

**Senate Judiciary Committee  
 Substitute for House Bill 2318  
 Testimony of Jennifer Roth  
 Proponent (with concerns)  
 March 21, 2011**

I appear today as an individual, as I did not have time to properly present this substitute bill to the organization on whose behalf I often appear. I have previously testified about changes to the drug code/drug sentencing grid on a number of occasions, including in 2009 (HB 2332) and 2010 (SB 399). I thank the Recodification Commission and Judicial Council for their hard, thoughtful work. While I applaud the policy of treating drug offenders in a more proportionate way, this bill presents a few problems:

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

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:

<b>Description of offense</b>	<b>Current penalty</b>	<b>Proposed penalty</b>
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)
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
Possession of paraphernalia with intent to distribute or cultivate a controlled substance	SL 4 drug felony (or a Class A misdemeanor if it is fewer than five marijuana plants)	SL 1, 2, 3 or 4 drug felony, depending on weight of drugs (if there are any present)
Possession of paraphernalia with intent to possess opiates, narcotics or stimulants	Class A misdemeanor	SL 5 drug felony
Possession of paraphernalia with intent to possess depressants, hallucinogens	Class A misdemeanor	Class A misdemeanor or SL 5 drug felony, depending on the number of 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. 21-3301(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.”

**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. That is to say this body did decide at one point that 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 severity level would be a 3 (since the lowest form of distribution under this bill is a SL 4).

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 enhancement to a person felony 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" – interestingly, 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 time dealers" into the "medium" category.

Thank you for your consideration and attention to these concerns.

Respectfully submitted,

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