

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

November 28, 2007
Room 519-S–Statehouse

Members Present

Tom Stacy, Chairman
Ed Klumpp, Vice Chairman
Tim Madden
Steve Opat
Jacqie Spradling
Debra Wilson
Senator David Haley
Representative Paul Davis
Representative Lance Kinzer
Michael Kaye

Members Absent

Ed Collister
Judge Christel Marquardt
Judge Richard Smith
Judge Larry T. Solpmon
Kim Parker
Senator John Vratil

Staff Present

Judge John W. White, Reporter
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Kansas Revisor of Statutes
Jason Thompson, Kansas Revisor of Statutes
Brett A. Watson
Connie Burns, Committee Assistant

Others Present

See attached list.

**Wednesday, November 28, 2007
Morning Session**

The meeting was called to order by Vice-Chairperson Ed Klumpp, due to not having a quorum committee business was discussed. A brief financial report was provided; the legislation provided \$150,000 thru the year, and expenditures through the last pay period in October \$40,417 which leaves a balance of \$109,582. Did a projection and at the current spending rate would expend \$142,000 leaving an \$8,000 balance. There had been discussion of doing subcommittees. The reason that it is staying the Attorney General has provided office space and other services which has cut down on overhead. Michael Kaye updated on the fund raisers that the subcommittee was going to meet with the Department of Corrections to review grant money available.

Staff changes. Connie Burns has agreed to do the committee minutes, and Dustin Slinkard, has the left the office of the Revisors of Statutes to work for the Shawnee County District Attorneys office. The next meeting will be January 9, 2008 and that will be before session starts, so availability of committee rooms will not be a problem, research staff will be available not sure on the revisors.

The minutes will be brought up when a quorum is met.

Judge White brought up the topics to be in the legislative report due February 1. Judge White explained to the committee that he met with Michael Kaye, Tom Stacy, Brett Wilson and Ed Collister on the 20th to talk about topics for the report and to work on the possibility of funding through grant. The report will reflect where the commission is, with emphasis through graphs and charts; what work previously has been done by the 3 R's sub-committee, updates including the work done, and the work yet to done by the commission. A history of the information and that law students from KU and Washburn assisted, and that attendance was good for the meetings.

Topics for Legislative Report

Helen Pedigo, Executive Director of the Kansas Sentencing Commission (KSC), stated that the KSC was looking to do away with the Drug Grid, and would like to see property crimes addressed and the multiplier offender, and retain a proportionality that needs to be part of the report.

Senator Haley asked Ms. Pedigo about the *Three Strikes You're Out* proposed legislation by Senator Schmidt and the bed impact of the legislation.

Ms. Pedigo responded that legislation was looked at this summer and if the language is changed, the impact statement may be modified a third time property offense is mandatory prison. If that language stands than it would be projected about 1,200 beds the first year, due to the change from presumptive probation to presumptive prison.

Tim Madden what will be done with the drug laws, two types, one that the legislative intent is carried through, *i.e.*, the McAdams issue, clearly defined those statutes, and proposed drug paraphernalia precursor be deleted and that the precursor shall be used in to manufacture drugs. Vera Institute has looked at the issues of manufacture and distribution, and models are available to review. Recidivism of repeat offenders could be done in some of the statutes and presented to the legislature on paraphernalia, and give the legislature a clear path if they choose to take it.

Chief Klumpp explained the updated report is due February 1, the sub-committee is working on proportionality, and to anticipate some policy changes that may come up during the legislative

session. Some of the changes might be voted down, but that the biggest policy change was bringing the drug statues over to the Criminal Code.

Debra Wilson, that in 2005 the 3 R's subcommittee voted to distinguished between marijuana and other drugs, because the level of harm associated with marijuana use is less than the harm to the user caused by other controlled substances, and recommends and urges the Commission to include recommendation of amendments to specific provisions of the drug code that would draw a distinction between crimes involving marijuana and crimes involving other drugs. Supporting her recommendation:

"Marijuana does not have the drastic negative impact on the users physical or mental health that drugs like methamphetamine, cocaine and heroin have.

"White House states 97.5 million Americans over 12 have tried marijuana, about 40.1% of US population as of 2005.

"Marijuana is less addictive that alcohol or tobacco, one study found that fewer than one in ten users of marijuana become regular users of marijuana while 15 percent of users of alcohol and 32% tobacco users develop a dependency on that drug.

"We have criminalized the possession, manufacture and distribution of marijuana because its use is viewed as harmful to the user, the penalties imposed for its possession, manufacture and distribution should reflect the level of harm.

"It was learned last month out of 51 American jurisdictions, 39 make a distinction in their distribution laws, treating marijuana more leniently than other drugs."

The latest recommendation by the commission was to leave marijuana at the level it is and to increase the level of severity on the other drugs to distinguish.

There is a volume distinction of five plants or more only distinguished on the tax stamp, but cultivation is not distinguished as number of plants.

