KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council, Professor Tom Stacy**

DATE: **January 31, 2012**

RE: **Testimony in support of Senate Substitute for Sub. for HB 2318**

As originally introduced, HB 2318 contained the drug policy recommendations of the Criminal Recodification Commission. The Judicial Council recommended the bill after a study by its Criminal Law Advisory Committee. Last year, the House Juvenile Justice and Corrections Committee amended the bill at the suggestion of the Kansas County and District Attorneys Association by adding a severity level to the drug sentencing grid. Expanding the drug grid from 4 to 5 levels and the conforming amendments to other statutes required a substitute bill: House Sub. for HB 2318. The bill currently before the Committee, Senate Substitute for Sub. for HB 2318, essentially returns to the original version of HB 2318.

The Judicial Council's Criminal Law Advisory Committee had no objection to the 5-level drug grid contained in the House Substitute bill; however, the Committee is not taking a position on whether a 4 or 5 level drug grid is preferable. Rather, the Committee's main concern is the other policy issues addressed by the bill, especially tying severity levels to drug quantities.

Senate Sub. for HB 2318 would amend the drug code as follows:

- **Section 1.** The definition of "manufacture" in the drug code should be revised. The proposed language would exclude the actions of packaging, repackaging and cutting controlled substances. Packaging, repackaging and cutting are not properly part of criminal drug manufacturing, but rather, they are acts more closely associated with drug distribution.
- **Section 2.** The severity of drug distribution should be determined by the quantity of the drug. The idea for using quantity originated at the Kansas Sentencing Commission Proportionality Subcommittee and was supported by the Recodification Commission. These two groups agreed to let the Commission determine the proper quantity levels and the Criminal Law Advisory Committee agreed with their proposals.

  Currently, the severity level for distribution is based on recidivism of the offender. However, the recidivism enhancement was created before the sentencing guidelines. Since the guidelines account for an offender's criminal history, drug quantity is a preferable alternative method of determining the severity level of the offense. Of the four states that border Kansas, each ranks the severity of its drug distribution offense by quantity in some way.

  The Commission conducted a substantial amount of research and carefully considered the proposed language. In 2008, staff members consulted with the KBI, the DEA, Kansas law enforcement officers along with Kansas prosecutors and district court judges regarding the proposal. The Commission also employed Kyle Smith, formerly of the KBI, as a staff attorney to work on this proposal.

The quantity thresholds are based on four classifications: small, medium, large and super large. The quantity thresholds are based on quantities that represent distribution units. Subsection (d)(1) creates a generic quantity threshold into which drugs such as cocaine fall. There is a specific quantity threshold for heroin and methamphetamine, due to its smaller distribution unit, and drugs sold by dosage unit such as LSD or prescription drugs. Subsection (g)(2) defines a dosage unit similarly to the definition used in the Drug Tax Stamp Act.

Subsection (e) contains a presumption of intent to distribute if certain quantities are possessed. A defendant may rebut the presumption; however, it allows a jury to infer, from the quantity alone, that a defendant intended to distribute.

- **Sections 3 and 4.** These sections contain technical amendments drafted by the Revisor's office.
- **Section 5**. The proposed language is recommended in lieu of K.S.A. 21-5709. The relationship between the possession of paraphernalia and precursors offense and the general possession, distribution, and manufacturing offenses has caused much confusion and litigation in cases such as *State v. Campbell* and *State v. McAdam*. A method of clarifying the relationship between these offenses is to eliminate the possession of paraphernalia and precursors as a separate offense and define such possession as a sufficient overt act toward the attempted violation of the possession, distribution and manufacturing offenses.
- **Sections 6 and 7.** After passage of the drug code recodification, the provisions of the 1,000 feet of school enhancement in K.S.A. 21-5705, K.S.A. 21-5709 and

K.S.A. 21-5710 were unintentionally changed. The previous version of the school property enhancement required the offender to be 18 or more years of age.

Legislation was submitted in 2010 to correct the error; however, the Recodification Commission has since discovered that several prosecutors are in favor of removing this offender age element and, in retrospect, the Commission determined that the purpose of the school property enhancement is meant to protect children from the dangers of controlled substances. In many cases, the offenders who bring controlled substances within such proximity to the schools are themselves under 18 years of age. Therefore, the recommendation is to remove the 18 year offender age requirements from the 1,000 feet of school property enhancements.

The remaining amendments are technical in nature.

- **Section 8.** The recommendation is to add subsection (d) in order to permit dual prosecution for this offense and theft by deception. The remaining amendments are technical in nature.
- **Sections 9 and 10.** These sections contain technical amendments drafted by the Revisor's office.