S.A. 65-1626(q), which is the article of chapter 65 of the Kansas statutes which addresses the Regulation of Pharmacists. Thus, removing the word "compounding" from K.S.A. 65-4101(n) would have the unintended consequence of criminalizing activity which is essential to the practice of a pharmacist and other practitioners as defined in other subsections of K.S.A. 65-4101 and K.S.A. 65-1626.

In addition, "compounding" is not defined anywhere in the statutes. If it were removed from the definition of manufacture, a criminal defendant could still argue that what he or she was doing was not manufacturing a controlled substance, but merely compounding it. Thus, a trial court would have to give a lesser included offense instruction for compounding under K.S.A. 65-4161, in every case where a criminal defendant were charged with manufacture of a controlled substance pursuant to K.S.A. 65-4159.

I have talked to other prosecutors from around the state, including Tom Stanton the Assistant Reno County Attorney, and Al Keil with the Southeast Kansas Drug Task Force. We believe that the predicament in which we find ourselves is most easily solved by striking the

word "compound" from K.S.A. 65-4161(a). This would make clear that manufacture of a controlled substance is indeed a level I felony on the drug sentencing grid, while taking away the argument that compounding is a lesser included offense of manufacture. Doing so would also protect pharmacists and other practitioners as the definition of manufacture excludes compounding by such persons.

For the reasons set forth above, I would respectfully suggest that H.B. 2777 be amended to read as follows:

> Section 1. K.S.A. 65-4161(a) is hereby amended to read as follows: 65-4161. (a) Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver, or distribute; prescribe; administer; deliver; distribute; *or* dispense ~~or compound~~ any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as provided in subsections (b), (c) and (d), any person who violates this subsection shall be guilty of a drug severity level 3 felony.

Kyle Smith

From: Ed Brancart [ebrancart@fordcounty.net]

Sent: Tuesday, February 17, 2004 11:10 AM

To: Senator Tim Huelskamp; Rep. Jan Scoggins-Waite; Rep. Melvin Neufeld; Rep. Dennis McKinney; Rep. Ward Loyd

Cc: Kyle Smith; Michael White; Dean Bush; John Ball

Subject: Methamphetamine and the McAdam decision

I know that a hearing is to be held today, or soon, with respect to removing the term "compounding" from a statute so that convictions for methamphetamine manufacturing will be punished at severity level 1 on the drug grid.

I had planned over this last weekend to compose text for presentation to the relevant committee, but this weekend was spent on call-outs to assist local law enforcement agencies. Attorneys in my office made application for 4 narcotic search warrants this weekend.

Near 10:00 p.m. Saturday a deputy patrolled through a COOP fertilizer distribution plant in rural Ford County. This is where anhydrous ammonia is stored in tanks. Anhydrous ammonia is a necessary ingredient in the clandestine manufacture of methamphetamine. This COOP station is in the middle of nowhere -- there is nothing but plowed fields surrounding it for at least a mile in all directions -- no trees, no farmsteads, nothing. The deputy found a man walking across the back side of the lot trying to get out in to the adjoining field.

The deputy notified other officers. He confronted the man in the field. As he kept walking the man furtively moved his hands into pockets on his jacket, and he did not simply stop and show his hands as requested. The deputy let the man know that he meant business, and the man laid on the ground, still trying to do something inside his jacket. The deputy approached the man and found a Tupperware container of white powder. The presumptive test on the powder showed it to be extracted ephedrine.

A state trooper arrived at the COOP, and began looking for evidence of what the man in the field had been doing. The trooper saw near the back of the lot, curiously sitting on the ground near an anhydrous tank, a coffee pot / carafe. Such implements are used as vessels to hold stolen anhydrous. The trooper began to search the area in the pitch darkness. To his surprise he aimed his flashlight on another man who was laying on the ground beneath a trailer about 10 feet from the coffee pot. The man was equipped with gloves, safety goggles, and several squares of aluminum foil.

Gloves and goggles are useful devices when draining anhydrous ammonia from tanks. Aluminum foil squares are fashioned into "boats" which are makeshift methamphetamine smoking devices.

Both men have been previously, within the past several months, investigated for manufacturing methamphetamine. Search warrants have been executed at each of their residences resulting in seizures of evidence. That evidence is now waiting its turn at the KBI laboratory. Both men have long histories of involvement with methamphetamine.

The theory drawn from these facts is that the men were stealing anhydrous ammonia in order to complete a manufacture of methamphetamine.

Similar fact patterns are developed in this area of the state with great regularity and frequency. Law enforcement officers are in danger - imagine the outcome had the men been armed and motivated to avoid apprehension more than they were. COOPs and farming operations are made victims of theft, again and again. Drug manufacturers repeat and repeat and repeat. Drug users forfeit ordinary, productive life in favor of satisfying their craving. Methamphetamine is a powerful drug.

I've been either a prosecutor or law enforcement officer in Kansas for over 20 years. I recall what happened when neighbor states acted first to impose severe sanctions for methamphetamine crimes -- offenders came to Kansas where they felt sanctuary. The legislature provided us a potent tool in statutes that made meth makers subject to long prison sentences.

Those of us in the business of picking up the pieces after drug crimes happen know that there are barely enough effective tools to use -- but strong prison penalties are among the tools that work.

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Attachment 8
2-17-04

I urge you to do all things necessary to restore the strong penalty provisions for methamphetamine manufacturers -- respond to the McAdam decision by fixing the problem. Establish for the courts that the legislature intends that manufacturing methamphetamine be punished at severity level 1 on the drug grid.

Ed Brancart
Ford County Attorney

(9)

STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

REPRESENTATIVE, SIXTY-FOURTH DISTRICT
CLAY, DICKINSON, GEARY,
AND RILEY COUNTIES

STATE CAPITOL
ROOM 303-N
TOPEKA 66614-1504
(785) 296-7637

COMMITTEE ASSIGNMENTS
CHAIR: EDUCATION
MEMBER: EDUCATION BUDGET

HB2649
Testimony

Thank you Chairman and committee members for allowing me to appear before you today in regards to HB 2649.

This legislation has certainly been a work in progress and will continue to be a work in progress with you, the committee, weighing into the mix.

HB2649 is a prevention tool to help families fight drug addiction. Too many times crimes are committed under the influence of an illegal controlled subject and law enforcement has no way of proving drugs have been involved.

HB 2649 limits testing to arrest for child abuse K.S.A. 21-3609, aggravated assault K.S.A. 21-3410, battery K.S.A. 21-3412 and I would like to add K.S.A. 21-3412 a which is domestic battery. In line 31 please strike K.S.A. 65-4160 and 4162. There was concern the language was too broad and would give law enforcement too much leeway in who they would test.

The U.S. military now can and does test for drug use among their personnel. The military have drug levels established which determine if charges are pursued and are detected with urine test. The KBI has levels set that their labs can detect which differ from the military. I do believe it would be a good idea to have levels set in statute to let our court system have guidelines on when to pursue charges.

There are attorneys as well as law enforcement officers here to testify today and I would request the more technical questions be asked of them.

Thank you for your time.

K A N S A S

WILLIAM R. SECK, SUPERINTENDENT

KANSAS HIGHWAY PATROL

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2649
to
House Corrections and Juvenile Justice Committee

Presented by
Lieutenant John Eichkorn
Kansas Highway Patrol

February 17, 2004

Good afternoon, Mr. Chairman and members of the committee. My name is Lieutenant John Eichkorn, and I appear before you on behalf of Colonel William Seck and the Kansas Highway Patrol to comment on HB 2649.

HB 2649 proposes to bar any person from using any controlled substances prohibited under K.S.A. 65-4160 or 65-4162. "Use" is defined as knowingly injecting, ingesting, inhaling, or otherwise introducing the substance into the human body. Under current law, it is illegal for a person to "possess or have under such person's control" controlled substances, but once a drug is inside a person's body, we enter a legal gray area.

This bill would allow an officer to request a drug test from an individual arrested for child abuse (K.S.A. 21-3609), aggravated assault (K.S.A. 21-3410), battery (K.S.A. 21-3412), or drug possession (K.S.A. 65-4160, 65-4162) if the officer had probable cause to believe the person used a controlled substance. The testing would comply with provisions of the state's DUI law (K.S.A. 8-1001).

In reviewing HB 2649, the Patrol would recommend a simple change to Section 2, line 30 that would remove the words "section 1". In the circular way it is stated, it could allow officers to stop virtually anyone and request a drug test. By removing "section 1," officers would be limited to requesting drug tests from those arrested for child abuse, aggravated assault, battery, or drug possession.

Once limited in this way, the Kansas Highway Patrol would support HB 2649 and would appreciate the role it would play in the war on drugs. The Patrol is committed to the war on drugs. We have an active Criminal Interdiction Program, specially trained police service dogs, certified Drug Recognition Experts, and award-winning troopers who are dedicated to removing drugs from the state's roadways. However, we know that we do not stop all contraband traveling through our state. Unfortunately, controlled substances do reach individuals who commit further crimes, sometimes violent crimes.

This bill would clarify the state's drug laws and help the nation fight the war on drugs. Once amended, it would also help the law enforcement community further protect the victims of child abuse,

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ıvated assault, and battery. Thank you for the opportunity to address you today, and on alf of the Patrol, I urge this committee to give HB 2649, with the proposed change, a favorable report. I will be happy to stand for any questions you might have.

###

ı Satterfield
County Attorney

Assistant County Attorneys
Morgan Metcalf
James Watts
Mary Ivester

Assistant County Attorneys
Juvenile Division
Darrin Devinney / Chief Assistant
Amber Norris

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11

Dear Committee members:

As Butler County Attorney, I support HB 2649 in its present form. In addition, I move to amend and add to HB 2649 to include modifications to K.S.A. 8-1567 expanding the drug DUI provisions to further define intoxication. This proposed legislation referred to as Tyler's law in memory of 11-year-old Tyler Oblerlechner who lost his life to an impaired driver. The proposed table corresponds to the alcohol definition of presumptive impairment currently established at .08.

Due to a recent unpublished Court of Appeals opinion, State v. Foiles, we are before you today. Drug impaired drivers are often difficult to detect and when detected prosecution is often more difficult. It would be beneficial to establish minimum standards in blood and urine which would either create presumptive impairment or a per se violation of the law. Four other states define intoxication to include blood and urine. Nevada in particular regulates in terms of quantitative levels.

I have provided you with a compilation put out by National Traffic Law Center, of each state's laws relating to driving under the influence. I have specifically provided you with the language contained in the Nevada statute. There are a couple of articles on marihuana or drug use and impairment along with several positive responses to this proposed legislation by other County Attorneys. Finally, I have furnished you with a copy of our proposed legislation that could certainly use some tweaking but substantively is in order. The table has been prepared and submitted by Dr. Tim Rohrig. Dr. Rohrig is the director of lab and toxicology at the Sedgwick County Forensic Science Center. As far as the numbers are concerned, he assures me that the blood levels are scientifically supported and that the urine levels should simply be legislatively prohibited as a matter of law without debate on acute impairment. However, he is quite comfortable with those numbers as well. Unfortunately, Dr. Rohrig was prepared to appear and testify on these matters last Tuesday but he is in Dallas today but would be more than willing to appear at any other requested time. Dr. Scanlan could not make it today either. Both gentlemen have provided their testimony in writing which is included in your packet. Thank you for your time.

Sincerely,

Jan Satterfield
Butler County Attorney

House Corr & JJ
Attachment 11
2-17-04

AMERICAN PROSECUTORS RESEARCH INSTITUTE

NATIONAL TRAFFIC LAW CENTER

DRIVING WHILE UNDER THE INFLUENCE OF DRUGS
STATE LAW SUMMARY

All 50 states, the District of Columbia, and the Virgin Islands make it illegal to drive under the influence of drug(s). Eight (8) states have per se laws (Arizona, Georgia, Illinois, Indiana, Iowa, Minnesota, Rhode Island and Utah) make it illegal to drive with any amount of certain illegal drug(s) in a person's system, regardless of whether or not the person is impaired by the drug(s). These states are shaded in gold. Nevada makes it illegal to drive if a person has minimum levels of certain illegal drugs in their system, regardless of whether or not the person is impaired by the drug(s). North Carolina and South Dakota makes it illegal for persons under 21 to drive with any amount of certain illegal drugs in their system. The specific language used by each state is outlined in this chart.

STATE	TIME LIMIT (IN HOURS)	SELECTED STATUTORY LANGUAGE RELATING TO DRUG IMPAIRED DRIVING
ALABAMA *Controlled Substance*		**Code of Ala. § 32-5A-191** (a) A person shall not drive or be in actual physical control of any vehicle while: (3) Under the influence of a **controlled substance** to a degree which renders him incapable of safely driving; (4) Under the combined influence of alcohol and a **controlled substance** to a degree which renders him incapable of safely driving; or (5) Under the influence of **any substance** which impairs the mental or physical faculties of such person to a degree which renders him incapable of safely driving. (d) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a **controlled substance** shall not constitute a defense against any charge of violating this section.
ALASKA *Controlled Substance*	4	**Alaska Stat. § 28.35.030** (a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft (1) while under the influence of intoxicating liquor, or any **controlled substance**; (3) while the person is under the combined influence of intoxicating liquor and a **controlled substance.**
ARIZONA **per se** *Prescription drugs exempt*	2	**A.R.S. § 28-1381** A. It is unlawful for any person to drive or be in actual physical control of any vehicle within this state under any of the following circumstances: 1. While under the influence of intoxicating liquor, **any drug**, a vapor releasing **substance containing a toxic substance** or any combination of liquor, **drugs** or **vapor releasing substances** if the person is impaired to the slightest degree. 3. While there is **any drug** defined in section 13-3401 or its metabolite in the person's body. A person using a **drug** prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section.