The recommendation of the 3 R's subcommittee to the full committee was the penalties for manufacturing, distribution, or use of narcotics or stimulants should carry more severe penalties than similar crimes regarding marijuana.

Jacqie Spradling stated that she would recommend an increase in punishment or consequences if after a first time conviction of marijuana stay a misdemeanor and manufacturing and distribution of the other drugs goes to a higher level and with second possession of marijuana remains a felony.

Steve Opat stated he would argue that the harm created by marijuana trafficking is greater, that there is great quantities being shipped, and is a criminal predictor which the cause is addiction to marijuana.

Another issue that the legislators will be looking at is property offenses, and that is the next section that the commission will be looking at.

Back on the drug issue, Brett Wilson stated that he is working on a memo for the commission, that is based on the Vera Report, of the five state region Kansas is the only one that does not rank

the drugs by weight, and the commission may want to introduce a schematic into our drug codes Recodification without to much trouble.

Jacqie Spradling stated that if the code would go by quantity, is it quantity on the day of arrest or quantity that can be proved that would be sold?

Brett Wilson stated that evidence that they possessed a greater amount would be possession with intent to distribute.

Discussion followed on the Drug Tax Stamp, and how they work. There is a different tax stamp for the different drugs and amount. The Drug tax stamp is treated as sales tax and each transaction needs a drug tax stamp and the crime is not having the stamp affixed to the drugs at the time of sale.

Back on the report - It was brought up that policy changes would come as bill draft, and property crimes, drug crimes and personal crimes be separate.

Approval of Minutes

Chief Klumpp said that there were several typos to be corrected, page 7, second to last paragraph by Senator Vratil add changes in the after substantive, page 3 paragraph by Mr. Opat delete you after explained that.

Senator Haley moved to make necessary changes and approve the minutes for October. The motion was seconded by Representative Paul Davis. The motion carried.

Article 5 - Drug Crimes

21-501.1 - Definition Section - page 4 added lines 40 thru 43, the definition of manufacture recommendation will be discussed this afternoon.

In the definition of possession the right of control was discussed and has been added.

These changes were approved at the October meeting and the change stands.

21-502 - Effective date of this act - changes to deleting certain parts that were approved at the October meeting and stand.

21-503 - language was changed in paragraph A to conform to language done in the statute. The form to use will be discussed.

21-504 - no change approved as written

21-505 - the "except as otherwise authorized by law, and the recidivism section and was approved, and no change.

21-506 - needed to added marijuana to paragraph C, and added the recidivism part added the violations of city ordinance and county resolution. Jacqie Spradling moved to include the addition of city ordinance and county resolution. Seconded by Debra

Wilson. The motion carried. Steve Opat moved to delete line 31 section (e). Seconded by Jacqie Spradling. The motion carried.

21-507 - no change approved as written

21-508 - this will be discussed in the recommendation, if a change is recommended than a change could affect 21-507 (a).

21-509 - *Steve Opat moved to delete section 3 (d) in 65-4152. Seconded by Debra Wilson. The motion carried.*

Chief Klumpp asked Ms. Pedigo if there were any items to update from the Proportionality Subcommittee work. Ms Pedigo responded:

"Changing sentencing ranges on the grid, areas presumptive, border boxes, probation, average length of time served throughout the different severity levels.

"Drug Quantities - differentiating between for sell and distribution and quantities, *i.e.*,: super, large, medium and small, not yet defined where those cut off's will be.

"Property Crimes - levels differentiating between severity levels on value of property loss and expanding that in great detail to misdemeanor and six different felon levels, *i.e.*, \$100,000 plus would be severity level 5 non person felony clear down to severity level 10.

"Bringing all crimes back on with the exception off grids back on the grid.

"Domestic Battery, multiple crimes, DUI a 5th - recommend non-grid crimes be served at a State Institution.

"Elimination of the 1000 feet school provision, and going to sale to a minor or in the presence of a minor.

"Two severity levels for unlawful manufacturing - level 3 for meth and level 5 for other types of drugs."

Afternoon Session

Professor Stacy was present for the afternoon session of the meeting. Starting again at subsection:

21-510 - no change and approved.

21-511 - no change and approved.

21-512 - divided into subpart or paragraphs and approved.

21-513 - no change and approved.

- 21-514 - divided into subparts and paragraph c was an addition. Professor Stacy asked about the relationship to the statute. This was discussed at length at the October meeting and had been explained by Kyle Smith of the KBI, about "Turkey Dope" and the chance for overdose, especially among children. A simulated controlled substance could be charged as theft by deception. Professor Stacy asked if it should be deleted all together? Judge White stated we needed to do two things look at the definition of simulated control substance and look at whether we need this statute. Leave as is because it is current law and will take a closer look at whether a recommendation needs to be made. Two things to look at; in regards to the definition and to these particular statutes. Professor Stacy moved approval of paragraph c so that it conforms to current law. Seconded by Debra Wilson. The motion carried.
- 21-515 - no change and approved.
- 21-516 - no change and approved.
- 21-517 - no change and approved.
- 21-518 - no change and approved.
- 21-519 - approved with the removal of subsection A-3.
- 21-520 - had been approved but because of a session 2005 law staff needs to research and fix.

