Approved: 4-3-09
Date

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairperson Pat Colloton at 11:00 a.m. on February 27, 2009, in Room 535-N of the Capitol.

All members were present except:
Representative Bob Bethell- excused
Representative Nile Dillmore- excused
Representative Sheryl Spalding- excused

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jackie Lunn, Committee Assistant

Conferees appearing before the committee:
Tom Drees, Chair, Kansas Sentencing Commission Recodification
Mark Gleeson, Office of Judicial Administration
Jennifrer Roth, Kansas Association of Criminal Defense Attorneys

Others attending:
See attached list.

HB 2332 - Recodification of certain drug crimes; quantities of drugs; proportionality of sentencing.

Chairperson Colloton opened the meeting by calling on Tom Drees, Chairperson, Kansas Sentencing Commission Recodification to continue his testimony as a proponent of **HB 2332.** He referred the Committee to a handout entitled *Drug Distribution/Possession with Intent to Distribute* to take in place of the one from February 26, 2009. (Attachment 1) He began his testimony finishing up the grids and changes they made and why. Mr. Drees took questions from the Committee during his testimony.

During Mr. Drees' testimony, Chairperson Colloton referred the Committee to the "written only" testimony of Tom Stanton, Deputy District Attorney, Reno County and KCDAA; (Attachment 2) and also, a supplement to his testimony. (Attachment 3) Mr. Drees yielded the floor to Richard Saminiego, who is standing in for District Attorney Stanton to review his testimony for the Committee. He stated that District Attorney Stanton is a proponent of the bill and highlighted on the two areas of the bill where he has concerns.

Upon the conclusion of the review, Mr. Drees continued with his testimony. In closing, he stated a lot of time and effort from great minds went into the drafting of this bill and urged to Committee to pass it out favorably.

Chairperson Colloton called on Ed Klumpp, Kansas Association of Chiefs of Police and Kansas Peace Officers Association to respond to District Attorney Stanton's concerns with the bill. He stated they had met with the Kansas Sentencing Commission and have come to an agreement.

Questions and answers followed.

Chairperson Colloton moved the hearing to neutral parties stating there was "written only" neutral testimony from Roger Werholtz, Secretary of the Department of Corrections (Attachment 4) and called on Mark Gleeson, from the Office of Judicial Administration, to give his testimony as a neutral party. Mr. Gleeson provided a written copy of his testimony. (Attachment 5) Mr. Gleeson stated the bill would require more training for Court Services Officers and he also added there are several sections of the bill that are unclear. He offered amendments attached to his testimony that address his concerns.

Upon the completion of Mr. Gleeson's testimony he stood for questions and a question and answer session followed.

Chairperson Colloton called on Jennifer Roth, Kansas Association of Criminal Defense Attorneys, to give her

testimony as an opponent of **HB 2332**. Ms. Roth provided written copy of her testimony. (Attachment 6) Ms. Roth stated the Kansas Association of Criminal Defense Lawyers has a great interest in proportionality. The bill causes great concerns regarding the drug related sections. She explained the concerns. In closing, she urged the Committee to address these areas of concern before passing the bill out favorably.

Being no others that wish to testify on **HB 2332**, Chairperson Colloton closed the hearing. She stated the Committee would take action on this bill on Monday and adjourned the meeting at 12:30 p.m. with the next meeting scheduled for March 2, 2009 at 1:30 in room 535 N.

CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 02-27-09

NAME	REPRESENTING
Brett Watson	Kan. Crim Code Recod Com.
Becky Heatherman	Judicial
Mark Gleeson	Judicial
John W. White	KCCRC
Ed Klumpp	KCCRC KPOA KACP

HB 2332 Proposal

by

Thomas J. Drees
Ellis County Attorney

Drug Distribution / Possession with Intent to Distribute

Marijuana Street Value				Current Proposal				Friendly Amendment			
25	grams	1 oz	$150	< 25	grams	L9p	1oz - $150	< 50	grams	L9p	2 OZ - $300
100	grams	4 oz	$400	< 450	grams	L7p	1 lb - $1,000	< 225	grams	L8p	8 oz, 1/2 lb - $500
450	grams	1 lb	$1,000	< 30,000	grams	L4p	66 lb - $60,000	< 450	grams	L7p	1 lb - $1,000
1,000	grams	2 lb	$2,000	> 30,000	grams	L3p	> 66 lb	< 1	kilo	L6p	2 lb - $2,000
30,000	grams	66 lb	$60,000					< 10	kilo	L5p	22 lb - $22,000
								< 100	kilo	L4p	66 lb - $60,000
								> 100	kilo	L3p	> 66 lb

Cocaine / Methamphetamine / Crack / Ice / Crank / Heroin

Street Value				Current Proposal				Friendly Amendment			
1	grams		$100	< 3.5	grams	L9p	1/8 oz - $300	< 2	grams	L9p	1/16 oz - $200
3.5	grams	1/8 oz	$300	< 100	grams	L7p	4 oz - $8,000	<7	grams	L8p	1/4 oz - $600
12.5	grams	1/2 oz	$1,200	< 1,000	grams	L4p	2 lb - $64,000	<13	grams	L7p	1/2 oz - $1,200
25	grams	1 oz	$2,000	> 1,000	grams	L3p	> 2lb	<100	grams	L6p	4 oz - $8,000
100	grams	4 oz	$8,000					< 250	grams	L5p	1/2 lb - $16,000
225	grams	1/2 lb	$16,000					< 1,000	grams	L4p	2 lb - $64,000
450	grams	1 lb	$32,000					> 1,000	grams	L3p	> 2lb

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

FROM: Thomas R. Stanton
Deputy Reno County District Attorney
President, KCDAA

RE: House Bill 2332

DATE: February 25, 2009

Chairman Colloton and Members of the Committee:

Thank you for giving me the opportunity to testify regarding House Bill 2332. The Kansas County and District Attorneys Association generally supports this legislation. We believe that the overall purpose of this legislation is positive, in that it seeks to create a sentencing grid which recognizes the relative seriousness of all offenses, including drug offenses. We also believe the conversion of serious drug offenses to person felonies appropriately recognizes the effect these offenses have on and in our communities. However, we see several issues which need to be addressed before this legislation is passed.

