Senate Judiciary Committee
House Bill 2318 (drug code/sentencing grid changes)
Testimony of Jennifer Roth
Proponent (with concerns)
January 30, 2012

I appear today as an individual. Because of all the moving parts in the different versions of HB 2318, I am going to speak only for myself for now. I thank the Recodification Commission and Judicial Council for their hard, lengthy and thoughtful work. While I applaud the policy of treating drug offenders in a more proportionate way, the recommendations present a few problems:

Treating possession of precursors and paraphernalia as attempted manufacture, distribution or possession. The rationale behind this proposed change is:

> 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*. The Commission determines that a method of clarifying the relationship between these offenses is 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.

Kansas Criminal Code Recodification Commission, 2010 Final Report to the Kansas Legislature, Volume II, pg. 49.

The best way to demonstrate the impact of this change is a chart:

Description of offense	**Current penalty**	**Proposed penalty (with 5-level grid)**	**Proposed penalty (with 4-level grid)**
Possession of ephedrine, pseudoephedrine, anhydrous ammonia, etc. with intent to manufacture (meth)	SL 2 drug felony	SL 1 drug felony (i.e. an attempted manufacture, which is the same as a completed manufacture)	SL 1 drug felony
Possession of paraphernalia with intent to manufacture a controlled substance	SL 4 drug felony	SL 1 drug felony (if offender has a prior conviction for the same or the drug is meth) or SL 2 drug felony	SL 1 drug felony
Possession of paraphernalia with intent to distribute or cultivate a controlled substance	SL 4 drug felony (or a Class A misd. if it is fewer than five marijuana plants)	SL 1, 2, 3 or 4 drug felony, depending on weight of drugs (if there is any present)	SL 1, 2 or 3 drug felony
Possession of paraphernalia with intent to possess opiates, narcotics or stimulants	Class A misdemeanor	SL 5 drug felony	SL 4 drug felony
Possession of paraphernalia with intent to possess depressants, hallucinogens	Class A misdemeanor	Class A misdemeanor or SL 5 drug felony, depending on if there are priors for possession	Class A misd. or SL 4 drug felony, depending on priors

It is important to remember that in drug sentencing, an attempt does not drop the offense to a different severity level. Instead, K.S.A. 21-5301(d)(1), the law on attempts (which this bill does not change) provides that "[a]n attempt to commit a felony which prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months."

Under this bill, every crack pipe is a felony. Every possession of ephedrine is the same as a completed full-blown meth manufacture (since an attempt is the same as a completed offense). Arguably, a bong could be a misdemeanor or a felony, depending on whether the person has a prior for possession of marijuana. This is not moving in the direction of proportionality – it creates more felonies or increases the severity levels of ones that exist now – all in the name of addressing "confusion and litigation." Furthermore, the bed impact will be huge. In 2011, Topeka Municipal Court had 135 people convicted of paraphernalia. Arguably a majority of those convictions would be felonies under HB 2318. In order to get a reliable prediction of not only bed impact but also the impact on probation or parole/postrelease resources, you would need to know how many misdemeanor convictions for paraphernalia there were in Kansas district courts and municipal courts.

Charging juveniles with distribution or intent to distribute. According to the Recodification Committee's final report:

> The Commission discovered that several prosecutors were in favor of the unintentional change. In retrospect, the Commission determines that there should be no offender age requirement because 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.

Kansas Criminal Code Recodification Commission, 2010 Final Report to the Kansas Legislature, Volume II, pg. 42.

This Legislature has to make a policy decision about whether to treat children differently than people 18 and over when it comes to 1,000 feet of a school enhancements. Apparently it was "unintentional" that the language was changed in the first place. At one point, the Legislature decided the 1,000 feet of a school enhancement would not apply to juveniles. I ask you to not undo that policy change now. This bill already addresses people who distribute or possess with intent to distribute to minors – regardless of the offender's age – by making it a severity level 7 person felony.

Continued use of the 1,000 feet of a school language. Currently the law provides that distribution or possession with intent to distribute within 1,000 feet of a school is a severity level 2 drug felony (in the absence of the school element, intent to distribute is a severity level 3). Under this proposed bill, "the severity level of the offense shall be increased one level if the controlled substance or controlled substance analog was distributed or possessed with the intent to distribute on or within 1,000 feet of any school property." Hence, the lowest possible severity level would be a 3 (with a 5-level drug grid – if it remains a 4-level drug grid, the lowest possible severity level is a 2).

While this is a step in the right direction, the 1,000 feet of a school language remains troubling. Both the Kansas Sentencing Commission Proportionality Subcommittee and the Kansas Criminal Code Recodification Commission considered 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, pg. 3).

Nevertheless, this language continues to appear in proposed laws. This bill already provides for an enhancement to a severity level 7 person felony "if the substance was distributed to or possessed with the intent to distribute to a minor." If the purpose of the school property enhancement is to protect children from the dangers of controlled substances as the Commission says it is, then this person felony enhancement certainly covers protecting children. There is no need to sweep in distribution or possession with intent to distribute cases that happen to occur within 1,000 feet of a school but do not involve students or children. Using the person felony enhancement when an actual minor is involved addresses the concerns about the locations of schools and purposefully-arranged controlled buys.