ARKANSAS *Controlled Substance*		**Ark. Stat. Ann. § 5-65-103** (a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle. **Ark. Stat. Ann. § 5-65-102** Definitions As used in this act, unless the context otherwise requires: (1) "Intoxicated" means influenced or affected by the ingestion of alcohol, **a controlled substance, any intoxicant, or any combination thereof**, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians; (2) "**Controlled substance**" means **a drug, substance, or immediate precursor in Schedules I through VI**. The fact that any person charged with a violation of this act is or has been entitled to use that **drug or controlled substance** under the laws of this state shall not constitute a defense against any charge of violating this act.
CALIFORNIA	3	**Cal Veh Code § 23152** (a) It is unlawful for any person who is under the influence of **any alcoholic beverage or drug**, or under the combined influence of any alcoholic beverage and **drug**, to drive a vehicle. (c) It is unlawful for any person who is **addicted to the use of any drug** to drive a vehicle. This subdivision shall not apply to a person who is participating in a methadone maintenance treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.
COLORADO *Controlled Substance* *Drug: includes medication intended for diagnosis and cure*	2	**C.R.S. § 42-4-1301** (1) (a) It is a misdemeanor for any person who is under the influence of alcohol **or one or more drugs**, or a combination of both alcohol and **one or more drugs**, to drive any vehicle in this state. (b) It is a misdemeanor for any person who is impaired by alcohol or by one or more **drugs**, or by a combination of alcohol and one or more **drugs**, to drive any vehicle in this state. (c) It is a misdemeanor for any person who is an **habitual user of any controlled substance** defined in section 12-22-303 (7), C.R.S., to drive any vehicle in this state. (d) For the purposes of this subsection (1), one or more **drugs** shall mean all substances defined as a drug in section 12-22-303 (13), C.R.S., and all **controlled substances** defined in section 12-22-303 (7), C.R.S., and **glue-sniffing, aerosol inhalation, and the inhalation of any other toxic vapor or vapors.** (e) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more **drugs** under the laws of this state shall not constitute a defense against any charge of violating this subsection (1). (f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more **drugs**, or a combination of alcohol and one or more **drugs**, which alcohol alone, or one or more **drugs** alone, or alcohol combined with one or more **drugs** affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle. (g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more **drugs**, or a combination of both alcohol and one or more **drugs**, which alcohol alone, or one or more **drugs** alone, or alcohol combined with one or more **drugs**, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

CONNECTICUT	2	**Conn. Gen. Stat. § 14-227a** (a) Operation while under the influence. No person shall operate a motor vehicle while under the influence of intoxicating liquor or **any drug** or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or **any drug** or both if he operates a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property (1) while under the influence of intoxicating liquor or any **drug** or both
DELAWARE *Controlled Substance*	4	**21 Del. C. § 4177** (a) No person shall drive a vehicle: (2) When the person is under the influence of **any drug** (3) When the person is under the influence of a combination of alcohol and **any drug**; (b) (1) The fact that any person charged with violating this section is, or has been, legally entitled to use alcohol or a **drug** shall not constitute a defense. (c) (5) "While under the influence" shall mean that the person is, because of alcohol or **drugs** or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle. (7) **"Drug"** shall include any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of **controlled substances** pursuant to Chapter 47 of Title 16. "Drug" shall also include any substance or preparation having the property of releasing vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.
DISTRICT OF COLUMBIA		**D.C. Code § 50-2201.05** (b) (1) No individual shall, when the individual's blood contains .08% or more, by weight, of alcohol (or when .38 micrograms or more of alcohol are contained in 1 milliliter of his breath, consisting of substantially alveolar air), or defendant's urine contains .10% or more, by weight, of alcohol, or under the influence of intoxicating liquor or **any drug** or any combination thereof, operate or be in physical control of any vehicle in the District... (d) The Mayor or his designated agent shall revoke the operator's permit or the privilege to drive a motor vehicle in the District of Columbia, or revoke both such permit and privilege, of any person who is convicted in the District of any of the following offenses: (1) Operating or being in control of a vehicle while the individual's blood contains .08% or more, by weight, of alcohol, or while .38 micrograms or more of alcohol are contained in 1 milliliter of the individual's breath, consisting substantially of alveolar air, or while the individual's urine contains .10% or more, by weight, of alcohol, or while under the influence of intoxicating liquor or any drug or any combination thereof.
FLORIDA *Controlled Substance*		**Fla. Stat. § 316.193** (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and: The person is under the influence of alcoholic beverages, **any chemical substance** set forth in s. 877.111, or **any substance controlled** under chapter 893, when affected to the extent that the person's normal faculties are impaired;

GEORGIA **per se** *Controlled Substance*	3	**O.C.G.A. § 40-6-391** (a) A person shall not drive or be in actual physical control of any moving vehicle while: (2) Under the influence of **any drug** to the extent that it is less safe for the person to drive; (3) Under the intentional influence of any **glue, aerosol, or other toxic vapor** to the extent that it is less safe for the person to drive; (4) Under the combined influence of any two or more of the substances specified in paragraphs (1) through (3) of this subsection to the extent that it is less safe for the person to drive; (6) Subject to the provisions of subsection (b) of this Code section, there is **any amount of marijuana or a controlled substance**, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood. (b) The fact that any person charged with violating this Code section is or has been legally entitled to use a **drug** shall not constitute a defense against any charge of violating this Code section; provided, however, that such person shall not be in violation of this Code section unless such person is rendered incapable of driving safely as a result of using a **drug** other than alcohol which such person is legally entitled to use.
HAWAII	3	**HRS § 291E-61 (2003) HRS § 291E-61 (2003)** (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle: (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty; (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
IDAHO		**Idaho Code § 18-8004** (1) (a) It is unlawful for any person who is under the influence of alcohol, **drugs** or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public. (b) It is unlawful for any person who is under the influence of alcohol, **drugs** or any other intoxicating substances, or who has an alcohol concentration of 0.04 or higher but less than 0.09, as defined in subsection (4) of this section, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a commercial motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public. (c) It is unlawful for any person who is under the influence of alcohol, **drugs** or any other intoxicating substances, or who has an alcohol concentration of .08 or higher, as defined in subsection (4) of this section, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a commercial motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public. (2) …Any person who does not take a test to determine alcohol concentration or whose test result is determined by the court to be unreliable or inadmissible against him, may be prosecuted for driving or being in actual physical control of a motor vehicle while under the influence of alcohol, **drugs**, or any other intoxicating substances, on other competent evidence. (3) If the results of the test requested by a police officer show a person's alcohol concentration of less than 0.08, as defined in subsection (4) of this section, such fact may be considered with other competent evidence of **drug use** other than alcohol in determining the guilt or innocence of the defendant.

ILLINOIS **per se** *Controlled Substance* *Intoxicating Compound*		**625 ILCS 5/11-501** (a) A person shall not drive or be in actual physical control of any vehicle within this State while: (3) under the influence of any **intoxicating compound** or combination of **intoxicating compounds** to a degree that renders the person incapable of driving safely; (4) under the influence of **any other drug** or combination of drugs to a degree that renders the person incapable of safely driving; (5) under the combined influence of alcohol and **any other drug** or drugs, or intoxicating compound or compounds to a degree that renders the person incapable of safely driving; or (6) there is any amount of a **drug, substance, or compound** in the person's breath, blood, or urine resulting from the unlawful use or consumption of **cannabis** listed in the Cannabis Control Act [720 ILCS 550/1 et seq.], or a **controlled substance** listed in the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], or **intoxicating compound** listed in the Use of Intoxicating Compounds Act. (b) The fact that any person charged with violating this Section is or has been legally entitled to use alcohol, other **drugs** or drugs, or intoxicating compound or compounds, or any combination thereof, shall not constitute a defense against any charge of violating this Section.
INDIANA **per se** *Controlled Substance*	3	**Burns Ind. Code Ann. § 9-30-5-1** (C) A person who operates a vehicle with a **controlled substance** listed in schedule I or II of IC 35-48-2 in the person's blood commits a Class C misdemeanor. (D) It is a defense to subsection (b) that the accused person consumed the controlled substance under a valid prescription or order of a practitioner (as defined in IC 35-48-1) who acted in the course of the practitioner's professional practice.
IOWA **per Se** *Controlled Substance*	2	**Iowa Code § 321J.2** 1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions: (a) While under the influence of an alcoholic beverage or **other drug** or a combination of such substances. (c) While **any amount of a controlled substance** is present in the person, as measured in the person's blood or urine. 7. (b) When charged with a violation of subsection 1, paragraph "c", a person may assert, as an affirmative defense, that the **controlled substance** present in the person's blood or urine was prescribed or dispensed for the person and was taken in accordance with the directions of a practitioner and the labeling directions of the pharmacy, as that person and place of business are defined in section 155a.3.
KANSAS	2	**K.S.A. § 8-1567** (a) No person shall operate or attempt to operate any vehicle within this state while: 4. under the influence of **any drug** or combination of **drugs** to a degree that renders the person incapable of safely driving a vehicle; or 5. under the influence of a combination of alcohol and any **drug or drugs** to a degree that renders the person incapable of safely driving a vehicle. (b) No person shall operate or attempt to operate any vehicle within this state if the person is a **habitual user** of any narcotic, hypnotic, somnifacient or stimulating drug. If a person is charged with a violation of this section involving **drugs**, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

KENTUCKY	2	**KRS Ann. § 189A.010** 1. A person shall not operate or be in physical control of a motor vehicle anywhere in this state: (c) While under the influence of **any other substance or combination of substances** which impairs one's driving ability; or (d) While under the combined influence of alcohol and **any other substance** which impairs one's driving ability.
LOUISIANA *Controlled Substance*		**La. R.S. 14:98** A. (1) The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when: (c) The operator is under the influence of any controlled dangerous substance listed in Schedule I, II, III, IV, or V as set forth in R.S. 40:964;or (d) The operator is under the influence of a combination of alcohol and one or more drugs which are not controlled dangerous substances and which are legally obtainable with or without a prescription and the label on the container of the prescription drug or the manufacturer's package of the drug contains a warning against combining the medication with alcohol. (e) The operator is under the influence of one or more drugs which are not controlled dangerous substances and which are legally obtainable with or without a prescription and the influence is caused by the operator knowingly consuming quantities of the drug or drugs which substantially exceed the dosage prescribed by the physician or the dosage recommended by the manufacturer of the drug.
MAINE		**29-A M.R.S. § 2411** A person commits OUI, which is a Class D crime unless otherwise provided, if that person operates a motor vehicle: 2. While under the influence of **intoxicants**; or 3. While having a blood- alcohol level of 0.08% or more. **29-A M.R.S. § 2401** 13. Under the influence of intoxicants- "Under the influence of intoxicants" means being under the influence of alcohol, **a drug other than alcohol,** a combination of **drugs** or a combination of alcohol and **drugs.**
MARYLAND *Controlled Dangerous Substance – not include prescription*	2	**Md. TRANSPORTATION Code Ann. § 21-902** (c) Driving while under influence of **drugs or drugs** and alcohol. – (1) A person may not drive or attempt to drive any vehicle while he is so far under the influence of **any drug**, any **combination** of **drugs**, or a combination of one or more **drugs** and alcohol that he cannot drive a vehicle safely. (2) It is not a defense to any charge of violating this subsection that the person charged is or was entitled under the laws of this State to use the **drug**, combination of **drugs**, or combination of one or more **drugs** and alcohol, unless the person was unaware that the **drug** or combination would make him incapable of safely driving a vehicle. (d) Driving while impaired by controlled dangerous substance. -- A person may not drive or attempt to drive any vehicle while the person is impaired by any controlled dangerous substance, as that term is defined in § 5-101 of the Criminal Law Article, if the person is not entitled to use the controlled dangerous substance under the laws of this State.
MASSACHUSETTS *Controlled Substance, Ch94C, sec. 1*		**Mass. Ann. Laws ch. 90, § 24** (a) (1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor, or of **marijuana, narcotic drugs, depressants or stimulant substances**, all as defined in section one of chapter ninety-four C, or the **vapors of glue** shall be punished…

MICHIGAN *Controlled Substance*		**MCL § 257.625** Sec. 625. (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies: (a) The person is under the influence of intoxicating liquor, **a controlled substance**, or a combination of intoxicating liquor and a **controlled substance.** (2) The owner of a vehicle or a person in charge or in control of a vehicle shall not authorize or knowingly permit the vehicle to be operated upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state by a person who is under the influence of intoxicating liquor, a **controlled substance**, or a combination of intoxicating liquor and a **controlled substance**... (3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of an intoxicating liquor, a **controlled substance**, or a combination of an intoxicating liquor and a **controlled substance**, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.
MINNESOTA **per se** *Controlled Substance*	2	**Minn. Stat. § 169A.20** Subdivision 1 Driving while impaired crime. It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state or on any boundary water of this state: (2) when the person is under the influence of a **controlled substance**; (3) when the person is knowingly under the influence of a **hazardous substance** that affects the nervous system, brain, or muscles of the person so as to substantially impair the person's ability to drive or operate the motor vehicle; or (4) when the person is under the influence of a combination of any two or more of the elements named in clauses (1), (2), and (3); (7) when the person's body contains any amount of a **controlled substance listed in schedule I or II other than marijuana or tetrahydrocannabinols.**
MISSISSIPPI *Controlled Substance*		**Miss. Code Ann. § 63-11-30** (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of **any other substance** which has impaired such person's ability to operate a motor vehicle; (d) is under the influence of **any drug or controlled substance**, the possession of which is unlawful under the Mississippi Controlled Substances Law;
MISSOURI		**§ 577.010 R.S.Mo.** 1. A person commits the crime of "driving while intoxicated" if he operates a motor vehicle while in an intoxicated or **drugged condition**.