Our first area of concern regards some of the changes in the drug laws. First, we oppose the removal of the enhancement for possession with intent to sell or sale of controlled substances within 1,000 feet of a school. This enhancement was placed into the statute to create drug free zones around school property. The enhancement is based on solid public policy, i.e. the protection of our children. Under the proposed change in the law, which would replace the language regarding crimes committed within 1,000 feet of a school with "to a minor or in the presence of a minor," it would be possible to set up a drug house across the street from a school without drawing an enhancement. The proposed terminology has been defined under the robbery statutes as requiring the criminal activity to be in the immediate presence of the alleged victim. This definition would, in all probability, be applied to the language of this statute. The

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Attachment # 2

sale of drugs across the street from a school, or even in the parking lot of a school when the students are in class, would not be sufficient to invoke the harsher penalty. Thus, the children of Kansas would receive no protection from the immediate dangers inherent in the illegal distribution of controlled substances.

Our second concern is the disparity in penalties between crimes involving heroin and crimes involving other drugs, primarily methamphetamine and cocaine. Most Kansas jurisdictions do not have serious issues with heroin; we do have serious problems with methamphetamine and cocaine. It makes no sense to promulgate criminal sanctions which do not reflect the issues facing Kansas. The fact that methamphetamine and cocaine are the substances creating a scourge in our communities cannot be denied, and passing legislation which addresses heroin as if it is the major drug problem in our communities is not reflective of the reality of drug trafficking and usage in Kansas.. Prosecutors need tools to crack down on the distribution of methamphetamine and cocaine, and this legislation fails to provide us with those tools.

We have a great concern with the portion of the proposed legislation which purports to determine by legislative fiat how a jury will determine the issue of presumptive amounts needed to suggest a presumption for possession of certain controlled substances with the intent to sell. Cocaine, and to a lesser extent methamphetamine, can be sold by either weight or dosage unit. Defining the presumptions for these drugs based on weight only ignores the realities of drug distribution. Additionally, the amounts fixed by the legislation which establish a presumption with intent to sell do not reflect the realities of street sales. For example, marijuana sells for about $50 to $100 per ounce on the street, while methamphetamine sells for about $100 per gram. The presumption within the proposed legislation (Section 5) would set the presumption for possession of marijuana with the intent to sell at 450 grams, or about $1,800 to $3,600 worth of the drug. However, the same statute sets the presumption for the sale of methamphetamine at 100 grams, or a street value of $10,000. Ecstacy sells for about $10 per pill, and the presumption for intent to sell is set at 100 dosage units, or about $1,000 street value. Finally, heroin sells for between $100 and $200 per gram in Kansas. This bill sets the presumption for possession of heroin with intent to sell at 3.5 grams, or a street value of between $350 and $700. The limited distribution of that drug in Kansas does not support the dramatically reduced cut-off amounts vis-à-vis methamphetamine and cocaine. The quantity breakdowns should be modified to reflect the issues we face in Kansas.

Additionally, there have been numerous attempts by the defense bar to reduce the seriousness of drug crimes in Kansas by alleging the language of various statutes are legally identical to one another. The most well known cases have involved manufacturing crimes, and resulted in the reduction of sentences pursuant to both K.S.A. 65-4159 and K.S.A. 65-7006. (See *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004); *State v. Frazier*, 30 Kan.App.2d 398, 42 P.3d 188, *rev. denied* 274 Kan. 1115 (2002)). We would like to suggest amendments to preclude future such attacks on this legislature's intended legislation.

The KCDAA is also concerned that this legislation does not take into account any of the legislative efforts currently underway in this session, many of which have received positive reaction from the legislature. None of the legislation currently under consideration is reflected

in the provisions of this act. The legislature would be remiss if this legislation were to pass without consideration of the other legislation currently pending before it.

We suggest the following friendly amendments to address these concerns and others:

