

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

June 25, 2008
Room 519-S—Statehouse

Members Present

Professor Tom Stacy, Chairperson
Ed Klumpp, Co-Chairperson
Senator David Haley
Representative Lance Kinzer
Representative Jan Pauls
Judge Richard Smith
Professor Michael Kaye
Jacqie Spradling
Tim Madden
Steve Opat
Kim Parker

Staff Present

Judge John White, Reporter
Brett Watson, Staff Attorney
Kyle Smith, Special Consultant
Jill Wolters, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Jerry Douglas, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Sean Ostrow, Assistant to the Commission
Jennifer Horchem, Legislative Intern
Kelly Navinsky-Wenzl, Legislative Intern

Also Present

Ed Britton
Richard Samaniego, Kearney and Associates
Katie Firebaugh, Kearney and Associates

Fundraising Efforts

Professor Kaye discussed the current state of the fundraising efforts. Two charitable organizations, the Pew Charitable Trusts and the Lamb Foundation, both recently turned down the Commission's requests for funding. The Lamb Foundation is unable to fund a public agency, and the Pew was simply unable to fund at this time. In the coming weeks a request for a smaller amount will be sent to the JEHT Foundation. Prof Kaye remained optimistic that the search for funding will soon yield results, and said that it is important that the Commission continue its fundraising pursuits and continue to educate people on the Commission's activities. Professor Stacy said that the JEHT Foundation has previously funded the Illinois state counterpart to this Commission. He noted the strengths of this Commission, namely that the Commission is funded by the legislature and likely to succeed, while other such organizations that were not legislatively funded have failed. This advantage will likely increase the committee's attraction to fundraising groups.

Mr. Klumpp said that, in the interest of efficiency, the Commission would be funding a working lunch.

Budget

Mr. Klumpp said that the Commission would be left with approximately 15-20 thousand dollars on their annual budget. He said he made a request to the legislature to roll over any leftover funds into the next years budget. The legislature largely approved, allowing the Commission to spend ten thousand dollars of this year's rollover amount. The Commission would need legislative permission to spend any more than this amount. Including the \$10,000 rollover, next year's budget is roughly \$162,600. He said that among the major expenses were the salaries of Brett Watson and Judge White, as well as Sean Ostrow, who was recently hired.

He also mentioned that the subcommittees' would require additional funding and support. He also mentioned spending more funding on surveying prosecutors, law enforcement, attorneys, and other pertinent parties throughout the state. He expects to spend \$157,000 next year, and said he is comfortable with a cushion of roughly \$5000 to cover potential unforeseen expenses.

Subcommittee Update

Judge White gave a brief synopsis of the subcommittee's state of affairs. He mentioned that their last meeting focused on crimes against property, and that they were making substantial progress. He said that next month's topic of discussion would be culpability.

At 10:00 a quorum was present.

Approval of the Minutes

Professor Stacy moved to approve the minutes, Ms. Spradling seconded, and the motion carried unanimously.

Personnel Matters

Mr. Klumpp discussed the Commissions' recent interest in hiring Kyle Smith as a special consultant. He said that Mr. Smith's expertise lied in the topics of drug crimes and proportionality issues. He thought that Mr. Smith's knowledge of the current sentencing structure would be highly useful during the coming months as the Commission dealt with drug and sentencing issues. Mr. Smith would be retained as a temporary employee while the Commission addressed drug statutes. Representative Kinzer asked what kind of work remained for the Commission with respect to drug crimes. Judge White said that the Commission still needed to make recommendations to the legislature regarding sentencing and quantity issues. Professor Stacy also mentioned that the status of methamphetamine statutes was still uncertain, and that Mr. Smith would be an excellent liaison between the KBI and the Commission. *Mr. Klumpp moved to allow the hiring of Mr. Smith on the temporary basis described. Ms. Spradling seconded, and the motion carried unanimously.*

Mr. Klumpp then brought up the topic of renewing Judge White's contract, which included a minor pay increase from last year. *Mr. Klumpp moved to renew the contract, Ms. Spradling seconded, and the motion passed unanimously.* Professor Stacy then, on behalf of the Commission, thanked Judge White for all his hard work.

Recidivism

Mr. Watson began by bringing the Commission's attention to the meeting memorandum. The recidivism provision, in KSA 21-506 as amended, will remain in effect to make a second conviction a felony. The recidivism provision in KSA 21-508(b)(3) was also reinstated.