<table>
<tr><td>MONTANA</td><td>"reasonable time after alleged act"</td><td>Mont. Code Anno., § 61-8-401
(1) It is unlawful and punishable as provided in 61-8-442, 61-8-714 and 61-8-731 through 61-8-734 for any person who is under the influence of:
(b) a dangerous drug to drive or be in actual physical control of a vehicle within this state;
(c) any other drug to drive or be in actual physical control of a vehicle within this state; or
(d) alcohol and any dangerous or other drug to drive or be in actual physical control of a vehicle within this state.
(2) The fact that any person charged with a violation of subsection (1) is or has been entitled to use alcohol or such a drug under the laws of this state does not constitute a defense against any charge of violating subsection (1).
(3) "Under the influence" means that as a result of taking into the body alcohol, drugs, or any combination thereof, a person's ability to safely operate a motor vehicle has been diminished.</td></tr>
<tr><td>NEBRASKA</td><td></td><td>R.R.S. Neb. § 60-6,196
(1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
(a) While under the influence of alcoholic liquor or of any drug;...</td></tr>
<tr><td>NEVADA

Controlled Substance</td><td>2</td><td>Nev. Rev. Stat. Ann. § 484.379
2. (a) It is unlawful for any person who: (a) Is under the influence of a controlled substance; (b) Is under the combined influence of intoxicating liquor and a controlled substance; or (c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle to drive or be in actual physical control of a vehicle, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.
3. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than:

<table>
<tr><th>Prohibited Substance</th><th>Urine
(Nanograms Per Milliliter)</th><th>Blood
(Nanograms Per Milliliter)</th></tr>
<tr><td>(a) Amphetamine</td><td>500</td><td>100</td></tr>
<tr><td>(b) Cocaine</td><td>150</td><td>50</td></tr>
<tr><td>(c) Cocaine Metabolite</td><td>150</td><td>50</td></tr>
<tr><td>(d) Heroine</td><td>2,000</td><td>50</td></tr>
<tr><td>(e) Heroine Metabolite:</td><td></td><td></td></tr>
<tr><td>(1) Morphine</td><td>2,000</td><td>50</td></tr>
<tr><td>(2) 6-monoacetyl Morphine</td><td>10</td><td>10</td></tr>
<tr><td>(f) Lysergic Acid Diethylamide</td><td>25</td><td>10</td></tr>
<tr><td>(g) Marijuana</td><td>10</td><td>2</td></tr>
<tr><td>(h) Marijuana Metabolite</td><td>15</td><td>5</td></tr>
<tr><td>(i) Methamphetamine</td><td>500</td><td>100</td></tr>
<tr><td>(j) Phencycladine</td><td>25</td><td>10</td></tr>
</table>
</td></tr>
<tr><td>NEW HAMPSHIRE
Controlled Drug</td><td></td><td>R.S.A. 265:82
No person shall drive or attempt to drive a vehicle upon any way:
While such person is under the influence of intoxicating liquor or any controlled drug or any combination of intoxicating liquor and controlled drugs;</td></tr>
</table>

NEW JERSEY		**N. J. Stat. § 39:4-50** (a) Except as provided in subsection (g) of this section, a person who operates a motor vehicle while under the influence of intoxicating liquor, **narcotic, hallucinogenic or habit-producing drug**, ...or permits another person who is under the influence of intoxicating liquor, **narcotic, hallucinogenic or habit-producing drug** to operate a motor vehicle owned by him or in his custody or control ...shall be subject...
NEW MEXICO		**N. M. Stat. Ann. § 66-8-102** B. It is unlawful for any person who is under the influence of **any drug** to a degree that renders him incapable of safely driving a vehicle to drive any vehicle within this state. D. Aggravated driving while under the influence of intoxicating liquor or **drugs** consists of a person who: (2) has caused bodily injury to a human being as a result of the unlawful operation of a motor vehicle while driving under the influence of intoxicating liquor or **drugs**; or (3) refused to submit to chemical testing, as provided for in the Implied Consent Act [66-8-105 to 66-8-112 NMSA 1978], and in the judgment of the court, based upon evidence of intoxication presented to the court, the person was under the influence of intoxicating liquor or **drugs**.
NEW YORK	2 (alcohol & drugs) § 1194[2(1)]	**NY CLS Veh & Tr § 1192** 4. Driving while ability impaired by **drugs**. No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of **a drug as defined in this chapter**.
NORTH CAROLINA *Impairing or Controlled substance*		**N.C. Gen. Stat. § 20-138.1** (a) Offense. -- A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of **an impairing substance**; or ... (b) Defense Precluded. -- The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a **drug** is not a defense to a charge under this section. **per se (for persons under 21)** **N.C Gen Stat. § 20-138.3** (a) Offense – It is unlawful for a person less than 21 years old to drive a motor vehicle...at any time while he has remaining in his body any alcohol or **controlled substance** previously consumed, but a person less than 21 years old does not violate this section if he drives with a **controlled substance** in his body which was lawfully obtained and taken in therapeutically appropriate amounts.

NORTH DAKOTA	2	**N.D. Cent. Code, § 39-08-01** 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply: (c) That person is under the influence of **any drug or substance** or combination of drugs or substances to a degree which renders that person incapable of safely driving. (d) That person is under the combined influence of alcohol and **any other drugs or substances** to a degree which renders that person incapable of safely driving. The fact that any person charged with violating this section is or has been legally entitled to use alcohol or other **drugs** or substances is not a defense against any charge for violating this section, unless a **drug** which predominately caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the **drug** to that person.
OHIO	2	**ORC Ann. 4511.19** (A) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if any of the following apply: (1) The person is under the influence of alcohol, a **drug of abuse**, or alcohol and a **drug of abuse**;
OKLAHOMA *Controlled Dangerous Substance*	2	**47 Okl. St. § 11-902** A. It is unlawful and punishable as provided in this section for any person to drive, operate, or be in actual physical control of a motor vehicle within this state who: 3. Is under the influence of **any intoxicating substance** other than alcohol which may render such person incapable of safely driving or operating a motor vehicle; or 4. Is under the combined influence of alcohol and any **other intoxicating substance** which may render such person incapable of safely driving or operating a motor vehicle. B. The fact that any person charged with a violation of this section is or has been lawfully entitled to use alcohol or a **controlled dangerous substance** or any other intoxicating substance shall not constitute a defense against any charge of violating this section. **47 Okl. St. §1-140.1** As used in this title, the term **"other intoxicating substance"** shall mean any **controlled dangerous substance** as defined in the Uniform Controlled Dangerous Substances Act, Section 2-101 et seq. of Title 63 of the Oklahoma Statutes, and any other substance, other than alcohol, which is capable of being ingested, inhaled, injected, or absorbed into the human body and is capable of adversely affecting the central nervous system, vision, hearing or other sensory or motor functions.
OREGON *Controlled Substance*		**ORS § 813.010** (1) A person commits the offense of driving while under the influence of **intoxicants** if the person drives a vehicle while the person: (b) Is under the influence of intoxicating liquor, a **controlled substance, or an inhalant**; or (c) Is under the influence of intoxicating liquor, an **inhalant** and a **controlled substance**.
PENNSYLVANIA *Controlled Substance*	3	**75 Pa.Code § 3731** (A) OFFENSE DEFINED.-- A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances: (2) While under the influence of any **controlled substance**, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, to a degree which renders the person incapable of safe driving. (3) While under the combined influence of alcohol and **any controlled substance** to a degree which renders the person incapable of safe driving.

RHODE ISLAND **Per se** *Controlled Substance*		**R.I. Gen. Laws § 31-27-2** (a) Whoever drives or otherwise operates any vehicle in the state while under the influence of **any intoxicating liquor, drugs, toluene, or any controlled substance as defined in chapter 28 of title 21**, or any combination of these, shall be guilty of a misdemeanor as set forth in subdivision (b)(3) of this section and shall be punished as provided in subsection (d) of this section. (b) (1) ...The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a **drug** shall not constitute a defense against any charge of violating this section. (2) Whoever drives or otherwise operates any vehicle in the state with a blood presence of any **scheduled controlled substance** as defined within chapter 28 of title 21, as shown by analysis of a blood or urine sample, shall be guilty of a misdemeanor and shall be punished as provided in subsection (d) of this section.
SOUTH CAROLINA	2 (§56-6-2950)	**S.C. Code Ann. § 56-5-2930** It is unlawful for a person to drive a motor vehicle within this State while under the: (1) influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired; (2) influence of **any other drug** or a combination of other **drugs** or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or (3) under the combined influence of alcohol and any other **drug or drugs**, or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.
SOUTH DAKOTA *Controlled Substance*		**S.D. Codified Laws § 32-23-1** A person may not drive or be in actual physical control of any vehicle while: (3) Under the influence of **marijuana or any controlled drug or substance to a degree which renders him incapable of safely driving**; or (4) Under the combined influence of an alcoholic beverage and **marijuana or any controlled drug** or substance to a degree which renders him incapable of safely driving. **per se (for persons under 21)** **S.D. Codified Laws § 32-23-21** It is a Class 2 misdemeanor for any person under the age of twenty-one years to drive, operate, or be in actual physical control of any motor vehicle: (1) If there is physical evidence of 0.02 percent or more by weight of alcohol in the person's blood as shown by chemical analysis of the person's breath, blood, or other bodily substance; or (2) After having consumed marijuana or any controlled drug or substance for as long as physical evidence of the consumption remains present in the person's body.

TENNESSEE		**Tenn. Code Ann. § 55-10-401** (a) It is unlawful for any person or persons to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state of Tennessee, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while: (1) Under the influence of **any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system**; ... (b) For the purpose of this section, "**drug producing stimulating effects on the central nervous system**" includes the **salts of barbituric acid**, also known as **malonyl urea**, or any compound, derivatives, or mixtures thereof that may be used for producing hypnotic or somnifacient effects, and includes **amphetamine, desoxyephedrine** or compounds or mixtures thereof, including all derivatives of **phenolethylamine** or any of the salts thereof, except preparations intended for use in the nose and unfit for internal use.
TEXAS *Controlled Substance*	2	**Tex. Penal Code § 49.01** In this chapter: (2) "Intoxicated" means: (a) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; ... **Tex. Penal Code § 49.04** (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place. **Tex. Penal Code § 49.10** In a prosecution under Section ...49.04...the fact that the defendant is or has been entitled to use the alcohol, controlled substance, drug, dangerous drug, or other substance is not a defense.
UTAH **Per Se** *Controlled Substance*		**Utah Code Ann. § 41-6-44** (2) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person: (ii) is under the influence of alcohol, **any drug**, or the combined influence of alcohol and any **drug** to a degree that renders the person incapable of safely operating a vehicle. (b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a **drug** is not a defense against any charge of violating this section. **Utah Code Ann. § 41-6-44.6** Definitions--Driving with any measurable controlled substance in the body (1) As used in this section: (a) **" Controlled substance" means any substance** scheduled under Section 58-37-4. (2) In cases not amounting to a violation of Section 41-6-44, a person may not operate or be in actual physical control of a motor vehicle within this state if the person has **any measurable controlled substance or metabolite of a controlled substance** in the person's body. (3) It is an affirmative defense to prosecution under this section that **the controlled substance** was involuntarily ingested by the accused or prescribed by a practitioner for use by the accused.

VERMONT	2	**23 V.S.A. § 1201** (a) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway: (3) when the person is under the influence of any other **drug** or under the combined influence of alcohol and any other **drug** to a degree which renders the person incapable of driving safely. (d) The fact that a person charged with a violation of this section is or has been entitled to use a **drug** under the laws of this state shall not constitute a defense against any charge of violating this section.
VIRGIN ISLANDS *Controlled Substance*	2	**20 V.I.C. § 493** (a) (1) It is unlawful for any person who is under the influence of an intoxicating liquor or a **controlled substance** included in Schedule I, II, III, IV, or V of section 595, chapter 29, Title 19, Virgin Islands Code, or under the combined influence of an intoxicating liquor and such a **controlled substance**, to drive, operate, or be in actual physical control of, any motor vehicle within the Territory.
VIRGINIA	3	**Va. Code Ann. § 18.2-266** It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (iii) while such person is under the influence of **any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature**, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (iv) while such person is under the combined influence of alcohol and any **drug or drugs** to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely.
WASHINGTON	2	**Rev. Code Wash. (ARCW) § 46.61.502** (1) A person is guilty of driving while under the influence of intoxicating liquor or **any drug** if the person drives a vehicle within this state: (b) While the person is under the influence of or affected by intoxicating liquor or **any drug**; or (c) While the person is under the combined influence of or affected by intoxicating liquor and any **drug**. (2) The fact that a person charged with a violation of this section is or has been entitled to use a **drug** under the laws of this state shall not constitute a defense against a charge of violating this section.
WEST VIRGINIA *Controlled Substance*	2	**W. Va. Code § 17C-5-2** (d) Any person who: (1) Drives a vehicle in this state while: (B) He is under the influence of **any controlled substance**, (C) He is under the influence of **any other drug**, or (D) He is under the combined influence of alcohol and any **controlled substance or any other drug**,... (2) Is guilt of a misdemeanor... (e) Any person who, being an **habitual user of narcotic drugs or amphetamine or any derivative thereof**, drives a vehicle in this state, is guilty of a misdemeanor... (g) Any person who: Knowingly permits his or her vehicle to be driven in this state by any other person who is an **habitual user of narcotic drugs** or **amphetamine** or any derivative thereof, is guilty of a misdemeanor...

WISCONSIN *Controlled Substance*	4	**Wis. Stat. § 346.63** (1) No person may drive or operate a motor vehicle while: (a) Under the influence of **an intoxicant, a controlled substance, a controlled substance analog** or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of **any other drug** to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other **drug** to a degree which renders him or her incapable of safely driving; or (2) (a) It is unlawful for any person to cause injury to another person by the operation of a vehicle while: 1. Under the influence of an intoxicant, a **controlled substance, or a controlled substance analog** or any combination of an intoxicant, a **controlled substance** and a **controlled substance** analog, under the influence of any other **drug** to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other **drug** to a degree which renders him or her incapable of safely driving; or … (b) In an action under this subsection, the defendant has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant, a **controlled substance**, a **controlled substance analog** or a combination thereof, under the influence of any other **drug** to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other **drug** to a degree which renders him or her incapable of safely driving or did not have a blood alcohol concentration described under par. (a) 2.
WYOMING *Controlled Substance*	3	**Wyo. Stat. § 31-5-233** Driving or having control of vehicle while under influence of intoxicating liquor or **controlled substances**; penalties (a) As used in this section: (ii) "**Controlled substance**" includes: (A) **Any drug or substance** defined by W.S. 35-7-1002(a)(iv); (B) **Any glue, aerosol or other toxic vapor** which when intentionally inhaled or sniffed results in impairment of an individual's ability to drive safely. (b) No person shall drive or have actual physical control of any vehicle within this state if the person: (i) has an alcoholic concentration of ten one-hundredths of one percent (0.10%) or more; or (ii) to a degree which renders him incapable of safely driving; (A) is under the influence of alcohol; (B) is under the influence of a **controlled substance**; or (C) is under the influence of a **combination of any of the elements** named in subparagraph (A) and (B) of this paragraph.

Last Update: 3/24/03. *For future updates, please contact the National Traffic Law Center, 99 Canal Center Plaza, Suite 510, Alexandria, Virginia, 22314, Phone:(703) 549-4253, Fax: 703-836-3195.*

NOT DESIGNATED FOR PUBLICATION

No. 88,423

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JIMMIE R. FOILES,
Appellant.

MEMORANDUM OPINION

Appeal from Butler District Court; JOHN E. SANDERS, judge. Opinion filed August 8, 2003. Affirmed in part, reversed in part, and remanded with directions.

Cory D. Riddle, assistant appellate defender, for appellant.

Morgan Metcalf, assistant county attorney, and *Phill Kline,* attorney general, for appellee.

Before MARQUARDT, P.J., PIERRON and JOHNSON, JJ.

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Per Curiam: Jimmie R. Foiles appeals his convictions for two counts of reckless involuntary manslaughter, three counts of aggravated battery, one count of driving while under the influence of drugs, and one count of failure to stop at a stop sign. We affirm in part, reverse in part, and remand with directions.