1. Section 1(f)(Q): Drug paraphernalia shall not include any substance, chemical or other item listed in K.S.A. 65-7006, and amendments thereto, prior to its repeal, or in Section 9 herein.
2. The definition of "presence of a minor" is found in Section 1(r) of this bill. Section 1(r)(2) indicates that this term means "the illegal activity is conducted in a place where minors can reasonably be expected to be present." This language is ambiguous in that it leaves the question open as to whether a minor is actually required to be present. This appears to be an attempt to mirror the intent of the legislature when designing drug-free school zones, making it unlawful to sell drugs within 1,000 feet of a school, regardless of whether school was actually in session. This section needs to be clarified as to this point.
3. New section 2 indicates the transfer dates for criminal prosecutions under the act is July 1, 2009. It was our understanding this legislation would not go into effect until 2010. If that is accurate, the appropriate change of date would be required.
4. Section 3(f) should be modified as follows: "The sentence of a person who violates this section or K.S.A. 65-4159 prior to it repeal shall not be reduced because these actions prohibit conduct identical to that prohibited by K.S.A.. *65-4152,* 65-4161, 65-4163, *or 65-7006* prior to such sections repeal, or section*s* 5 *or 9*, and amendments thereto."
5. The divisions for the sentences for possession of methamphetamine, cocaine and any other controlled substance sold by weight with the intent to sell in section 5(d)(1) should be modified to less than 3.5 grams, severity level 9 person felony; 3.5 to 50 grams, severity level 7 person felony; 50 to 100 grams, severity level 4 felony; and over 100 grams, severity level 3 person felony.
6. New section 5(d)(5) should be amended as follows: "For any violation of subsection (a), the severity level of the offense shall be increased one level if the offender is 18 or more years of age and the controlled substance or controlled substance analog is distributed or possessed with the intent to distribute to a minor or in the presence of a minor, *or 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.*
7. New section 5(e)(4) should be modified to reflect 50 grams as the presumptive amount for the rebuttable presumption.
8. The definition of "dosage unit" in section 5(g)(2) should be modified to allow

crack cocaine to be sold by dosage units.

9. New section 8 should be corrected to begin "Unlawfully obtaining," rather than "Unlawful by obtaining."
10. There should be no reduction in the severity level for aggravated battery on a law enforcement officer from a severity level 4 person felony to a severity level 5 person felony in section 38. The KCDAA has supported HB 2060 which would leave the severity level at 4, and make the sentence presumed imprisonment.
11. Section 79 needs to reflect the *Holt* fix currently before the legislature in SB 281.
12. Re §18 (p19), seeking to amend KSA 8-2,128: The definition of "felony" should be amended to read as follows – "any offense under state or federal law that is punishable by death or imprisonment for a term exceeding one year ***or is defined by Kansas law as a felony***;" This will allow for the use of past convictions of felonies that carried a lesser term of possible imprisonment than one year.
13. Regarding section 78, seeking to amend KSA 21-4603d: We are requesting removal of all references to conservation camp placements. The conversation camps will not be funded for the next fiscal year and likely will not be funded in the next few years, if ever again. Since the camps are not operational, the courts cannot place inmates there. Leaving the law on the books requires the courts to undertake a meaningless analysis of an offender's suitability for placement in a non-existent facility. If the camps are ever funded again, it would be easy to reestablish mandatory placement consideration. Wee also believe that references to the non-existent intermediate sanction centers should also be removed.
14. Regarding sections 86 (p113) and 90 (p118) – these sections each contain a restriction on prosecutors' ability to plea bargain criminal history in drug cases. The restrictions are unnecessary given other laws which require all criminal history to be counted, but in any event, the restriction doesn't need to be stated more than once.

These suggested amendments reflect the changes the KCDAA believes should be considered prior to the final adoption of HB 2332. Again, we believe the concept put forth in this bill is positive, but the legislation should mesh with legislation currently being considered for this session.

Thank you for your consideration of our positions on this matter.

Respectfully submitted,

Thomas R. Stanton
President, KCDAA

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

FROM: Thomas R. Stanton
Deputy Reno County District Attorney
President, KCDAA

RE: House Bill 2332

DATE: February 26, 2009

Chairman Colloton and Members of the Committee:

This testimony is intended to supplement my previous written testimony on HB2332. I was present for the first day of hearings on this bill, but my duties in Reno County preclude me from attending any further hearings. This testimony is intended to cover some issues that I would have covered in my oral testimony, and to respond to some of the issues that were raised in the first day of hearings.

Initially, I would indicate to you that the version of the bill that I possessed at the time I submitted my initial written testimony was the initial bill, which has apparently been corrected in some manner since I submitted my testimony. My recommendation #3 regarding the date upon which this act would become effective has apparently been amended. Additionally, my recommendation #9 regarding a technical grammatical change to section eight of the legislation has also already been addressed.

I would like you to understand my background as I make recommendations on behalf of the Kansas County and District Attorneys Association. I have been a prosecutor for eighteen years, primarily in the area of drug prosecution. I have prosecuted numerous methamphetamine lab cases, as well as many cases involving possession of controlled substance with intent to sell and sale of controlled substances. I am very familiar with most of the drugs commonly sold in Kansas, with the exception of heroin, which does not pose a problem in Reno County at this point. However, I have done some research into that drug. Additionally, I am the head of the legal staff for Kansas Top Gun, a drug prosecution and narcotics officer school which has been presenting instruction on drug-related topics for the last six years. In that capacity, I have contact with drug prosecutors and drug investigators throughout the State of Kansas.

The first issue I would like to discuss in this testimony is regarding the issue of possession of controlled substances with intent to sell or sale of controlled substances within 1,000 feet of a school. I am very involved in the drug prosecution section of the Kansas County and District Attorneys Association, which last met in October of 2008. The issue of doing away

with the concept of creating a buffer zone within 1,000' of a school met with extreme resistance from all of the prosecutors in that section.