Exclusion of defenses. This bill proposes to preclude defendants from raising a defense that he/she "did not know the quantity of the controlled substance or controlled substance analog" or "did not know the specific controlled substance or controlled substance analog contained in the material that was distributed or possessed with the intent to distribute." If a goal of this bill is to address confusion and litigation, then putting in a provision that limits a defendant's constitutional right to present a defense is antithetical to that goal.

Amounts of drugs in lower levels. Currently our law has drug tax stamp provisions found at K.S.A. 79-5201 et. seq. This bill does not propose any changes to them. In K.S.A. 79-5201(c), "'dealer' means any person who, in violation of Kansas law, manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses more than 28 grams of marijuana, or more than one gram of any controlled substance, or 10 or more dosage units of any controlled substance which is not sold by weight."

Under this bill, the lowest level for marijuana is "less than 25 grams" – yet that won't even get a person a tax stamp charge. It takes an ounce (28 grams) to be a "dealer" for tax stamp purposes. Under this bill, the lowest level for methamphetamine is "less than 1 gram" – again, not enough to get a tax stamp charge. The lowest level of drugs sold by dosage unit under this bill is "fewer than 10" – again, it takes 10 or more to get a tax stamp charge.

These lowest severity levels need to have the weights increased a bit or it will sweep up "small" "distributors" into the "medium" category.

Attached to this testimony is a proposed balloon amendment with the reasoning behind it. Thank you for your consideration and attention to these concerns.

Respectfully submitted,

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Proposed Balloon Amendment with Rationale

K.S.A. 29-4202. Kansas Offender Registry Act.

(f) "Drug offender" means any person who has been convicted of:

(1) Unlawful manufacture or attempting such of any controlled substance or controlled substance analog as defined in K.S.A. 65-4159, prior to its repeal, or K.S.A. 2010 Supp. 21-36a03, and amendments thereto;

(2) possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to manufacture a controlled substance as defined in subsection (a) of K.S.A. 65-7006, prior to its repeal, or subsection (a) of K.S.A. 2010 Supp. 21-36a09, and amendments thereto;

(3) K.S.A. 65-4161, prior to its repeal, or subsection (a)(1) of K.S.A. 2010 Supp. 21-36a05, and amendments thereto *(i) if the quantity of the material was 100 grams or more, unless otherwise provided herein; (ii) if the controlled substance was heroin or methamphetamine, then if the quantity of the material was 3.5 grams or more; or (iii) if the controlled substance is distributed by dosage unit, then if the number of dosage units was 10 or more*. The provisions of this paragraph shall not apply to violations of subsections (a)(2) through (a)(6) or (b) of K.S.A. 2010 Supp. 21-36a05, and amendments thereto, which occurred on or after July 1, 2009, through April 15, 2010;

(4) an offense in effect at any time prior to July 1, 2011, that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection; or

(5) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2011 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

Rationale:

Years of work by the Recodification Commission, followed by the work of the Judicial Council, produced a lot of valuable information. Surrounding states use the weight system in classifying drug crimes. Not all people who distribute drugs or possess with intent to distribute should be treated the same. There are people who "distribute" drugs to their friends, there are people who sell drugs to support their own addictions and there are people who are drug dealers in the true sense.[1]

Current law provides that anyone convicted of distribution/possession with intent to distribute opiates, opium or narcotic drugs, or any stimulant – regardless of the amount of drug involved – must register under the Kansas Offender Registration Act (KORA). The addition of these offenders to the registry occurred in 2007. The drug crimes did not specify an effective date and, after much confusion, were applied retroactively. The current minimum time period to register is 15 years. Failure to comply with the registration requirements is a severity level 6, 5 or 3 person felony (depending on priors and/or length of noncompliance period). An offender convicted of distribution with intent to sell/distribution cannot petition for an expungement until his/her registration period is over (whereas it used to be five years after sentence or probation/postrelease supervision ended).[2] Obviously, being a registered offender presents challenges to people's rehabilitation.

Last session, the fiscal note for HB 2322 said changes to KORA would add 2,150 offenders to the offender registry *per year*. Testimony from the KBI indicated our registry already has about 4,000 non-sex offenders. While I do not know how many of these are drug offenders, it seems almost certain a majority of them are – and a big portion of that 2,150 people/year will also be drug offenders.

HB 2318 tells us it is time to stop treating alike all people who distribute/possess with intent to distribute drugs – and start considering the amount of drugs involved. Under the same reasoning, it is time to stop treating them all alike for registry purposes as well.

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[1] When reading through the minutes of the Recodification Committee, it is clear that members recognized a distinction between "small-time dealers" and "big-time dealers." (Sample comment: it is easier to catch small-time dealers than big-time dealers because they are often caught holding drugs, not selling them – see 9/26/07 meeting minutes). Even the KBI thought small-time dealers should be treated differently. (1/9/08 meeting minutes). That was the reason the Committee went to great lengths to come up with justifiable amounts/severity levels, so that proportionality could result. The minutes reflect that [one member , a prosecutor] commented that "everyone who habitually used drugs becomes a dealer at some point as a means to support their habit or help make drugs available to others." (12/3/08 meeting minutes, p. 3).

[2] As I finalize this and head out the door, it occurs to me the balloon should also include a change to the expungement statute as well – allow offenders convicted of possession with intent to distribute/distribution of a "small" quantity to petition for expungement three years after completion of sentence or supervision - the same time period for people convicted of possession.