The intersection of Butler Road and Northwest 30th in Wichita is controlled by stop signs for east and west bound traffic on Butler Road. There are "Stop Ahead" signs on Butler Road approximately 1,000 feet before the actual stop sign. The intersection is unobstructed with open fields on all four corners.

In August 2000, Douglas Hague was traveling on Northwest 30th when he saw that a truck and a car had been involved in an accident. Hague called 911 and then saw Foiles, the driver of the truck, standing on the road acting "like he was in a stupor." In addition to the driver of the car, there were three small children in the back seat and one small child was in the front passenger seat. The driver was not breathing. Hague described all of the children as being "in bad shape." Corporal Mike Tanner, a law enforcement officer, discovered that Tyler Oberlechner, one of the children, and Jerry Hill, the driver, were deceased.

Foiles said that he had been involved in the accident but could not remember what

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happened. Deputy William Baker testified that Foiles' demeanor was appropriate for someone who had been involved in an accident. Deputy Baker did not believe that Foiles was under the influence of alcohol or drugs.

Detective Kelly Herzet contacted Foiles after he was treated at the hospital. Foiles told Detective Herzet that he thought the sun had been in his eyes. Foiles said that he slept approximately 6 hours the night before the accident and had been intoxicated on the previous night. Without further questioning, Foiles also admitted that he had smoked marijuana approximately 2 or 3 days prior to the accident.

Dr. Mark Mosley noted that Foiles was awake and alert in the emergency room. However, Dr. Mosley thought Foiles was "flat" and "lackadaisical." Foiles' urine contained 730 nanograms per milliliter of metabolites from marijuana; the metabolites are inactive ingredients that do not make an individual "high." The only way to estimate the last time an individual used marijuana is to test his or her blood for THC which is the active ingredient. There is nothing in the record on appeal to indicate that Foiles' blood was tested for THC.

Foiles was arrested and charged with two counts of reckless involuntary manslaughter, three counts of aggravated battery, and one count of failure to stop at a stop sign. The complaint was later amended to add one count of driving while under the influence of drugs.

Foiles was convicted as charged by a jury. He was sentenced to a controlling term of 72 months' imprisonment. Foiles timely appeals.

Dr. Scanlan's Testimony

Prior to trial, the State filed a motion to designate Dr. Timothy Scanlan as an expert witness on the question of whether Foiles was under the influence of marijuana at the time of the accident. Foiles immediately filed a motion in limine to exclude, *inter alia*, Dr. Scanlan's testimony, arguing that there is no accepted scientific basis for Dr. Scanlan's testimony. Foiles cited *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) to support his argument. After hearing oral arguments, the trial court allowed Dr. Scanlan to testify.

At trial, Dr. Scanlan was certified as an expert over Foiles' objection. Dr. Scanlan testified that Foiles' drug screen of 730 nanograms meant he was a chronic or heavy marijuana user. Dr. Scanlan testified that even if an individual ceases marijuana use, there are residual effects that affect visual and spacial awareness, cognitive function, memory, and eye-hand coordination. Dr. Scanlan stated that the impairment caused by chronic marijuana use would render Foiles incapable of safely operating a motor vehicle.

On appeal, Foiles argues that Dr. Scanlan's testimony violates the rule of law established in *Frye*. Foiles contends that before an expert scientific opinion may be received

into evidence, the basis of the opinion must be generally accepted as reliable within the expert's scientific field. Foiles maintains that Dr. Scanlan's theory is not generally accepted in the scientific community.

Generally, the admission of expert testimony lies within the sound discretion of the trial court. *Olathe Mfg., Inc. v. Browning Mfg.*, 259 Kan. 735, 762, 915 P.2d 86 (1996). However, the issue of whether the trial court correctly applied the *Frye* standard in determining the admissibility of expert testimony is a question of law. *Kuhn v. Sandoz Pharmaceuticals Corp.*, 270 Kan. 443, 456, 14 P.3d 1170 (2000).

The State contends that Dr. Scanlan's testimony was not subject to the *Frye* test because it was "pure opinion" testimony and pursuant to *Kuhn,* the trial court was not required to conduct a *Frye* analysis. The *Kuhn* court reasoned that the *Frye* test is concerned with whether the expert's opinion is based on a technique that has earned general acceptance in the expert's scientific field as reliable. Expert testimony based on the results of an experimental technique should not be admitted into evidence. 270 Kan. at 457.

In *State v. Witte*, 251 Kan. 313, Syl. ¶ 3, 836 P.2d 1110 (1992), the Kansas Supreme Court held: "The *Frye* test requires that, before expert scientific opinion may be received in evidence, the basis of that opinion must be shown to be generally accepted as reliable within

the expert's particular scientific field. If a new scientific technique's validity generally has not been accepted as reliable or is only regarded as an experimental technique, then expert testimony based on its results should not be admitted into evidence." Here, the trial court should have used the *Frye* analysis before Dr. Scanlan was allowed to testify.

At trial, Foiles' expert testified that all of the articles referenced by Dr. Scanlan were inconclusive and that additional research was necessary on the issue. In fact, the expert testified that the evidence was insufficient to support the idea of residual effect of marijuana on the human body, and there have been no studies of chronic marijuana users and the residual effects relative to driving performance.

Dr. Scanlan said that his opinion was based on his own experience and "what the scientific evidence literature about marijuana impairment, that would make one unsafe to operate a motor vehicle." When Dr. Scanlan was asked, "Based on the level of nanograms in a UA [urinalysis], is the metabolite found in marijuana, based solely on the level and you cannot determine whether somebody is impaired?" He responded, "That's correct." Notwithstanding this response, later he was asked, "[Y]our basic opinion is if somebody at 730 nanograms would be impaired?" He responded. "That's correct." Dr. Scanlan testified that he knew of no studies concerning chronic use of marijuana and how it affects an individual driving an automobile. When asked, "And you would agree that the current limit

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on quantitative tests of urine is that you cannot determine impairment from that test?" Dr. Scanlan responded, "As I have stated the test itself and number itself, does not have a correlation of impairment, like we do with blood alcohol tests that have been clearly demarked in terms of what course - - as to the various blood levels."

Dr. Scanlan's testimony was allowed based on the fact that he was an expert on the question of whether Foiles was under the influence of marijuana at the time of the accident. Dr. Scanlan had no studies or personal observations on how various levels of inactive metabolites from marijuana affect a person's driving, and more particularly, the effect that 730 nanograms had on Foiles' driving. Dr. Scanlan's opinion was mere speculation. The trial court erred by admitting Dr. Scanlan's testimony as expert testimony.

Meaning of Reckless

Foiles claims that the State failed to prove he was driving recklessly at the time of the accident. Foiles does not believe that impairment from the residual effect of marijuana could constitute recklessness. Foiles points out that Dr. Scanlan's theories were not supported by scientific evidence; thus, there is no evidence that Foiles knew he was impaired due to prior marijuana use.

When the sufficiency of the evidence is attacked, the standard of review is whether,

after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Zabrinas*, 271 Kan. 422, 441-42, 24 P.3d 77 (2001).

Foiles was charged with two counts of involuntary manslaughter pursuant to K.S.A. 2002 Supp. 21-3404(a). K.S.A. 2002 Supp. 21-3404(a) defines involuntary manslaughter as the reckless unintentional killing of a human being.

Foiles was also charged with three counts of aggravated battery pursuant to K.S.A. 21-3414(a)(2)(A). That statute defines aggravated battery as recklessly causing great bodily harm to another person or disfigurement of another person.

K.S.A. 21-3201(c) defines "reckless conduct" as:

> "[C]onduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms 'gross negligence,' 'culpable negligence,' 'wanton negligence' and 'wantonness' are included within the term 'recklessness' as used in this code."

In *State v. Jenkins*, 272 Kan. 1366, 39 P.3d 47 (2002), the defendant was convicted of two counts of involuntary manslaughter. The State's theory was that Jenkins recklessly

drove, knowing his propensity for epileptic seizures. The Kansas Supreme Court affirmed Jenkins' convictions. During the trial, the State provided evidence of Jenkins' involvement in seven car accidents caused by seizures. Moreover, the court noted that Jenkins' prior accidents provided sufficient evidence of Jenkins' knowledge of the imminent danger he created for other drivers. 272 Kan. at 1375.

In *State v. Spicer*, 30 Kan. App. 2d 317, 42 P.3d 742 (2002), this court noted that the reckless requirement of the charged offense does not require any specific state of mind. Rather, K.S.A. 21-3201 merely requires that a person take an unjustifiable risk which results in a harmful touching of another person. 30 Kan. App. 2d at 324.

The Kansas appellate courts have consistently held that to prove reckless behavior, the State must provide additional evidence beyond evidence indicating that the defendant was driving while under the influence of alcohol or drugs. See *State v. Huser*, 265 Kan. 228, 234, 959 P.2d 908 (1998). In *Huser*, the court suggested that such evidence might include incidents of weaving, speeding, or a failure to stop quickly after the accident occurred. 265 Kan. at 234-35.

In *State v. Robinson*, 267 Kan. 734, 987 P.2d 1052 (1999), the defendant ran a stop sign and collided with another car, causing serious injuries. Robinson's blood alcohol level

was measured at .21. On appeal, the State argued that Robinson's blood alcohol level, combined with the fact that Robinson ran a stop sign at a clearly marked intersection, was sufficient to show probable cause of recklessness. The court noted that driving drunk cannot stand alone as reckless behavior. However, the court believed that driving while impaired may be considered as evidence of recklessness along with other factors. 267 Kan. at 739.

Under the specific facts of *Robinson*, the court found adequate evidence of recklessness. The court considered that Robinson's alcohol consumption continued from early evening into the night; he specifically asked to drive, even though he had been drinking the entire evening; his blood alcohol level was more than twice the legal limit; and he ran a stop sign at a major intersection. 267 Kan. at 739. See *State v. Lafoe*, 24 Kan. App. 2d 662, 666-67, 953 P.2d 681, *rev. denied* 263 Kan. 889 (1997).

Here, law enforcement officials testified that Foiles was driving between 43 and 49 miles per hour at the time of the crash. The speed limit was 55 miles per hour. Deputy Baker, the first person to make contact with Foiles, testified that Foiles "appeared normal" and did not detect an odor of marijuana.

Foiles told Detective Herzet that he did not feel like he was impaired at the time of the accident. Detective Herzet did not detect an odor of marijuana. Detective Herzet testified

that in his experience, he knew when to suspect that a driver was impaired. In this case, Detective Herzet did not see any behavior that made him think Foiles was impaired.

An accident investigator noted that there were skid marks of approximately 15 feet before the stop sign. The skid marks evolved into slide marks, leaving a total marked area of 41 feet. According to the investigator, Foiles would have been able to see the oncoming car for approximately 8.7 seconds before the impact.

The State's theory was that Foiles was impaired at the time of the accident. We agree with the State that Foiles would have been reckless had he smoked marijuana, driven, and then run the stop sign. See *Robinson*, 267 Kan. at 739. However, that is not what happened in this case.

All of the State's evidence concerning Foiles' impairment came from Dr. Scanlan who testified that Foiles was incapable of safely operating a motor vehicle due to his chronic marijuana use. However, even the State would have to concede that Dr. Scanlan's theory is not widely accepted.

In order to be reckless, Foiles would have had to display conduct that would evince disregard of or indifference to the consequences, under circumstances involving danger to

life or safety of others, although no harm was intended. See *State v. Pope*, 23 Kan. App. 2d 69, 77, 927 P.2d 503 (1996), *rev. denied* 261 Kan. 1088 (1997).

Although Foiles did not testify, all who came in contact with him testified that there was no reason to believe he was impaired. The State's theory that Foiles was under the influence of marijuana at the time of the accident could be termed as reckless only if Foiles knew that he was under the influence. Instead, all that can be seen from the record on appeal is that Foiles ran a stop sign.

Driving While Under the Influence

Foiles claims that there was insufficient evidence for the jury to have found him guilty of driving while under the influence of drugs based on the inert metabolites found in his urine.

K.S.A. 2002 Supp. 8-1567(a) holds:

> "No person shall operate or attempt to operate any vehicle within this state while:
>
> . . . .
>
> "(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle."

We have long held that driving while under the influence of alcohol or drugs is an absolute liability offense. An absolute liability offense, unlike most other crimes, does not require any criminal intent. The only proof required to convict an individual of an absolute liability offense is that the individual engaged in the prohibited conduct. *State v. Creamer*, 26 Kan. App. 2d 914, 917, 996 P.2d 339 (2000).

In order to obtain a conviction for driving while under the influence of drugs, the State was required to prove that Foiles was incapable of safely driving a vehicle. There was no requirement that the State must prove any intent. Dr. Scanlan testified that Foiles was incapable of safely driving a vehicle. Given the fact that Dr. Scanlan's testimony should not have been admitted, Foiles' convictions are reversed and this case is remanded to the trial court for a new trial.

Photographs as Evidence

Foiles argues that he was denied his constitutional right to a fair trial when the trial court admitted photographs of the bodies of Jerry Hill and Tyler Oberlechner taken at the accident scene. Foiles claims that the photographs were highly prejudicial and without probative value.

The photographs have not been included with the record on appeal. An appellant has

the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. In the absence of such a record, an appellate court presumes that the action of the trial court was proper. *State v. Moncla*, 262 Kan. 58, 68, 936 P.2d 727 (1997). The trial court did not err in admitting the photographs.

The trial court's admittance of the photographs is affirmed; Foiles' convictions are reversed and the case is remanded for a new trial.