The crime of possession of controlled substances with intent to sell within 1,000 feet of a school or sale of controlled substances within 1,000 feet of a school is based on a federal model. The federal government has such a statute, and Kansas adopted that model. The purpose for that model was to place a drug-free zone around a school. The concept was based on child safety, not on the increased prosecution of drug offenders. I believe it has worked well. The suggested change to the drug laws which would do away with this crime is, in my opinion, misplaced. In speaking with Mr. Drees regarding this change, I was informed of two basic purposes or reasons for this change. First, I was informed that there were jurisdictions in which officers were intentionally setting up purchases within 1,000 feet of a school in order to obtain a higher crime designation against an offender. While I would agree that this is in contravention of the purpose of setting up such zones, I was totally unaware of such incidents until Mr. Drees informed me of them. If these types of activities are occurring in Mr. Drees's jurisdiction, or in others, then that is a local issue for the prosecutor. A prosecutor using his or her discretion telling law enforcement officers that he or she will not prosecute such cases as level 2 felonies would certainly be a better solution than removing the drug-free zones around schools. Those are issues that can be handled by local prosecutors. In speaking with the KBI, I was only informed of one other jurisdiction in which this may be occurring. This leaves 103 Kansas counties where it does not appear to be occurring. I believe this is an insufficient reason to remove this crime from the books.

The second issue that was raised to me was that in some smaller towns most of the town would be covered by this rule. My response to that is, "What's the problem with that?" I do not like people selling drugs in my jurisdiction. If the person selling drugs wants to take the risk of selling within 1,000 feet of a school in a small town, then he or she should realize the chances of being prosecuted for a higher felony are present. The fact that there are only small potions of a community not within 1,000 feet of a school is certainly not a good public policy reason for not pursuing this aspect of the law.

I am further concerned with the language of the statute. New section 1(r) is a definitional section. It defines "presence of a minor" in three ways. First, "presence of a minor" means "a minor is in close proximity to the illegal activity." This close proximity definition would be similar, in my opinion, to "in the presence of" portion of the robbery and aggravated robbery statutes, which would require the minor to be very near the activity and personally present for the activity in order for the condition to be applied. The second definition of "presence of a minor" is "the illegal activity is conducted in a place where minors can reasonably expect to be present". The proportionality committee believes that this language is sufficient to cover schools and, therefore, replace the language currently in the statute forbidding drug activity within 1,000 feet of a school. However, I believe that this term will be found to be unconstitutionally over-broad. The term could easily be applied to anywhere within a city setting. For example, a child could reasonably be expected to be at school, in a grocery store, at the mall, in a residential area, on any street or sidewalk, in any government building, the public library, any restaurant, etc. As you can see, this language is so broad that it is my belief the Kansas appellate courts will find it unconstitutional. There is no requirement that a child actually be present, and there is nothing in the statute that indicates the child does not have to be present. In the current statute, there is a specific statement by the legislature that there is nothing requiring a student to be present on school grounds for there to be a violation. The third definition of "presence of a minor" is "in the minor's dwelling". I wholeheartedly support the concept of increasing penalties when minors

reside at the location regardless of the proximity to a school. However, this does not act as a protection for school children. If, as I believe the case to be, the second definition is found by the appellate courts to be unconstitutional, this destroys the concept of protecting children from drug activity except in situations where minors are actually present or reside in the house. I believe that this public policy change is not in the best interests of the children of the State of Kansas.

The next issue I would like to address is the issue of the amount of drugs that are required for the various sentencing levels, and for the definition for the presumption of intent to sell. I have dealt with this issue in my previous written testimony, but I will attach to this testimony a chart showing the amounts required for presumption with the intent to sell, the street prices for those drugs at this time, and the total street value of the amounts laid out by this bill. The largest drug problem in Kansas involves the distribution of methamphetamine and cocaine, both powder drugs. The street values require for presumptions by this legislation are clearly out of proportion with those required for other drugs. This bill should be amended to address the realities of prosecution in Kansas. Again, this was an issue that was of overwhelming concern to all the drug prosecutors that attended the prosecution section meeting at the October KCDAA meeting.

The next issue I would like to address in this supplemental testimony was raised by legislators regarding manufacture of methamphetamine. It was the committee's determination that the high departure rate was a result of prosecutors, judges and defense attorneys agreeing that the sentence for this crime was out of proportion, and was too harsh. I respectfully disagree with the conclusion of the committee. I have prosecuted as many or more manufacturing cases in the State of Kansas as any other Kansas prosecutor. I have also had discussions with other prosecutors regarding the prosecution of this crime. I have great respect for the courts in the State of Kansas. This body needs to understand that the individual judges are sworn to do what the believe is justice in every single case. There has been a perception by some judges that the sentence for manufacture of methamphetamine is out of proportion to other sentences for different crimes within the state. Specifically, I have heard on many occasions persons within the system question why manufacture of methamphetamine is penalized more harshly than some homicide cases. I will not address that issue, because the proportionality committee has attempted to do so. However, I do not believe that the perception of the committee regarding the high rate of departures is accurate. I am aware that after the legislature raised the penalty of manufacture to a level 1 drug crime, there were some courts, all be it a minority of courts, which began to grant durational departures on a regular basis. These departures were, many times, ordered over the objection of the prosecutors. This meant that prosecutors were taking cases to trial only to have a departure subsequently ordered by the court. The prosecutors, therefore, determined it was better to work out cases to a departure rather than to take a case all the way to trial, see a departure, and end up having to fight the case on appeal. I want to stress that this was a minority position taken in Kansas, but it remains a fact.

More importantly, and more significantly, departures are granted in these cases for very different reasons. The manufacturing statute is an unique statute. The provisions of the statute forbid a district court judge from granting a dispositional departure, that is a departure to probation, in cases where there is a conviction for attempted manufacture or manufacture of methamphetamine. This is not true of lesser-included charges, such as possession of pseudoephedrine with the intent to manufacture. Because of this fact, prosecutors often will agree to a downward departure in order to make sure that a defendant goes to prison on a manufacturing charge without the opportunity of requesting a dispositional departure. In other types of cases, such as aggravated kidnapping or aggravated robbery, the prosecutor may plead

down the case to a kidnapping or a robbery, and such would not be shown to be a departure. It is the unique character of this statute that results in prosecutors agreeing to departures to insure prison time for defendants.