Presence of a Minor

Mr. Watson discussed the proportionality subcommittee's recommendation to change 1000 feet of a school provisions to "within the presence of a minor" in drug offenses. He said that the Revisor's Office has done research on other state laws concerning "presence", and uncovered an Iowa Law, I.C.A. 124.401(c)(2). There was still much debate on what the term "presence" meant for purposes of this statute. Mr. Opat, Ms. Parker, and Judge Smith were concerned with the proposed requirement that a minor actually be aware of the drug transaction, because this would create an overbearing burden on the prosecutor to prove actual awareness, or even if the child was "capable of sensing" the drug deal. Judge Smith also expressed concern about bringing children into the courtroom frequently to prove this element.

The conversation shifted to the issue of "residence of a minor" in the second prong of the Iowa statute. Professor Kaye suggested adding a term like "currently resides" to make the statute sufficiently narrow and distinct. He proposed the hypothetical of the child who is gone for months at a time, as in an extended vacation or summer camp, while a drug deal is conducted at the child's home. Though the child has little meaningful connection to the home for an extended period of time, offenders could still be eligible for a sentencing increase under this statute. Ms. Parker thought it is a matter of proof to determine where the child resides, and that residence will often not be where the child is physically close. Mr. Klumpp liked the residential enhancement because it provided much-needed protection to a place where children are most vulnerable.

Professor Stacy suggested sticking to what was agreed upon last week as a matter of good Commission procedure, and said that the definition of presence should include the requirement that the child actually witness the drug transaction. Judge Smith disagreed, saying that the offense should be strict liability, whether or not the child actually perceived the deal. Professor Stacy said

that he believed, and the Commission voted, that the mens rea of the offender does not require knowledge of the child's presence, and that only in this respect it is a strict liability offense. Professor Stacy suggested adding subsection (c) of the Iowa Statute to the Kansas definition. Mr. Madden disagreed, stating that this would create a situation where too much area was covered by the definition, the sentencing enhancement would lose its intended purpose, and that the sentencing structure would allow for excessive prosecutorial discretion.

Judge Smith moved to adopt the statute as written, and remove the element of "sensing, or able to sense" from the construction of the word "presence." Mr. Madden seconded, and the motion carried, with Ms. Parker and Professor Kaye dissenting. Professor Stacy then moved to add subsection (c) from the Iowa definition to the Kansas proposal. Judge Smith then moved to change "residence" in subsection (b) to "dwelling" in accord with a body of case law defining the term to mean an enclosed space used for human habitation. Both motions passed.

Section 3437 – Mistreatment of a Dependent Adult

Mr. Watson noted that the phrase "aggregate value of the resources" complies with existing statutory language. Professor Stacy said that he believed the language of subsection (e), which was intended to serve as a non-preemption clause, was too vaguely worded to give much direction as to its purpose. *Professor Stacy moved to change subsection (e) to read "This section shall not preclude punishment under KSA 21-3701 (general theft) or any other criminal offense." He also suggested adding commentary to solidify this point. Mr. Opat seconded, and the motion passed unanimously. Ms. Parker then moved to accept the statute as amended, Mr. Klumpp seconded, and the motion carried unanimously.*

Section 3701 - Theft

Mr. Watson noted that subsection (b)(1), which provided for the theft of property from 3 different establishments within 72 hours, had been reinstated. Mr. Klumpp said that he was worried about this section's potential to under-criminalize because it lacked a value provision. *He moved to change the words "regardless of value" to "value of less than \$2000." Ms. Parker seconded the motion, which passed unanimously.*

Mr. Klumpp then addressed subsection (b)(10), the recidivism provision. He believed that this aggravating factor should only increase the severity level by one degree, and suggested either changing the value provision to \$2000 or decreasing the severity level from a 9 to a 10. *Judge Smith moved to change the severity level provision in subsection (b)(10) to a 10, Mr. Klumpp seconded, and the motion passed unanimously.*

Based on the newly implemented change, Judge Smith said that subsection (b)(1) should reflect subsection (b)(10). *He moved to amend Mr. Klumpp's previous motion regarding changing subsection (b)(1) to "value of less than \$2000" to "value of less than \$1000", and to change the penalty to a severity level 10. The motion was seconded by Mr. Klumpp, and carried unanimously.*

Section 3704- Theft of Services

Mr. Klumpp made a motion to approve the statute as written, Mr. Opat seconded, and the motion carried unanimously.