Drug Blood

8-1567. Driving under influence of alcohol or drugs; blood alcohol concentration; penalties.
**Update Notice: This section has been amended by SENATE BILL No. 33 of 2003

(a) No person shall operate or attempt to operate any vehicle within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence, as defined in paragraph (1) of subsection (f) of K.S.A. 8-1013, and amendments thereto, is .08 or more;
(2) the alcohol concentration in the person's blood or breath, as measured within two hours of the time of operating or attempting to operate a vehicle, is .08 or more;
(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;
(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or
(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle.
(6) a person is presumed to be under the influence of drugs if the following blood concentration is at or above these levels:

Drug*	Blood concentration [ng/ml]
Amphetamine	100
Methamphetamine	100
MDMA (methylenedioxymethamphetamine)	100
Cocaine	50
Benzoylecgonine (Cocaine metabolite)	n/a
Morphine	150
Codeine	150
6-actylmorphine (Heroin metabolite)	10
Lysergic acid diethylamide (LSD)	10
THC (active ingredient MJ)	1 whole blood or 2 serum/plasma
Carboxy-THC (MJ metabolite)	n/a
Phencyclidine (PCP)	10

*language to address the isomer issue eg to include all isomers
** cut-off concentration -so only requirement is to est concentration greater than or equal to

(7) It is per se illegal to operate a motor vehicle with urine concentrate at or above these levels:

Drug*	Urine Concentration** ng/ml]
Amphetamine	500
Methamphetamine	500
MDMA (methylenedioxymethamphetamine)	500
Cocaine	150
Benzoylecgonine (Cocaine metabolite)	150
Morphine	5,000
Codeine	5,000
6-actylmorphine (Heroin metabolite)	10
Lysergic acid diethylamide (LSD)	25
THC (active ingredient MJ)	10
Carboxy-THC (MJ metabolite)	500
Phencyclidine (PCP)	25

(8) under the influence of any drugs below the above stated levels if other competent evidence exists to establish impairment.
(b) No person shall operate or attempt to operate any vehicle within this state if the person is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug.

(c) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(d) Upon a first conviction of a violation of this section, a person shall be guilty of a class B, nonperson misdemeanor and sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service, and fined not less than $500 nor more than $1,000. The person convicted must serve at least 48 consecutive hours' imprisonment or 100 hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole. In addition, the court shall enter an order which requires that the person enroll in and successfully complete an alcohol and drug safety action education program or treatment program as provided in K.S.A. 8-1008, and amendments thereto, or both the education and treatment programs. (e) On a second conviction of a violation of this section, a person shall be guilty of a class A, nonperson misdemeanor and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,000 nor more than $1,500. The person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The court may place the person convicted under a house arrest program pursuant to K.S.A. 21-4603b, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the person shall be required to enter into and complete a treatment program for alcohol and drug abuse as provided in K.S.A. 8-1008, and amendments thereto.

(f) On the third conviction of a violation of this section, a person shall be guilty of a nonperson felony and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,500 nor more than $2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The court may also require as a condition of parole that such person enter into and complete a treatment program for alcohol and drug abuse as provided by K.S.A. 8-1008, and amendments thereto. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The court may place the person convicted under a house arrest program pursuant to K.S.A. 21-4603b, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment.

(g) On the fourth or subsequent conviction of a violation of this section, a person shall be guilty of a nonperson felony and sentenced to not less than 90 days nor more than one year's imprisonment and fined $2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 72 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. At the time of the filing of the judgment form or journal entry as required by K.S.A. 21-4620 or 22-3426, and amendments thereto, the court shall cause a certified copy to be sent to the officer having the offender in charge. The law enforcement agency maintaining custody and control of a defendant for imprisonment shall cause a certified copy of the judgment form or journal entry to be sent to the secretary of corrections within three business days of receipt of the judgment form or journal entry from the court and notify the secretary of corrections when the term of imprisonment expires and upon expiration of the term of imprisonment shall deliver the defendant to a location designated by the secretary. After the term of imprisonment imposed by the court, the person shall be placed in the custody of the secretary of corrections for a mandatory one-year period of postrelease supervision, which such period of postrelease supervision shall not be reduced. During such postrelease supervision, the person shall be required to participate in an inpatient or outpatient program for alcohol and drug abuse, including, but not limited to, an approved aftercare plan or mental health counseling, as determined by the secretary and satisfy conditions imposed by the Kansas parole board as provided by K.S.A. 22-3717, and amendments thereto. Any violation of the conditions of such postrelease supervision may subject such person to revocation of postrelease supervision pursuant to K.S.A. 75-5217 *et seq.*, and amendments thereto and as otherwise provided by law.

(h) Any person convicted of violating this section or an ordinance which prohibits the acts that this section prohibits who had a child under the age of 14 years in the vehicle at the time of the offense shall have such person's punishment enhanced by one month of imprisonment. This imprisonment must be served consecutively to any other penalty imposed for a violation of this section or an ordinance which prohibits the acts that this section prohibits. During the service of the one month enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(i) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than 90 days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(j) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to $5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(k) The court shall report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings or a complaint alleging a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(l) For the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under this section:

(1) "Conviction" includes being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(2) "conviction" includes being convicted of a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such law, ordinance or resolution;

(3) any convictions occurring during a person's lifetime shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth or subsequent offender;

(4) it is irrelevant whether an offense occurred before or after conviction for a previous offense; and

(5) a person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, and amendments thereto, or an ordinance which prohibits the acts of this section, and amendments thereto, only once during the person's lifetime.

(m) Upon conviction of a person of a violation of this section or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section, the division, upon receiving a report of conviction, shall suspend, restrict or suspend and restrict the person's driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

(n) Nothing contained in this section shall be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city or county and prescribing penalties for violation thereof, but the minimum penalty prescribed by any such ordinance or resolution shall not be less than the minimum penalty prescribed by this act for the same violation, and the maximum penalty in any such ordinance or resolution shall not exceed the maximum penalty prescribed for the same violation. In addition, any such ordinance or resolution shall authorize the court to order that the convicted person pay restitution to any victim who suffered loss due to the violation for which the person was convicted.

(o) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A. 12-4413 *et seq.* or 22-2906 *et seq.*, and amendments thereto, shall not constitute plea bargaining.

(p) The alternatives set out in subsections (a)(1), (a)(2) and (a)(3) may be pleaded in the alternative, and the state, city or county, but shall not be required to, may elect one or two of the three prior to submission of the case to the fact finder.

(q) Upon a fourth or subsequent conviction, the judge of any court in which any person is convicted of violating this section, may revoke the person's license plate or temporary registration certificate of the motor vehicle driven during the violation of this section for a period of one year. Upon revoking any license plate or temporary registration certificate pursuant to this subsection, the court shall require that such license plate or temporary registration certificate be surrendered to the court.

(r) For the purpose of this section: (1) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(2) "Imprisonment" shall include any restrained environment in which the court and law enforcement agency intend to retain custody and control of a defendant and such environment has been approved by the board of county commissioners or the governing body of a city.

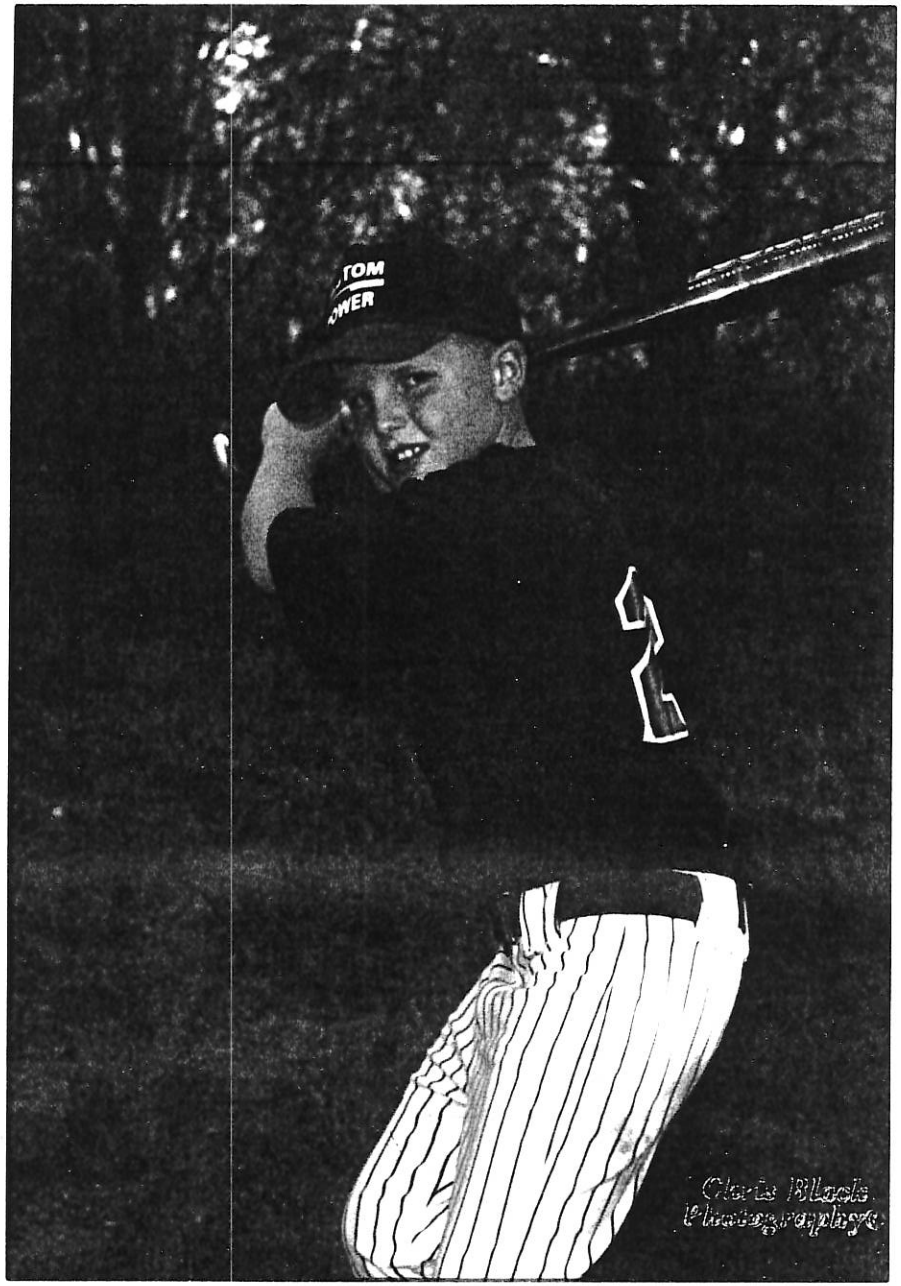
(3) "Drug" includes toxic vapors as such term is defined in K.S.A. 65-4165, and amendments thereto.

(s) The amount of the increase in fines as specified in this section shall be remitted by the clerk of the district court to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of remittance of the increase provided in this act, the state treasurer shall deposit the entire amount in the state treasury and the state treasurer shall credit 50% to the community alcoholism and intoxication programs fund and 50% to the department of corrections alcohol and drug abuse treatment fund, which is hereby created in the state treasury.

- My name is Dennis Hill of rural Butler County. Thank you for allowing me this time to speak to you today. On Aug. 8, 2000 our son Jerry Hill, 35 and Tyler Oberlechner, 10 were killed by a driver that had high levels of THC the inactive metabolite ingredient in marijuana found in his system. Christian Lauban and our Grandson's Luke and Dylan were severely injured. Dylan has acid scars on his face and body that will remain for the rest of his life. Luke has hearing loss in one ear and partial loss in the other ear as well as facial scars. We spent days in court and then found out our Kansas laws will not allow a case to be filed only on basis of an illegal substance being found in a person's system. There are states such as Nevada which have set levels of marijuna at 10 nanograms per millileter in the unine and 2 nanograms in the blood. The individual that caused the tragic deaths of our loved ones had 700+ nanograms of THC in his urine.

  Please consider revising our present laws so law inforcement and prosecutors will be able to prosecute these offenders.