The other unique aspect of this statute is that a second conviction results in a presumptive sentence twice the aggravated sentence. When I prosecute a drug case, I normally prosecute on multiple felony counts. This usually results in a defendant being at least criminal history category "E" for all subsequent convictions. This would mean that if a defendant goes and serves a five or six year prison term, and then re-offends by manufacturing again, the presumed sentence for that defendant would be 340 months in prison. Knowing there is this high of a penalty for persons who re-offend, prosecutors who agree to departures are setting a high bar for a defendant once that defendant is released from prison. I have several opinion cases involving persons who received leniency on manufacturing cases under *State v. McAdam*, who have re-offended. I am not agreeing to negotiations with any of those persons. Additionally, if a defendant goes to a prosecutor and agrees to serve eight or nine years in prison for a drug manufacturing crime, the prosecutor is left to reflect on whether this is a significant penalty for the actions of the defendant, and whether the acceptance of that offer would be in the best interests of the people of the State of Kansas. The prosecutor may very well determine that that is in the best interests of the people of the State of Kansas to accept such an offer.

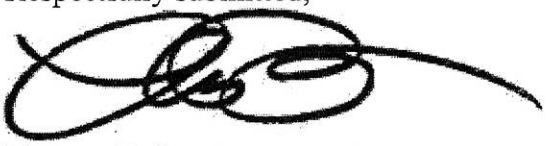
Finally, on this issue, the high departure rate cited by the committee apparently also takes into consideration dispositional departures. When I am prosecuting a case, I have to look at all of the factors regarding the case to determine what I believe is just in the case. For example, if I have a situation where I have a 22-year-old girl who is assisting in the manufacture of methamphetamine in order to receive methamphetamine for personal use, she may not be the type of candidate for a long prison term that this legislature envisioned when the serious penalties were passed. I have developed what I think is a positive alternative to prison for persons in this particular situation. I charge a defendant in a separate case with a misdemeanor. The defendant then pleads to conspiracy to manufacture methamphetamine and other felony charges, along with the misdemeanor case. The defendant agrees that the felony sentences will run consecutive to the misdemeanor sentence. The defendant agrees to serve the twelve month misdemeanor sentence from the point of sentencing on. In many cases, this means the defendant has already served several months in jail waiting for trial, and will serve another twelve months. My experience both as a prosecutor and in speaking with professionals in the treatment arena, tells me that a person can be healed from the effects of methamphetamine after two years of abstinence. My experience also tells me that if a person stays off methamphetamine for at least a year, the chances of that person being successful in kicking the methamphetamine habit are greatly increased. Therefore, by placing a person in custody for a long period of time, and then putting them on corrections for three years, their chances of recovery and becoming viable citizens in our community increases greatly. These persons have long sentences hanging over their head, and if they fail, they will go to the Department of Corrections and serve twelve or more years. If they are successful, however, they become viable citizens in our community and are not a burden to the prison system. I have done this on several cases, and have seen most of those persons complete community corrections without a single violation. Those two or three that violated community corrections are in prison. It is incumbent upon prosecutors such as myself to seek these alternatives, especially in a time when there is such an issue regarding bed space. While I began my career vowing never to grant a departure to a person charged with manufacture of methamphetamine, I came to realize that doing so would overburden the system. I, therefore, attempt to place people in prison for long periods of time only when I believe they are a danger to the community.

The next issue I would raise to this committee is an issue that was discussed yesterday regarding the crime of failing to register. I spoke to Mr. Drees about this after the hearing, and I think he will probably be telling you himself that there was an error made in that presentation. The presentation yesterday indicated to you that a person would be presumptive prison for this crime because of his or her prior conviction for a person felony. However, in *State v. Pottoroff*, 32 Kan.App. 2nd 1161, 96 S.3rd 280 (2004), the Kansas Supreme Court found that the underlying offense for which a person has to register is considered an element of that offense. Therefore, a person convicted of failing to register will be in a presumptive probation category unless a defendant has prior person felonies other than the person felony underlying the requirement to register. The state argued in that case that this was a status offense, and therefore the underlying crime should not be considered an element. However, the Supreme Court disagreed with that analysis.

The final issue I wish to address regards section #16 of the bill. This section considers unlawful proceeds derived from drug activity. The section would have the same breakdown applied as in any other theft crime. However, I would request that this body reject that analysis. The unlawful proceed section is basically a money laundering section. To send a message that any drug money laundering operation, regardless of its size, should be a misdemeanor, is a bad policy decision. We do not believe that the breakdown for this statute should be lumped in with theft statutes.

We ask that this body carefully consider the requested amendments in my previous testimony, and take into consideration the testimony I would have provided had I been able to meet with you in person.