Section 3707 – Giving a Worthless Check

Mr. Watson addressed the multiple occurrences provisions, (e)(1) and (e)(2), and said that the Commission needed to review these provisions. Professor Stacy recommended changing the value amounts in subsection (e)(2) from “at least \$1000” to “at least \$2000” and raising the severity level from a 9 to an 8. *Mr. Madden moved to treat the multiple occurrences as a sentencing enhancement and Ms. Parker seconded.* Professor Stacy said that enhancing the penalty, as Mr. Madden’s motion would do, would amount to a substantive change in the law. He said the legislative intent was not to make multiple instances an aggravating factor. He also noted that treating this as an aggravating factor would conflict with the existing law regarding misdemeanor levels of giving a worthless check, because misdemeanor level provisions did not have a multiple occurrence clause. Judge White said that this change was discussed at the subcommittee meeting, and that it could be treated as a recommended policy change to the legislature. *Mr. Madden then amended his motion; to make the recommendation to the legislature to treat multiple occurrences as a penalty enhancement and not apply this enhancement to the misdemeanor provisions. Ms. Spradling seconded, and the motion carried unopposed.*

Ms. Parker then moved to change the subsection (e)(3) penalty from a severity level 9 to a 10, because this would reflect the 1 level enhancement the Commission had discussed. Representative Pauls seconded, and the motion passed with Representative Kinzer opposing. Professor Stacy then moved to accept the statute as written, Ms. Spradling seconded, and the motion passed with Representative Kinzer opposing.

Section 3720 – Criminal Damage

Mr. Madden moved to approve the statute as written, Ms. Spradling seconded, and the motion carried unanimously.

Section 3729 – Criminal Use of a Financial Card

Mr. Watson noted there were no substantive changes, but that this statute had been reorganized stylistically. Representative Kinzer asked why there was a seven day period in which total value accrued included in the penalty provisions. Professor Stacy said that there must be some time period included in the statute, otherwise instances of conduct from long ago could be considered for sentencing purposes. Ms. Parker said that many retail establishments, as well as credit-issuing financial establishments, were becoming more savvy about stopping credit card fraud, and it is unlikely that fraudulent use of a card would continue for more than seven days undetected. *Professor Stacy moved to add the highlighted provisions on page 26 of the memo, covering misdemeanor level use of a card, and continue to use the seven day period definition. Ms. Parker seconded, and the motion carried unopposed.*

Representative Kinzer noted that he didn’t want the seven day rule to be under-inclusive of a continuing course of conduct, but didn’t want to tamper with the statute for fear of unintended consequences or over-penalization. Mr. Opat said that most cases are discovered by the credit card companies within 3-4 days, so the provision may not have any real effect.

Section 3734 – Impairing a Security Interest

Ms. Spradling moved to accept the statute as written, Mr. Opat seconded, and the motion passed unopposed.

Section 3761 – Railroad Property

Ms. Spradling moved to accept the statute as written, Mr. Opat seconded, and the motion passed unopposed. Ms. Parker asked about the “maliciously or wantonly” language in subsection (a)(2), and Professor Stacy said that this would be addressed in the subcommittee meeting on culpability.

Section 3763 – Counterfeiting

Professor Stacy said he was concerned that the recidivism provisions in subsection (1)(A) and (1)(B) didn't do what the existing provision intended. He noted that they could potentially cause a repeat offender to receive less of a punishment than a first time offender because of the problems with the value provisions. Mr. Watson said that the provisions should be based on the same dollar amounts as the other value provisions for property crimes.

Mr. Madden suggested eliminating the recidivism provisions altogether. *Representative Kinzer moved to make a distinct section to clarify how repeat offenders would be handled. Professor Stacy included in Representative Kinzer's motion that this statute should be rewritten. Ms. Parker seconded, and the motion passed unopposed. Mr. Watson said that this section would be rewritten and reviewed at next month's meeting.*

Section 3846 – Making a False Claim

The dollar value amounts had been added to this statute. *Mr. Opat moved to adopt it as written, Ms. Spradling seconded, and the motion carried unanimously.*

Section 3902 – Official Misconduct

Mr. Watson said that this section may or may not include the aggregate amount language in the value and penalty sections. *Ms. Spradling moved to adopt the statute as amended, which included the aggregate language, but there was no second. Professor Stacy then moved to adopt the statute without the aggregate language. Ms. Parker seconded, and the motion passed unanimously.*

Section 4018 – Identity Theft

Professor Stacy said that there are cases where identity theft doesn't result in monetary loss to the victim, and is concerned that this statute doesn't cover cases where there is no monetary loss, but other types of harm. Mr. Opat agreed, saying that monetary loss is not frequently associated with identity theft.