Dennis & Carolyn Hill
3745 NW Butler Rd.
Benton, KS 67017
316-799-2353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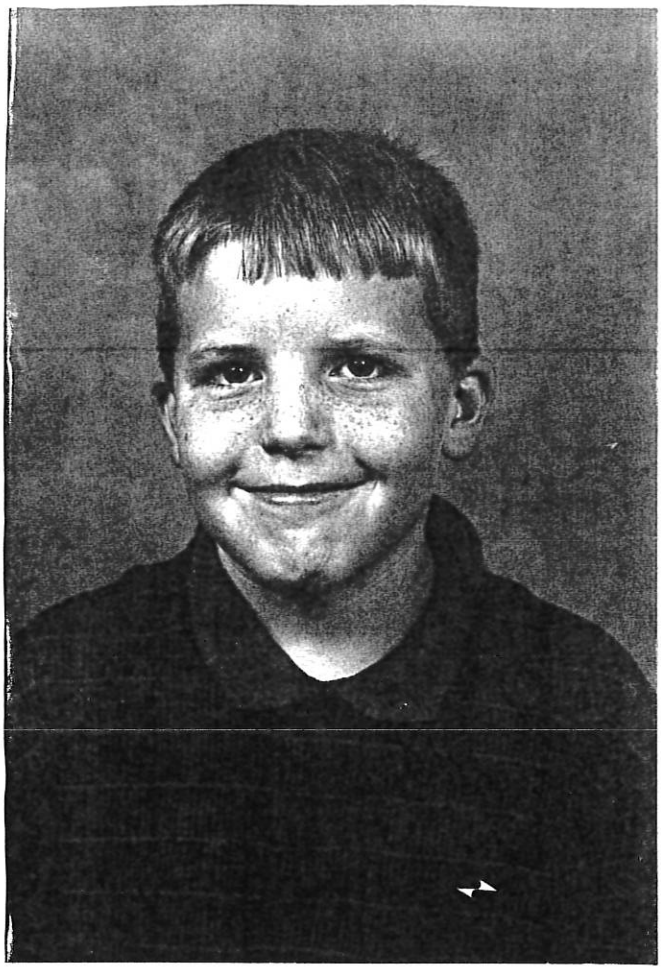
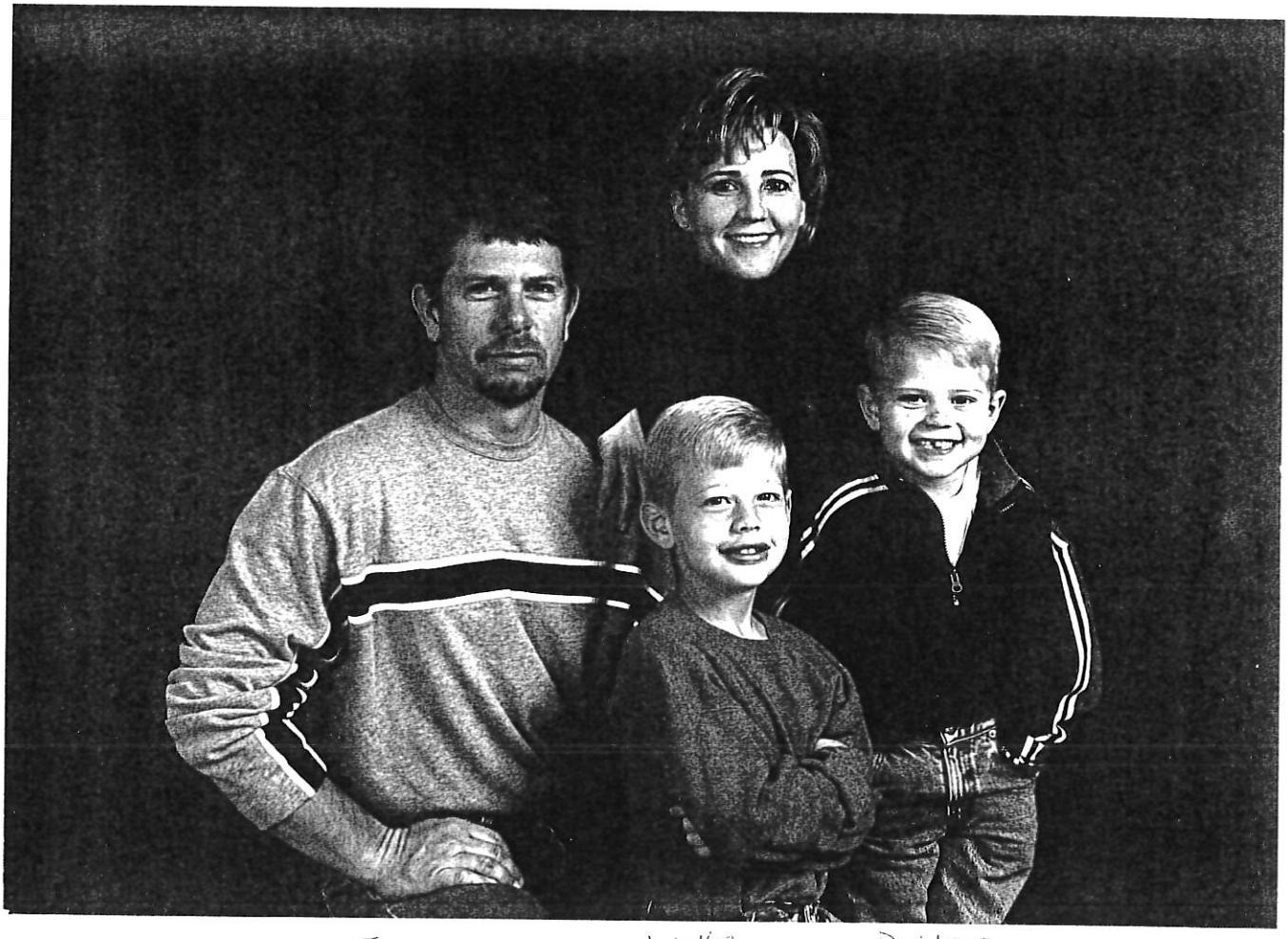
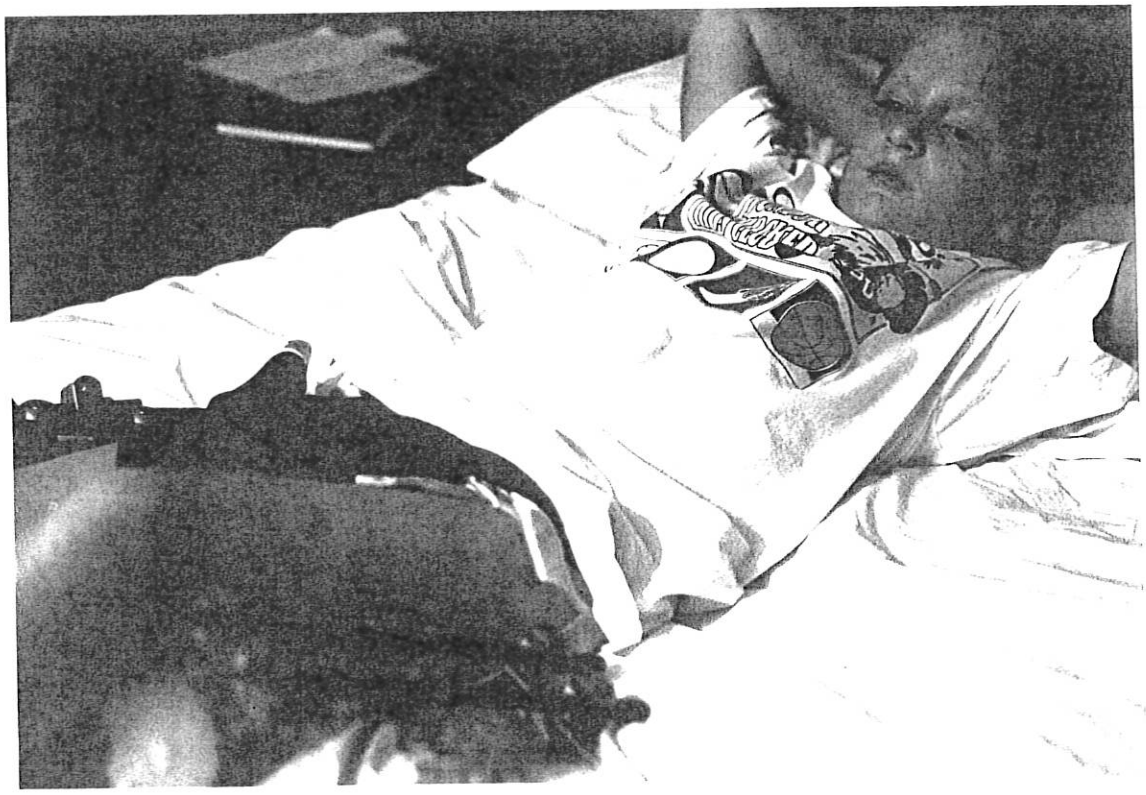


Tyler



Jerry Luke Dylan

Dylan Christian Luke



Christian

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Hl

Testimony in front of Committee

I would like to thank the committee members for allowing me to speak in reference to a change to the Kansas Law in regards to driving under the influence of drugs.

On the evening of August 8, 2000 I felt a pain and sickness that is indescribable as I approached the scene of the crash. Looking, at what was left of the car and being told that Lifewatch had just left, I knew in my heart no one had survived. Having the sheriff officer inform me that my husband was dead and a child had been killed is a memory that will never be forgotten. My two sons Luke 8 years old and Dylan 5 and family friend Christian Lauhban received critical injuries that has changed their lives forever. There is not one day that goes by where we are not haunted by this terrible tragedy.

Having to relive this casualty during the jury trial was emotionally draining to myself, family and friends. The guilty verdict was of some relief until the sentencing day. It was unbelievable to learn that Jimmie Foiles' maximum sentence was 6 years prison time under Kansas State Sentencing guidelines. Jimmie Foiles had an extremely high level of THC in his urine drug screen. Had a simple blood screen test been performed it would have proven the true level of the drug in Foiles' system.

Justice has obviously not been served. Two lives have been taken and many lives changed forever. After, only two years of prison time Jimmie Foiles was released from prison and charged with a misdemeanor of running a stop sign. Having no state guidelines or law in place in regards to driving under the influence of drugs. We are in need of another alternative to the Kansas State Law, to prevent this from occurring to another unfortunate family without severe consequences to follow.

Eight States have "per se" laws making it illegal to drive with any amount of certain illegal drugs in a person's system regardless of whether they are impaired. For example the State of Nevada has specific amounts of prohibited substances found in a person blood or urine which would make it illegal for a person to drive or be in control of a vehicle. Our desire at this time is to approach the committee members to pursue a change in the Kansas State law in reference to obtaining a more accurate drug screening procedure with ranges of impairment levels

(15)

My name is Patty Oberlechner. My son Tyler Oberlechner was involved in a motor vehicle accident on August 8, 2000. He did not survive the accident. Tyler was 10 ½ years old at the time of his death. He is greatly missed by myself, my husband, and his sister, Lindsey, who was 9 at the time of his death.

I was told I needed to explain to you why I feel the law should change regarding marijuana's influence on an individual while operating a vehicle. My view is basically black and white. The individual responsible for my son's death was under the influence of marijuana while driving his vehicle. He was convicted and sentenced. In November of 2003, he was released because, as I understand it, the evidence that convicted him was considered only opinion. He is now a free man with only one count of driving thru a stop sign on his record.

When I was notified of his release, I felt as though I was kicked in the stomach. I cannot describe to you the feeling that my son's life was taken by an irresponsible individual, only to have very little consequence for his actions. I watch all the anti-marijuana ads that play on TV, showing crash dummies passing a joint while driving and then crashing the car, of a young man who places candles at the site of an accident where his younger brother was killed by a person driving under the influence of marijuana. Are these public service announcements the only deterrent available?

You might think I am biased in this case, but I am speaking from almost four years of heart break and disappointment. There is not a day that passes that I don't think of my little boy. My little boy who never got the opportunity to grow up, to go to college, get married, or have his own family. There is not a thing in this world to show that he was ever here. He left this world without being able to leave his mark.

In closing, I would like to reiterate that there needs to be consequences for actions. Thank you.

Thanks you for giving me the opportunity to share my comments with you today.

My son, Christian James Laubhan, was a passenger in the car that was struck by Jimmie Foiles. Both of Christian's femur bones were broken, with the left leg being a compound fracture with the bone sticking out of his leg. He also received a skull fracture and additional face lacerations. He was flown from the site of the car wreck to Wesley in a helicopter.

As a result of the wreck, Christian spent eight days in the hospital, four in Pediatric Intensive Care Unit and four in a private room. Christian's legs were held in place by external fixators, which consisted of four rods screwed into each leg with two rods that ran parallel to his legs. The hardest thing to come to terms with in the hospital was the pain he was in. He was not able to move his legs on his own, it was like he was paralyzed.

During the course of Christian's recovery he had to have three surgeries. The first one was to correct his right leg because it was growing crooked. The other two surgeries were to remove the external fixators from each leg. To this day, Christian's legs are still not back to 100 percent. He also limps when he gets tired and doesn't run as well as he did before the wreck.

Christian had to have extensive physical therapy for his legs. He went three times a week and then it was reduced to two times a week. He started learning to walk again February 14, 2001.

After the nightmare of August 8th, I didn't think life could get much worse, but it has. Watching friends suffer during the trial, hearing that the conviction had been overturned and Foiles was set free without anything on his record to show what he had done, killing two people and scaring for life three children. Something needs to be done to ensure that chronic drug abusers are kept off of our roads and get the help that they need.

Jan Satterfield and the rest of her team have done everything possible to soften the horrendous ordeal that our families have endured. Please give her your full attention today as she endeavors to return a small measure of hope to our families, something good to result from the nightmare of August 8, 2000.

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ADDICTION SPECIALISTS OF KANSAS, INC.

Feb. 15, 2004

The Honorable Ward Loyd
Chair, House Corrections and Juvenile Justice Committee
Kansas Legislature
Topeka, KS

Dear Mr. Loyd,

Thank you for the opportunity to share my thoughts about the recommended additions to HB 2649 for the purpose of amending our states DUI laws. My comments are meant to specifically support the blood and alcohol test result levels recommended in the bill.

As a physician who practices in Addiction Medicine, and a certified Medical Review Officer for D.O.T. drug testing, I have extensive training and clinical experience in blood and urine drug testing toxicology. I am concerned about the significant problem we have in Kansas with citizens driving under the influence of alcohol and other drugs, as evidenced by our embarrassing national ranking in DUI deaths.

Most DUI cases in the state involve alcohol. This is due in part to alcohol being the most common drug people use that impairs driving. Other drugs of abuse pose an significant threat to public safety, but unfortunately, testing is not usually done for drugs other than alcohol. I suspect this lack of testing is due to urine collection being more cumbersome and less convenient than obtaining a blood specimen, and that urine testing results are not established as a legal basis for DUI, leaving little incentive on the part of law enforcement to attempt to collect these specimens.

Positive blood test results as listed in the proposed amendment provide evidence of being under the influence of alcohol and/or drugs. Urine drug testing results provide good evidence for recent and/or heavy use of drugs which can impair safe operation of a motor vehicle. Drugs of abuse typically clear from the system in a day or two, as evidenced by negative urine tests within 48 to 72 hours after use. Over this 2 to 3 day time frame, urine levels rapidly decline, so higher levels are indicative of recent or heavy use. Urine drug testing cut-off levels are established scientifically and set high enough to eliminate the possibility of a positive test being caused by passive contact with the drug.

Kansas has already established in our workers compensation laws that the presence of drugs in one's system is evidence of drug use. Kansas now has the opportunity to join a few other states as leaders in fighting driving under the

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influence of drugs, and taking a needed step towards reducing our state DUI problem by passing this amendment.

The recommended blood and urine concentration levels for this bill are at levels appropriate to establish recent use, and are above the levels we clinically see with casual or remote use, and are reasonable to establish presumption of operation of a motor vehicle under the influence of these substances.

I urge you to support this amendment and pass it out of your committee in your continuing effort to make our state a safer place in which to drive, and to establish penalties for all drivers who choose to operate a motor vehicle under the influence of mood altering substances.

I am unfortunately not available to testify in person at your meeting on Tuesday, Feb. 17th, but would be happy to appear later if necessary, or provide any additional information if needed.

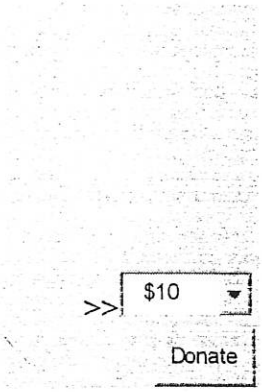
Sincerely,

Timothy Scanlan, MD

US UT: Senate Approves Easier Prosecution of Drug-Impaired Drivers

URL: http://www.mapinc.org/drugnews/v03/n148/a04.html
Newshawk: The GCW
Pubdate: Wed, 29 Jan 2003
Source: Deseret News (UT)

Contact: letters@desnews.com
Website: http://www.desnews.com/
Details: http://www.mapinc.org/media/124
Author: Jerry Spangler



SENATE APPROVES EASIER PROSECUTION OF DRUG-IMPAIRED DRIVERS

No matter how you crack the egg, your brain on drugs is not a pretty sight.

It's also ugly when those taking illegal drugs are behind the wheel of a car, causing death and mayhem not unlike what happens when someone drives while drunk.

That scenario motivated the Utah Senate Tuesday to pass SB7, which makes it a whole lot easier for prosecutors to charge anyone with illegal drugs in their system with felony vehicular homicide should they kill another person in a traffic accident.

And prosecutors do not even need to prove the driver was under the influence of drugs, only that illegal drugs were in his or her system.

"It is not quite a zero tolerance policy, but it is the same philosophy," said Sen. Carlene Walker, R-Holladay.

But there are exceptions, and Walker said there will be some who are clearly impaired by drugs who will get away with murder.