Respectfully submitted,



Thomas R. Stanton

PRESUMPTIVE DISTRIBUTION QUANTITIES

CONTROLLED SUBSTANCE	PRESUMTIVE QUANTITY	STREET PRICE	STREET VALUE
Marijuana	450 grams	$50-$100/ounce	$900 to $1,800
Heroin	3.5 grams	$100-$200/gram	$350 to $700
Ecstacy	100 dosage units	$10/pill	$1,000
Methamphetamine	100 grams	$100/gram	$10,000
Cocaine	100 grams	$100/gram	$10,000

KANSAS
DEPARTMENT OF CORRECTIONS

Kathleen Sebelius, Governor
Roger Werholtz, Secretary

www.dc.state.ks.us

Testimony on HB 2332
to
The House Corrections & Juvenile Justice Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
February 25, 2009

The Department of Corrections supports the work of the Recodification Committee and their merger of the drug and non-drug sentencing grids into one inclusive sentencing grid. The proportionality of sentences is something that has eluded the Kansas criminal justice system for some time, and thanks to the work of the committee, that goal seems to be attainable. As an agency that served as a voting member of the committee, we understand the time-consuming and dedicated deliberations of all committee members that went into the policies and philosophies behind the proposed HB 2332. However, the KDOC would like to stress that the bill comes with a projected bed increase of 265 to 458 additional prison beds needed by June 30, 2011. Due to the current budget situation, the Kansas Department of Corrections has had to remove 96 beds from our potential capacity since January 1, 2009, and will be removing an additional 424 more beds by June 30, 2009. Our agency will not be able to meet the demand for the projected 458 additional beds within two years at our current capacity without the resources to reopen beds closed in FY 2009 or without new capacity added elsewhere.

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House Bill No. 2332
Testimony
House Corrections and Juvenile Justice Committee
February 25, 2009

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Family and Children Program Coordinator

Thank you for the opportunity to testify on House Bill No. 2332. This is a lengthy and complicated bill, and I want to commend the recodification committee for what appears to be a very thoughtful and comprehensive revision of the Kansas criminal code. This bill has had considerable input from the Kansas Judicial Branch by virtue of having Court of Appeals Judge Christel Marquardt, Chief Judge Richard Smith, Chief Judge Larry Solomon, and retired Judge John White on the committee. Chris Mechler, Court Services Specialist, also worked with the committee as a representative of the Kansas Sentencing Commission.

All of my testimony is in regard to the supervision of offenders by court services officers. Court services officers are state employees with salaries and benefits paid by the state and subject to Judicial Branch personnel rules. Unlike the Kansas Department of Corrections and other state agencies, the responsibility for Judicial Branch salary and operating expenses is borne by two separate entities. The state is responsible for salaries and the counties are responsible for operating expenses such as training, housing, travel, equipment, supplies, and communications. This is particularly relevant considering the significant training requirements necessary to implement HB 2332. If passed, we anticipate being able to prepare judges and court services officers for the upcoming changes.

The intent of Section 78 (o) on page 92 is unclear to me. The first sentence appears to require that all persons convicted of a Class A Misdemeanor be supervised by court services officers. The second sentence states that offenders released on probation shall be supervised by court services officers. I don't believe the intent is to put all offenders on probation under the supervision of court services, as the second sentence appears to require. There is also some question whether the intent of the first sentence is to place every person convicted of a Class A misdemeanor on supervised probation. Currently, judges place most individuals convicted of a misdemeanor on probation, but there is not a requirement. Although we don't have data showing us the number of individuals convicted of a Class A misdemeanor who are not on supervised probation, we believe the number is small and manageable. I have attached a balloon amendment that I believe resolves this issue.

Section 84 (f)(2)(B) on page 108 is new and requires the person requesting that the nonprison sentence be served by attending and successfully completing a treatment or behavioral modification program and notifying the court and opposing counsel *not less than* 20 days prior to sentencing. Once that request is made, the court services officer conducting the presentence investigation is required to verify the availability of the program and the adequacy of the person providing the program and the treatment or behavioral modification plan. This formalizes current practice in most cases and stops an infrequent but potentially dangerous practice of having the defendant promise at the sentencing hearing to enter an unknown and unverified treatment program.

However, first sentence of Section 87(f)(2)(B) on page 108 of the bill could be interpreted to apply only to a sentence that would be wholly satisfied by attending and successfully completing a treatment or behavioral modification program. Moreover, the 20 day requirement should be satisfied if the notice were provided to the court not less than 20 days prior to sentencing. Finally, I recommend striking the last phrase, since the defendant, not the program, is being sentenced. I recommend the first sentence be amended to read, "Any party requesting the nonprison sentence be served **in whole or in part** by attending and successfully completing a treatment or behavioral modification program shall notify the court and opposing counsel **not less than** 20 days prior to sentencing ~~of the proposed program.~~ I have attached a balloon amendment.

Finally, section 148 requires the administration of a standardized risk and needs assessment to determine the supervision level and placement of certain felony offenders by July 1, 2010. The Kansas Sentencing Commission has selected the Level of Service Inventory – Revised (LSI-R) as the instrument to be used.

Acquiring funding to train approximately 270 of our 352 court services officers has been a significant challenge. Remember that the Judicial Branch does not have a training budget for court services officers, as all training expenses are paid by the counties. Starting in 2003, the Office of Judicial Administration has submitted applications on three separate occasions for Byrne grants to pay for this training. All applications were denied. Funding was included in the base budget for FY 2010 and our most optimistic guess is that funding would be available in time to implement the LSI-R, but not earlier than January 1, 2011. SB 283, introduced on February 19 in Senate Ways and Means, would move the LSI-R implementation date from July 1, 2010, to January 1, 2011. The Judicial Branch remains committed to implementing this important procedure. However, without appropriate funding in the Judicial Branch FY 2011 base budget, successfully implementing and sustaining the LSI-R will not be possible.