Professor Stacy moved to make all identity theft below the value level of \$50,000 a level 8 nonperson felony, in order to appropriately punish instances of identity theft that may not result in

monetary loss. He also moved to keep the higher penalty provisions for identity theft over \$50,000. Ms. Spradling seconded, and the motion passed unanimously.

Miscellaneous Statutes

Ms. Parker moved to approve the following statutes; 3904 – False Claims, 3905 – Permitting False Claims, 3910 – Misuse of Public Funds, and 4111 – Criminal Desecration. The motion was seconded by Judge Smith, and carried unanimously.

Section 4142 – Drug Proceeds

Mr. Watson explained that this was formerly part of the drug code, but would be incorporated in the criminal code. The general consensus among Professor Stacy, Mr. Opat, and Judge Smith was that the value delineations for property crimes should not be applied to this statute. Mr. Opat said that they would too harshly penalize accepting drug proceeds, and enforcement of this law would be difficult because of the evidentiary burden involved.

Mr. Klumpp moved to not accept this statute until further research on case law and legislative intent could be conducted. Senator Haley seconded and the motion carried unanimously. Judge Smith cited 29 Kan.App.2d 1051 and 33 Kan.App.2d 22. He said the goal of the statute is to penalize those who knowingly accept drug proceeds.

Judge Smith then moved to have the support staff research the term “previous conviction” and determine how this term will be utilized in practice. Representative Pauls said that there is a need for a single definition that practitioners can universally stick with. She seconded the motion, which passed unanimously.

Methamphetamine Memo

Mr. Watson discussed the new data from the Kansas Sentencing Commission, who compiled its information from the Department of Corrections and probation officers’ journal entries. Downward departures were granted in 59.1 percent of all D1 felony cases. He said that he had collected and compiled survey data from prosecutors, judges and county attorneys to determine their particular sentiments and experiences with meth cases. Very few prosecutors in the state feel that meth sentences are too severe. He addressed one proposal for handling the high rates of departure; limiting judicial discretion. He said that it would have the benefit of providing more uniformity and predictability, but would be somewhat impracticable and may lead to disproportionate sentencing.

Mr. Watson said that another alternative would be making methamphetamine manufacture a separate, and more heavily penalized, offense from the manufacture of other drugs. Mr. Klumpp said that meth should be penalized more because of the dangerous way in which it is manufactured, which creates the possibility of explosions, release of toxic chemicals, and seriously hazardous pollution. Kyle Smith added that he had never seen a drug manufacturing case that did not involve meth production. Mr. Klumpp moved to accept the proportionality subcommittee’s recommendations, and create a separate manufacturing statute specifically designed for meth cases. He also moved to include fentanyl, an extremely potent and dangerous narcotic, in the “higher risk” manufacturing statute. Representative Pauls seconded, and the motion carried, with Mr. Opat and Ms. Spradling dissenting. Kyle Smith volunteered to conduct further research on the dangers of drug manufacture to determine if other manufacturing processes are dangerous enough to warrant their placement in the newly authorized statute.

Professor Stacy noted his preference for having aggravated manufacturing offenses, and listed two aggravating factors which warranted specific provisions to penalize and deter. These factors are the potential danger of the manufacturing process, and the quantity of drugs that can be produced. He suggested that the meth manufacture statute have an aggravated provision, or perhaps a separate aggravated meth manufacture statute. Ms. Parker agreed, and said that the Commission should spend some time determining quantitative and qualitative factors for the aggravated offense.

Mr. Klumpp and Judge Smith suggested including factors such as the location of the manufacturing operation (ie. residential neighborhood), potency of the drugs, and presence of precursors. Judge Smith said that Illinois has a specific statute to control pollution stemming from meth operations, and thinks that pollution would be an aggravating factor as well. *Professor Stacy moved for the staff to conduct research on meth statutes in other states as well as the potential factors that would warrant aggravated status. Mr. Klumpp seconded the motion, which passed unanimously.* At his point Judge Smith expressed his strong feeling that judicial discretion is absolutely necessary, and that any attempts to restrict judges from granting departures when they see fit is a limitation on the whole system.

Judge White briefly addressed the agenda for next month's meeting, which will take place July 23, 2008. The meeting was adjourned at 4:20.

Prepared by Brett Watson

Approved by Commission on:

July 23, 2008

(Date)