"It's just one more tool to get those with drugs in their system off the roads," she said.

Walker points to one national study found that 18 percent of all traffic fatalities are caused by drivers under the influence of drugs.

But Paul Boyden, director of the Statewide Association of Prosecutors, said such incidents are extremely rare in Utah, and when they happen they generate considerable media attention.

The legislation, in partnership with existing misdemeanor laws, sends the message "it is illegal to drive with any controlled substance in your system," he said.

And prosecutors will have it easier to prove their cases in court because they will not have to prove the driver was impaired, the standard for driving under the influence with alcohol cases.

Utah law currently states that drivers are impaired when they have 0.08 percent alcohol in their blood stream. But there is no comparable scientific test to determine a level of impairment for drugs.

The new legislation, if passed by the House, simply states that any amount of illegal drugs in the system constitutes the legal parameters for vehicle homicide when an accident results in death.

Boyden said the approach is not without its potential problems, and the legislation has been tweaked to stand up in court.

One change, Boyden said, was to remove from prosecution the "metabolites," or the minute traces of illegal drugs that remain in the human body for weeks after they are ingested. Instead, the bill addresses only the active chemicals of illegal drugs that would suggest they were taken recently and it can be proven in court what the drugs were.

Another is a defense for those who might have drugs in their system they did not voluntarily take, like second-hand marijuana smoke.

The legislation requires prosecutors to prove the fatal accident was caused by negligence, and the drugs have to be proven by scientific tests to be among a catalog of illegal drugs called Schedule I and Schedule II drugs.

But could an over-zealous prosecutor use the law to charge someone with a felony if they had traces of illegal drugs days or weeks old?

"Nothing can stop an over-zealous prosecutor," Boyden quipped.

MAP posted-by: Josh

Cognitive Deficits in Marijuana Smokers Persist After Use Stops

By Jill Schlabig Williams, NIDA NOTES Contributing Writer

NIDA-funded scientists have found that cognitive impairments resulting from smoking marijuana can last up to at least 28 days after an individual last smoked the drug. The more a person had smoked prior to abstinence, the more profound this impairment, with marijuana smokers with lower IQs faring worse than their higher IQ peers, even if the latter had routinely smoked more of the drug.

NIDA-funded researchers Dr. Karen Bolla from the Johns Hopkins University School of Medicine in Baltimore and Dr. Jean Lud Cadet from NIDA's Intramural Research Program (IRP) admitted marijuana smokers to IRP's Clinical Inpatient Research Unit on Hopkins' Bayview campus, tested them to ensure they abstained from marijuana use throughout their 4-week stay, and gave them a battery of neurocognitive tests at the end of the study.

Twenty-two individuals participated. Their average age was 22, 86 percent were male, and all reported consuming fewer than 14 alcoholic drinks a week. The researchers estimated that the group had been smoking marijuana for an average of 4.8 years. Based on participants' reports of their current levels of marijuana use, the researchers grouped them as light, medium, or heavy smokers. "Determining an exposure index—how many joints participants smoked per week—and looking at the range of use in the study population strengthened our ability to make causal inferences," says Dr. Bolla.

Very heavy abusers smoked an average of 94 joints a week and scored worse than light abusers (average 11 joints per week) on 24 of the 35 neurocognitive tests, even after 28 days of abstinence. The measures on which the heavy abusers had comparative deficits included verbal and visual memory, executive functioning, visual perception, psychomotor speed, and manual dexterity. On some tests, quantity of marijuana use accounted for more than half the variance in test scores. "We found a dose-response relationship," says Dr. Bolla. "The more marijuana people used, the worse they performed on the tests, especially those for memory."

"We know a lot about the acute effects of marijuana use, but researchers are just now beginning to look at the long-term effects," says Dr. Jag Khalsa of NIDA's Center on AIDS and Other Medical Consequences of Drug Abuse. "This study demonstrates that marijuana smoking has chronic, dose-related effects on cognitive impairments up to 28 days after last use. But how long do these effects persist beyond that point? That's something we have to examine."

"We have shown that marijuana use is associated with persistent detrimental cognitive effects," explains Dr. Bolla. "These results are not attributable to use of other drugs, because participants were excluded for current or past history of significant use of other substances, including alcohol. Marijuana appears to be harmful when smoked in very large quantities."

The study results also suggested that some people are at higher cognitive risk from smoking marijuana than others. Cognitive performance in individuals with lower IQ scores decreased as the number of joints smoked per week increased, while those with higher IQ scores had fewer decrements even as marijuana use increased. "This finding demonstrates the concept of cognitive reserve," says Dr. Bolla. "People with higher IQs do better than those with lower IQs; the fewer cognitive reserves you have, the more impact you will see from a slight change in brain function."

The results of this study are consistent with study findings obtained by Dr. Harrison Pope, Jr., at Harvard University McLean Hospital in Belmont, Massachusetts (see *NIDA NOTES*, Vol. 11, No. 3). Dr. Pope and his colleagues found that memory and learning problems caused by heavy marijuana smoking lasted for at least a week after use stopped, although the problems disappeared within a month. "Since marijuana has a half-life of 4 days, the neurocognitive effects seen in Dr. Pope's study after 7 days indicate that marijuana does have residual effects," says Dr. Khalsa. "Study differences in longer term effects could be explained by differences in the study population."

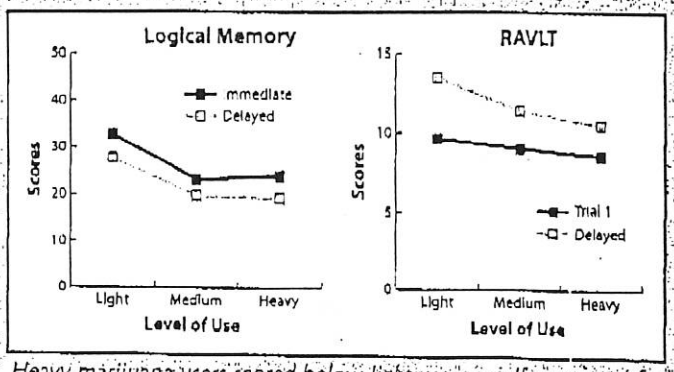
"In the Harvard study," Dr. Bolla notes, "participants were older, ranging from age 30 to 55; had higher IQs; were more affluent; and were more likely to be employed. Our inpatient study was conducted in the inner city with a younger, poorer population that used marijuana more heavily. Plus, Dr. Pope measured lifetime episodes of smoking marijuana, not the current number of joints smoked per week." In Dr. Bolla's study, duration of use was associated with a decrease in performance on just one neurocognitive test, which measured participants' ability to copy a complex figure.

Source

• Bolla, K.I., et al. Dose-related neurocognitive effects of marijuana use. *Neurology* 59(9):1337-1343, 2002. NN

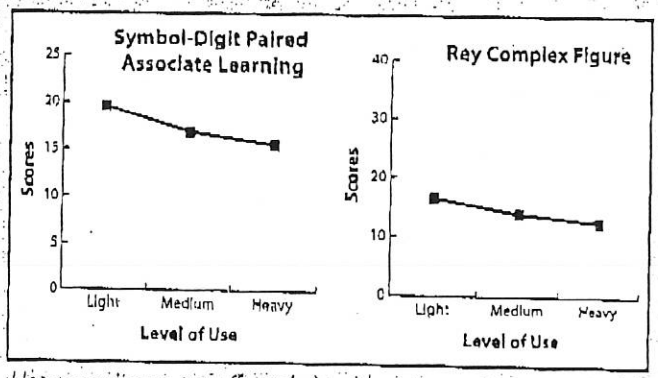
Severity of Cognitive Deficits Varies by Level of Marijuana Use

Verbal Memory. In tests of logical memory, participants were read a paragraph and then asked questions about it immediately and again after 30 minutes. The Rey Auditory Verbal Learning Test (RAVLT) involved listening to 15 words and then repeating them either immediately (Trial 1) or after 30 minutes. The response patterns suggest difficulty with information recall, not with the acquisition or retention of information, according to the researchers.



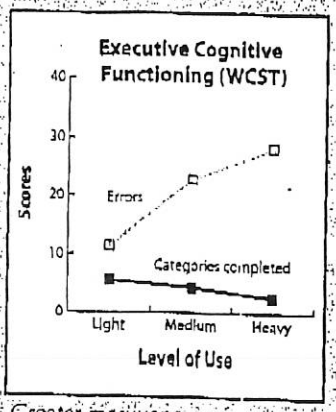
Heavy marijuana users scored below light users on all measures of verbal memory, although they had no problems recognizing previously learned material.

Visual Memory. In the Symbol-Digit Paired Associate Learning test, seven flash cards featuring a symbol and a number were displayed; test subjects were then shown only the symbol and asked to supply the number that originally accompanied that symbol. In the Rey Complex Figure tests, participants were shown a complex figure and asked to draw it from memory.



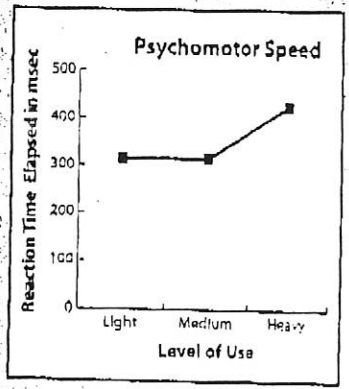
Heavy marijuana use affected visual learning and memory.

Executive Cognitive Functioning. In the Wisconsin Card Sorting Test (WCST), participants are asked to sort cards by three different concepts that the tester changes. This exercise tests the subject's ability to switch cognitive sets based on feedback. Poor performance indicates difficulty incorporating feedback to guide and change incorrect response selection.



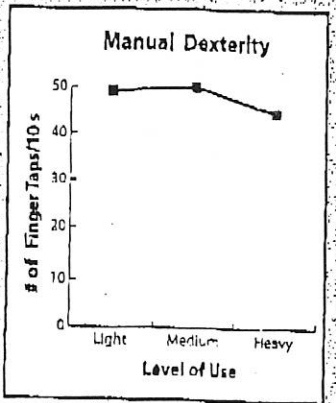
Greater marijuana use was associated with lesser executive cognitive functioning.

Psychomotor Speed. Participants were given the California Computerized Assessment Package (CALCAP) to measure their psychomotor speed. In this test, they were asked to hit a button when they saw a light flash. Reaction time measured the milliseconds that elapsed between the light flashing and the participant hitting the button.



Heavy marijuana users showed slower reaction times on a test of simple reaction time.

Manual Dexterity. For this test, participants were asked to tap a finger on their left hand. Manual dexterity was determined by the number of taps made in 10 seconds.



Heavy marijuana use was associated with lower performance on manual dexterity measures.

Toxicology Bureau Fact Sheet:
DRUG-IMPAIRED DRIVING

The Toxicology Bureau of the Scientific Laboratory Division performs toxicological investigations on a wide variety of criminal and forensic casework, including drug-impaired driving. This fact sheet provides basic information on drug-impaired driving for law enforcement, judges, drug recognition experts (DREs) and attorneys.

This Fact Sheet will highlight some important issues concerning drug-impaired driving cases. These cases are more difficult to prosecute than alcohol-impaired driving, and require special attention.

INTRODUCTION

The Toxicology Bureau of the New Mexico Department of Health Scientific Laboratory Division (SLD) initiated a Drug-Impaired Driving Outreach Program in October of 2001. With support from the Traffic Safety Bureau, SLD has committed to a plan to develop and enhance a cooperative, comprehensive and multi-strategy program for the prevention, education, enforcement and handling of drug-impaired driving at the local, district and state levels. The proposed program would provide training to judges, attorneys, law enforcement and community groups. Agencies can request training from SLD using the training request form which is available on our website at www.sld.state.nm.us.

Drug impaired driving is under-reported, often goes unrecognized and is more difficult to prosecute than alcohol impaired driving. Yet drug impaired driving is a constant factor in serious traffic crashes. A recent U.S. Department of Transportation (DOT) study conceded that the full impact of drugs on traffic safety is still unknown. A successful prosecution involves careful coordination of legal, law enforcement and scientific agencies. Unlike per-se laws governing alcohol use, drug-impaired driving is inherently more complex. The expert opinion of the toxicologist regarding driving impairment is often critical for prosecution. To render an opinion of impairment, the toxicologist may require key information from law enforcement personnel and prosecutors, such as signs and symptoms of drug use, behavioral observations and driving pattern.

STATISTICS

According to the 1996 National Household Survey on Drug Abuse conducted by the Department of Health and Human Services (DHHS), 9 million people drove after drug use. A 1995 study conducted by the National Highway Traffic Safety Administration (NHTSA) and the U. S. Department of Transportation showed that drugs were used by 10 to 22% of drivers involved in crashes, often in combination with alcohol. In a 1990-1991 NHTSA study of 1,882 fatally injured drivers, drugs other than alcohol were found in 17.8% of the cases. Studies of injured drivers taken for medical treatment have shown positive drug rates as high as 40%. Between 15 and 50% of drivers arrested for motor vehicle offenses tested positive for drugs. These national statistics, combined with the substance abuse problem in New Mexico, is a cause for concern and action. While it is understood that many illicit drugs impair driving skills, the driving deficits from prescription and over-the-counter drugs can also pose a significant risk.

DRUG-IMPAIRED DRIVING IN YOUNG PEOPLE

The incidence of non-alcohol related driving impairment might be even greater in young adults. In one study funded by the DHHS, 23.5% of drivers under the age of 21 tested positive for drugs other than alcohol. Statistics from NHTSA and the Substance Abuse and Mental Health Services Administration (SAMHSA) have shown that driving after drug use was more common among young drivers. Persons aged between 16-20 were more than twice as likely to drive after using drugs (excluding alcohol) compared with those aged 21 or over. As many as 22% of young people reported using drugs prior to driving.

As many as 9 million people drove their vehicles after using drugs.

FARS DATA

Data from the Fatality Analysis Reporting System (FARS) in New Mexico indicated that of the 449 fatal crashes that were tested for drugs in 2000, as many as 19% were positive for drugs other than alcohol. Of these, the majority (12%) involved drugs alone (BAC<0.08%), with the remaining 7% involving both alcohol and drug use. A total of 8% of the fatal accidents involved multiple drug use, other than alcohol. These New Mexico statistics are in accordance with federal estimates obtained by NHTSA and the Department of Health and Human Services.