Memorandum of Possible Recommendations Concerning Drug Provisions

A memorandum was provided that addresses a number of topics for the commission to consider recommendation in the existing drug provisions (Attachment 1).

Section 1, Definition of manufacture - discussion regarding the recommendation on Page 3 of the memo, lines 8 thru 29. Steve Opat moved to approve the proposed recommendation with the addition of the prison statutory line on 2. Jacqie Spradling seconded the motion. The motion carried.

Discussion: question was raised about cutting if that could be part of the distribution or manufacturing be part of the end process. Chief Klumpp stated that maybe a section should be added to cover this.

Professor Stacy stated that under existing law the cutting agent would be listed as drug paraphernalia, so than it would be possession of drug paraphernalia with the intent to distribute. So the question becomes does the addition of the cutting agent in some ways increase the harm, by diluting the drug. Under existing law the mechanism for dealing with that is to treat as manufacturing which carries ten years more imprisonment for ever criminal history score than does distribution. The law isn't used that way, but could be used as a pre-addition of the cutting agent as an aggravated circumstance that would warrant an increased penalty for distribution and attempted distribution.

Chief Klumpp stated that if language isn't added the commission needs to at least be sure that the intent of the mere act of cutting would be an indicator to be used with attempt to sell the drug.

Section II, the recommendation to the legislation that a subsection be added to 21-515, specifying that an offender may be convicted of and sentenced for both that crime and theft by deception.

There was a case cited, where a drugs were sold as cocaine but was actually baking soda and was convicted by theft by deception. Steve Opat moved the recommendation be adopted. Tim Madden seconded the motion. The motion carried.

Section III. Grading Method - several options were offered, one common method is to rely on the quantity of the drugs involved. Instead of quantity our Code grades severity depending on whether the offense involved manufacture or distribution.

The commission lost a member and no longer has a quorum, so there will be general discussion on the memo.

Professor Stacy asked Ms Pedigo about the 85.9% downward departure rate for D-1 offenses listed in the 2006 Annual Report, and what effect this had on the McAdams decision. If an offender was convicted on the manufacture and in deference to McAdams how that was counted.

Ms. Pedigo said that this numbers were prior to the McAdams fix and would have been treated as D3. Seems to be a large number of downward departures on the Drug grid.

Steve Opat that there was all but one case that was a departure. Every other case was pleaded and this case went to court, and got 12 years right off the top.

Chief Klumpp stated that we fix this and we will don't have as many downward departures, than there would be more jury trials.

Jacqie Spradling stated that of her cases charged with possession and they might be facing a relatively insignificant sentencing of presumptive probation their statement to her every time would be why would I plea, even if I loose I get probation. So consequence do play in whether it is tried or plead.

Professor Stacy stated that if they made a recommendation to the legislature of reduction of D-1 sentencing, that the commission would not be that far off from the Proportionality subcommittee's recommendation.

Judge White stated he had seen a document that superimposed the drug grid into the non drug grid and at the low end some very severe sentences but did increase on the top end. Ms Pedigo doesn't recall the reason for that.

Ms. Pedigo stated that the report is due to the Sentencing Commission on December 20th.

Chief Klumpp stated that he felt downward departure is plea bargain is driven more by case load and that to proceed with caution.

Back on the discussion of section III.

Steve Opat stated he like all three options but would go with number 3.

Section IV Inclusion of recidivism in the definition of offenses

The recommendation should be that it moved over not up, and to eliminate the other recidivism provision from the distribution statutes.

It is not taking presumptive imprisonment putting in border boxes, it is taking presumptive probation and putting it in the border boxes.

Section V - The length of the guideline ranges applicable to D1 felonies.

The recommendation to remain there for the commission to consider.

Section VI - Relationship between precursor, paraphernalia crimes and other crimes

The recommendation to move what was previously in 509 to this section. The recommendation to be treated as attempts.

Back on the report, Judge White stated that suggestion has been made that the severity level either in or close to the provision that defines the crime.

The revisor stated that this would be a change, from previous drafting styles:
"The preferred style is where the code can call a crime in 3 or 4 words, than defines and list the crime.
"The second starts "it shall be unlawful " can be quite wordy
"The third listing a severity 1 person felony 2

Tim Madden stated sometimes handier having the elements set out, and which ever method used to be consistent.

The next meeting will be January 9, 2008, in the Statehouse. The meeting was adjourned at 3:40 pm.

Prepared by Connie Burns
Edited by Judge John W. White, Reporter

Approved by Commission on:

April 16, 2008

(Date)