Thank you for your time and attention.

in K.S.A. 21-4729, and amendments thereto, to participate in a certified drug abuse treatment program, as provided in K.S.A. 2008 Supp. 75-52,144, and amendments thereto, including, but not limited to, an approved after-care plan. If the defendant fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding, the defendant shall be subject to revocation of probation and the defendant shall serve the underlying prison sentence as established in K.S.A. 21-4705, and amendments thereto. For those offenders who are convicted on or after the effective date of this act, upon completion of the underlying prison sentence, the defendant shall not be subject to a period of postrelease supervision. The amount of time spent participating in such program shall not be credited as service on the underlying prison sentence.

and placed on probation

(o) All offenders who are convicted of a class A misdemeanor shall be under the supervision of a court services officer. ~~*In releasing a defendant on probation, the court shall direct that the defendant be under the supervision of a court services officer.*~~

Sec. 79. K.S.A. 21-4611 is hereby amended to read as follows: 21-4611. (a) The period of suspension of sentence, probation or assignment to community corrections fixed by the court shall not exceed five years in felony cases involving crimes committed prior to July 1, 1993, or two years in misdemeanor cases, subject to renewal and extension for additional fixed periods not exceeding five years in such felony cases, nor two years in misdemeanor cases. In no event shall the total period of probation, suspension of sentence or assignment to community corrections for a felony committed prior to July 1, 1993, exceed the greatest maximum term provided by law for the crime, except that where the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. Probation, suspension of sentence or assignment to community corrections may be terminated by the court at any time and upon such termination or upon termination by expiration of the term of probation, suspension of sentence or assignment to community corrections, an order to this effect shall be entered by the court. The provisions of K.S.A. 75-5291, and amendments thereto, shall be applicable to any assignment to a community correctional services program pursuant to this section.

(b) The district court having jurisdiction of the offender may parole any misdemeanant sentenced to confinement in the county jail. The period of such parole shall be fixed by the court and shall not exceed two years and shall be terminated in the manner provided for termination of suspended sentence and probation.

(c) For all crimes committed on or after July 1, 1993, the duration of

time; or

~~(3)~~ *(iii)* the nonprison sanction will serve community safety interests by promoting offender reformation.

in whole or in part

(B) Any party requesting the nonprison sentence be served by attending and successfully completing a treatment or behavioral modification program shall notify the court and opposing counsel ~~20~~ *days prior to sentencing* ~~of the proposed program~~*. The presentence investigation report by the court services officer shall verify the availability of the program and the adequacy of the provider of such program and the treatment or behavioral modification plan.*

not less than

(C) Any decision made by the court regarding the imposition of an optional nonprison sentence if the offense is classified in grid blocks 5-H, 5-I or 6-G shall not be considered a departure and shall not be subject to appeal.

(g) ~~The sentence for the violation of K.S.A. 21-3415, and amendments thereto, aggravated battery against a law enforcement officer committed prior to July 1, 2006, or K.S.A. 21-3411, and amendments thereto, aggravated assault against a law enforcement officer, which places the defendant's sentence in grid block 6-H or 6-I shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence, if the offense is classified in grid block 6-H or 6-I, shall not be considered departure and shall not be subject to appeal.~~

~~(h)~~ When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

~~(i)~~ *(h)* The sentence for the violation of the felony provision of K.S.A. 8-1567, subsection (b)(3) of K.S.A. 21-3412a, ~~subsections (b)(3) and~~ *subsection* (b)(4) of K.S.A. 21-3710, K.S.A. 21-4310 and K.S.A. 21-4318, and amendments thereto, shall be as provided by the specific mandatory sentencing requirements of that section and shall not be subject to the provisions of this section or K.S.A. 21-4707, and amendments thereto. If because of the offender's criminal history classification the offender is subject to presumptive imprisonment or if the judge departs from a presumptive probation sentence and the offender is subject to imprisonment, the provisions of this section and K.S.A. 21-4707, and amendments thereto, shall apply and the offender shall not be subject to the mandatory

House Corrections and Juvenile Justice Committee
February 27, 2009
Testimony of the Kansas Association of Criminal Defense Lawyers
Proponent in part/Opponent in part to House Bill 2332

Thank you for this chance to discuss HB 2332. For obvious reasons, KACDL has a great interest in proportionality. We are excited that this topic has received the attention it deserves. We are thankful for the years of hard, thoughtful work that the Kansas Sentencing Commission (KSC) and Kansas Criminal Code Recodification Commission (KCCRC) have put into their recommendations. We look forward to most of the proposed changes, but have a few concerns. Our concerns fall in the following areas:

Drugs

- **Making all distribution/intent to distribute offenses person felonies.** This is our biggest concern in this area. The Proportionality Recommendations say the rationale for designating all sales as person felonies is it "[r]eflects the degree of harm inflicted on the community and on the purchasers of said drugs." (written testimony of Tom Drees, Proportionality Chair of KSC, chart summary of recommendations dated 2/23/09, pg. 2). Person felonies currently include crimes of violence or injury (exs: sex offenses, homicides, robbery, aggravated battery, DUI manslaughter) or crimes involving a threat or risk of violence or injury (exs: stalking, aggravated assault, criminal threat, aggravated burglary, fleeing and eluding, arson). Where is the proportionality in putting rapists, murderers, robbers, house burglars and arsonists in the same category as the person who passes a joint at a party or tries to sell a few rocks of crack in order to earn product to feed his/her own addiction? Where is the proportionality in saying someone driving $60,000 of marijuana across the state of Kansas with no intent to sell anything in Kansas deserves a person felony whereas the investor who steals a Kansan's life savings will never be guilty of more than a nonperson felony?