The complexity of drug-impaired driving is compounded by drug-alcohol or drug-drug interactions of additive, synergistic or antagonistic nature. These issues, together with individual differences, makes interpretation extremely challenging. In the absence of other information, it is very difficult to predict whether someone was impaired based on toxicology testing alone. As a result, individuals need to be

able to recognize the signs and symptoms of drug-impaired driving. This requires a community-based program of awareness surrounding the dangers of drugs and driving and preventive measures to keep New Mexico's roads safe for all drivers.

DRUG EFFECTS

Drug effects can vary between individuals. The effects are influenced by history of drug use (chronic or naïve user), tolerance, overall health, individual sensitivity to the drug, metabolism and other factors. Many drugs, especially those that affect the central nervous system, can impair driving. These include illicit drugs, as well as therapeutic and over-the-counter medications. Many therapeutic drugs that are available with or without a prescription, can have unwanted side effects that can impair driving performance.

Illicit, therapeutic and over-the-counter drugs may impair driving performance.

EFFECTS OF DRUGS ON DRIVING

Drugs can impair several factors that are necessary for safe driving:

- **COORDINATION**
  Effects on nerves and muscles (hand-eye coordination). Needed for steering, braking, accelerating and manipulation of the vehicle.
- **REACTION TIME**
  Insufficient time for response (reaction or judgement).
- **JUDGMENT**
  Cognitive effects, risk reduction, avoidance of potential hazards, emergency decision making, anticipation, risk-taking behavior, inattention, fatigue, decreased fear, exhilaration, loss of control.
- **TRACKING**
  Needed for staying in lane and maintaining distance.
- **ATTENTION**
  Driving requires divided attention, not focussed. It is a time-shared task with a high demand for information processing.
- **PERCEPTION**
  Information processing while driving is largely visual (glare resistance, recovery, dark and light adaptation, dynamic visual acuity).

DRUG RECOGNITION

Drug recognition and documentation of signs and symptoms is especially important in drug-impaired driving cases. The first choice is Drug Recognition Expert (DRE) Certification. The DRE program was pioneered in California, by the Los Angeles Police Department in the 1980s. The program was formally validated by NHTSA in collaboration with Johns Hopkins University in 1985. The program provides specialized training in drug recognition that allows a trained officer to predict the class of drugs that may be present. The DRE plays a crucial role in drug-impaired driving prosecutions. The information collected by the DRE can facilitate an opinion of impairment from the Toxicologist. New Mexico has a very strong DRE program, but unfortunately there are not enough DREs. **For more information on the New Mexico DRE Program, contact the State Coordinator, Lt. Murray Conrad at the Albuquerque Police Department (505 256 2050).**

Documentation of drug signs are important in impaired driving cases. If observed, characteristic signs, symptoms or behaviors associated with drug use should be noted in the police report. If drugs are suspected, the arresting officer should document this on the SLD 705 form, which is submitted with the biological sample. Typical signs may include:

- **DEPRESSANTS**
  Sedated, confused, poor divided attention, slowed reaction times, memory effects, poor psychomotor skills, slurred speech, ataxia, disorientation, decreased pulse and blood pressure.
- **STIMULANTS**
  Hypervigilance, excitability, anxiety, self-absorbed, agitated, paranoid, delusional, obsessive activity, rapid speech, hand-wringing, bruxism, dilated pupils, elevated pulse and blood pressure.
- **CANNABINOIDS**
  Relaxed, sedated, confused, poor divided attention, slowed reaction times, memory effects, poor information processing, poor coordination, reddening of conjunctivae (in eyes), elevated pulse and blood pressure.
- **OPIOIDS/NARCOTIC ANALGESICS**
  Euphoria, sedated, confused, mental clouding, stupor, slowed reaction times, poor coordination, constricted pupils, decreased pulse and blood pressure.

DRUG ANALYSIS

Drug analysis is automatically conducted if the blood alcohol concentration (BAC) is less than 0.08%. If the BAC exceeds 0.08% the investigator or prosecutor must contact the Bureau Chief by telephone to request drug analysis.

TRAINING

The Toxicology Bureau of the Scientific Laboratory Division can provide on-site training at your agency. To request training on drug-impaired driving or other issues, contact the Toxicology Bureau Chief.

FOR MORE INFORMATION CONTACT:
DR. SARAH KERRIGAN
BUREAU CHIEF, TOXICOLOGY
NEW MEXICO DEPARTMENT OF HEALTH
SCIENTIFIC LABORATORY DIVISION
TEL: 505 841 2562 FAX: 505 841 2513
EMAIL: sarah.kerrigan@state.nm.us

SEDGWICK COUNTY
REGIONAL FORENSIC SCIENCE CENTER

Testimony of Dr. Timothy P. Rohrig
House Committee

17 March 2004

Good Afternoon Mr. Chairman and Committee Members:

My name is Dr. Tim Rohrig; I am the Director of the Forensic Science Laboratories and Chief Toxicologist at the Sedgwick County Regional Forensic Science Center located in Wichita, Kansas.

The Forensic Science Center is a state of the art facility, which houses the 18th Judicial District Coroner and the Sedgwick County Forensic Science Laboratories. The Center was constructed in 1995 to promote the health and public safety of the citizens of Sedgwick County. The forensic science services [Crime Lab] are provided to Sedgwick County Law Enforcement Agencies and the Sedgwick County District Attorney's Office at no cost.

In Sedgwick County and throughout the state, driving under the influence of alcohol and other drugs continues to be a significant problem. Countless lives are devastated and lost due to drug intoxicated drivers. Currently, unlike driving under the influence of alcohol, the state statutes do not provide for presumptive levels of drugs for intoxication or impairment.

The enactment of law setting presumptive levels of drugs for driving under the influence will provide an additional and needed tool for law enforcement to further reduce the number of drug intoxicated drivers on our roadways. Existing law requires expert testimony to establish that a person is under the influence of a drug and/or under the influence of alcohol and drug(s) to a degree that renders the person incapable of safely driving a vehicle.

Today, I stand before you in support of the amendment to **House Bill 2649**. This amendment will set forth "prohibitive substances" in urine samples and in blood, set drug concentrations for the presumption of intoxication/impairment as it relates to the operation of motor vehicles and watercraft within the state of Kansas.

Although the enactment of this proposed amendment will have some impact on the local crime laboratories [Johnson County Crime Lab and Sedgwick County Regional Forensic Science Center] as well as the state crime laboratory [KBI], the positive impact on public safety is worth the fiscal investment.

Jan Satterfield

From: Rohrig, Timothy Dr. [trohrig@sedgwick.gov]
Sent: Friday, February 06, 2004 4:22 PM
To: Jan Satterfield
Subject: HB 2649/2603

Jan
reviewed the two bills 2649 seems the closest to what you want as far as an amendment that is consistent with or similar to the current bill [if that makes sense].

The language in the NV law states that it is a violation to have in your system the "prohibitive substance" at the listed concentrations. I would suggest the same or similar language for the urine sample but for blood and I would specify whole [serum or plasma] that the listed concentrations should be presumptive evidence or the appropriate legal language of impairment as it pertains to operating a motor vehicle and/or watercraft in the state of Kansas. Below I have made some suggested modification to the table.

Drug*	Urine Concentration** [ng/ml]	Blood concentration [ng/ml]
Amphetamine	500	100
Methamphetamine	500	100
MDMA (methylenedioxymethamphetamine)	500	100
Cocaine	150	50
Benzoylecgonine (Cocaine metabolite)	150	n/a
Morphine	5,000	150
Codeine	5,000	150
6-actylmorphine (Heroin metabolite)	10	10
Lysergic acid diethylamide (LSD)	25	10
THC (active ingredient MJ)	10	1 whole blood or 2 serum/plasma
Carboxy-THC (MJ metabolite)	500	n/a
Phencyclidine (PCP)	25	10

*language to address the isomer issue eg to include all isomers
** cut-off concentration -so only requirement is to est concentration greater than or equal to

these cut-offs to override/supercede or what ever language is needed to overcome the reporting threshold listed by KDHE certified labs - all labs but the KBI which is exempt must follow their [KDHE] guidelines in which in some cases are different from these

this table does not address carisoprodol and some of the benzodiazepines that we see in our impaired drivers

however, may want to stick with the illicit drugs at this point [exception being codeine] to negate the therapeutic use argument

Timothy P. Rohrig, Ph.D., DABFT
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REGIONAL FORENSIC SCIENCE CENTER
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Wichita, Kansas 67214
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trohrig@sedgwick.gov

2/6/2004

NRS *484.379* Driving under the influence of intoxicating liquor or controlled or prohibited substance: Unlawful acts; affirmative defense.

****Update notice:** This section has been amended by Chapter 421 of 2003.
Chapter 492 of 2003.

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his blood or breath; or

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who:

(a) Is under the influence of a controlled substance;

(b) Is under the combined influence of intoxicating liquor and a controlled substance; or

(c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

3. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than:

Prohibited substance	Urine Nanograms per milliliter	Blood Nanograms per milliliter

(a) Amphetamine	500	100
(b) Cocaine	150	50
(c) Cocaine metabolite	150	50
(d) Heroin	2,000	50
(e) Heroin metabolite:		
(1) Morphine	2,000	50
(2) 6-monoacetyl morphine	10	10
(f) Lysergic acid diethylamide	25	10
(g) Marijuana	10	2
(h) Marijuana metabolite	15	5
(i) Methamphetamine	500	100
(j) Phencyclidine	25	10

4. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

AB271 AB24 AB35, 43, 218

(Added to NRS by 1969, 1485; A 1971, 2030; 1973, 587, 1277, 1501; 1975, 788; 1981, 1924; 1983, 1068; 1993, 539; 1999, 2451, 3415; 2001, 172)

AB151

[Previous Document in Book] [Next Document in Book]

1981 – SB 83
1983 – AB 167
1993 – AB 144?
AB 499?
SB 528

METABOLITES ⟹ 1999 – AB 196 ✗
SB 481

2001 – SB 143?
AB 453?

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2. It is unlawful for any person who:

(a) Is under the influence of a controlled substance;

(b) Is under the combined influence of intoxicating liquor and a controlled substance; or

(c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

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(1) Morphine	2,000	50
(2) 6-monoacetyl morphine	10	10
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(h) Marijuana metabolite	15	5
(i) Methamphetamine	500	100
(j) Phencyclidine	25	10

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(Added to NRS by 1969, 1485; A 1971, 2030; 1973, 587, 1277, 1501; 1975, 788; 1981, 1924; 1983, 1068; 1993, 539; 1999, 2451, 3415; 2001, 172)

AB (5)

[Previous Document in Book] [Next Document in Book]

1981 – SB 83
1983 – AB 167
1993 – AB 144?
AB 499?
SB 528

METABOLITES ⟹ 1999 – AB 196 ✗
SB 481

2001 – SB 143?
AB 453?

19

Jan Satterfield

From: Kristi Coup [kcoup@dkcoks.com]
Sent: Thursday, January 22, 2004 4:42 PM
To: Jan Satterfield
Subject: proposed legislation on DUI drug cases

I am in support of such a bill, and if you don't get many responses because of how busy we all are, I'll say that I would be surprised if any prosecutors have a differing position.

I was not provided with the proposed language so I cannot comment on whether I believe the language in the proposed bill will withstand judicial scrutiny.

Kristie C. Hildebrand
Dickinson County Attorney

House Corr & JJ
Attachment 19
2-17-04

Jan Satterfield

From: Ernie Richardson [kiowaca@giantcomm.net]
Sent: Thursday, January 22, 2004 4:05 PM
To: Jan Satterfield

Jan,

As Kiowa County Attorney, Pratt County Attorney, and Pratt City Attorney, I would favor a presumption.

Ernie Richardson

Jan Satterfield

From: Biggs, Chris [chris.biggs@securities.state.ks.us]
Sent: Friday, January 23, 2004 10:09 AM
To: Jan Satterfield
Subject: DWI drug laws

We had a case in Geary County involving multiple deaths with allegation of possession of multiple drugs with evidence of them in the blood. The issue was whether he was under the influence. Hard to prove without presumptive levels.

Chris Biggs

(20)

Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

Before the House Corrections and Juvenile Justice Committee
In Support of HB 2649
Kyle G. Smith, Special Agent
Director of Public and Governmental Affairs
Kansas Bureau of Investigation
February 17, 2004

Chairman Loyd and Members of the Committee:

I appear today on behalf of the Kansas Bureau of Investigation, in support of the concept behind HB 2649. It seems self-evident that if it's illegal to possess a controlled substance that it should also be illegal to use a controlled substance. However, there are some practical issues that I thought should be addressed.

First, there is a fiscal impact. Prosecution of this crime contemplates testimony concerning the presence of controlled substances inside a person's system, either through blood or urine testing. As can reasonably be anticipated, the defenses will occasionally be that they did not intentionally ingest the drugs or received only second-hand smoke in the case of marijuana. That defense will bring into issue the ***quantity*** of the controlled substance or the metabolite found in their system. Scientific methodology is involved in testing for the quantity of a drug is in addition to qualitative act of identifying the drug.

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

Currently the KBI has two forensic scientists working full time testing for controlled substances in blood and urine. Normally these are only qualitative tests, looking for and identifying the drug, not the amount of the drug. If we were also to do quantitative testing, it would essentially be doubling the number of tests to be done per case. Unfortunately qualitative and quantitative tests cannot be run at the same time.

Therefore, we would need two additional people and additional equipment, and as you have probably heard in the past, additional space. Without the additional fiscal resources, these additional tests will swamp our toxicology lab and result in large back logs and cases being dismissed.

I understand there is a proposed amendment which sets certain levels of nanograms per milliliter for certain controlled substances. I understand from our scientists that there are some problems with this approach. I'm certainly no expert in the science involved so I have brought with me Larry Mann, head of our Toxicology Division, who can explain more of the details and answer your questions. But in summary, the levels of controlled substances will differ between urine and blood, so we can not have one standard for both. Secondly, since you're talking about nanograms per milliliter, if I were to drink 64 ounces of water prior to a urine test, while the nanograms in my system may still be the constant, they would be diluted per milliliter. Third, the levels of some drugs are so small that current equipment utilized by the KBI, as well as many other forensic labs would not be able to detect those amounts. Newer and more

expensive equipment would be needed. Of course, there are frequently multiple drugs found and so the testing could get even more complicated and expensive. And finally, there has been some confusion as to these levels and what they actually indicate. As a prosecutor, I would love to be able to bring in evidence of the amount of metabolites or drugs in a person's system will show that they were under the influence while driving. However, these levels, or any levels, probably can't scientifically reflect intoxication – there are just too many variable in our current level of scientific knowledge. As for more detailed question on scientific matters, I'll defer those to Larry Mann, but otherwise I'll be happy to answer any questions.