  Another proposed rationale for designating sale/intent to sell offenses as person felonies is to allow "movement to presumptive imprisonment areas upon multiple convictions." (written testimony of Tom Drees, 2/25/09, pg. 1). If this committee is concerned about offenders facing increased penalties for repeat convictions for distribution/ possession with intent to distribute, then make a provision that provides 1) each subsequent conviction goes up a severity level or 2) a special rule that the second conviction is presumptive prison regardless of grid box presumption.

  Another thing to keep in mind is that currently everyone convicted of sale/intent to sell (regardless of weight of substance) is required to register as a drug offender. This means they have the same requirements (and penalties, if they fail to register) as sex offenders. They have the same stamped driver's license. They are on the same website.

- **Definition of "presence of a minor"** (new Section 1, pg. 6). Currently the law provides that possession with intent to sell/sale of drugs within 1,000 feet of a school is a severity level 2 drug felony (in the absence of the school element, that offense is a severity level 3 drug felony). Both Commissions considered the realities that "much of the cities and towns of the state are within radius of school property" and that often controlled buys (i.e. arranged by law enforcement) are arranged within the radius to ensure the enhancement. (KCCRC meeting minutes, 4/16/08, p. 3). Under this bill, if a person distributes or possesses with intent to distribute to a minor or in the "presence of a minor," it increases the severity level by one. The bill proposes this definition:

  > (r) ''Presence of a minor'' means:
  > (1) A minor is within close proximity to the illegal activity;
  > (2) the illegal activity is conducted in a place where minors can reasonably be expected to be present; or
  > (3) in the minor's dwelling.
  > This definition shall not be construed as requiring that a defendant actually be aware of the presence of a minor or a minor actually be aware of the illegal activity.

  It is our position that this definition 1) is worse than existing law, 2) is vague and ripe for argument, 3) will lead to the same problems and abuses that plague the current 1,000 feet law as recognized by the Commissions, and 4) will foster disproportionate punishment in that two-thirds of the definition does not even require a minor to be present or proximate!

- **Weight ranges**. We take issue with a couple of the weight ranges in the current bill (new Section 5, pgs. 7-8). However, we support the weight ranges in Mr. Drees' amendment with one exception. When "drug mules" drive through our state destined for some place else, they often do so not knowing exactly what they have and/or what it weighs. If the load is marijuana, it is usually well over 66 pounds. Currently, those people would be charged with a severity level 3 drug felony, which is a presumptive prison border box if they have no felony criminal history (otherwise it is outright presumptive prison). Many times the "mules" we see do not have any felony criminal history. The federal system is generally not interested in people carrying under 250 pounds (unless they have significant criminal history) and thus the state system takes on those cases. Under the amendment, distribution/ possession with intent to distribute marijuana over 100 kilos (66 pounds) would be a severity level 3. Even if a person had no criminal history, he/she would be facing a presumptive prison sentence of 54-66 months. Our state will have to pay to incarcerate these people for at least five years (with the accompanying price tag) and to keep them on post-release for three years. We would suggest that the levels in the amendment be adjusted so that over 100 pounds would be a severity level 5 (still presumptive prison, but for roughly half as long), with graduations up from there.

"Presumptive imprisonment border boxes"

- **Doubling the number of "PIBs" is currently fiscally impossible.** Not only is the Department of Corrections unable to meet the projected bed impact without additional resources (written testimony of Roger Werholtz on HB 2332, 2/25/09), but resources currently relied upon in sentencing border box defendants are also drying up. Labette camps for women and men are gone. Many treatment facilities are maxed out and/or facing their own budget cuts.

- **Current law addresses repeat property offenders.** "These [PIB] boxes have been added as a means to address repeat property offenders and allow the court latitude to order prison for repeat property offenders." (written testimony of Tom Drees, 2/25/09, pg. 1).

  First, the Legislature has spent a lot of time recently addressing repeat property offenders. For example, in 2007 it strengthened penalties for repeat burglaries. Last year, HB 2707 made the sentence for felony theft presumptive prison for people with three priors for felony theft and/or burglary (or a combination thereof) and the sentence for burglary presumptive prison for people with two priors for theft and/or burglary (or a combination thereof). HB 2707 also made a third and subsequent conviction for criminal deprivation of a motor vehicle a presumptive prison felony. (Note: All of these changes were analyzed at length regarding their bed impact and this is what the conference committee determined was fiscally possible.) Second, courts currently have latitude to sentence offenders to prison even if they fall into a presumptive probation box – it's called a dispositional departure. It does implicate *Apprendi* and can be done on the motion of the state or *sua sponte* by the court.

  In its January 2009 report, the KSC Proportionality Subcommittee states: "While one of the goals of the Kansas Sentencing Guidelines is to treat similar defendants similarly, the Subcommittee recognizes that a 'one size fits all' sentencing structure leads to disproportionate sentencing." (Kansas Sentencing Proportionality Recommendations, pg. 3). This statement is one of the philosophies of KACDL. Having "special rules" may make for a long journal entry and a lengthy KSA 21-4704, but special rules are tailored solutions passed by this legislative body over time. They address the public's specific concerns within the bounds of what is fiscally possible. Doubling the border boxes and emphasizing they are presumptive prison is antithetical to proportionate sentencing and the current fiscal situation.

Respectfully submitted,

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on behalf of KACDL