

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION SUBCOMMITTEE

October 16-17, 2008
Room 446-N—Statehouse

Members Present

Professor Thomas Stacy
Ed Klumpp
Representative Jan Pauls
Steve Opat
Tim Madden

Staff Present

Judge John White – reporter
Brett Watson – staff attorney
Sean Ostrow – assistant to the commission
Jill Wolters – Senior Revisor, Office of the Revisor of Statutes
Jason Thompson – Assistant Revisor, Office of the Revisor of Statutes
Melissa Doeblin – Assistant Revisor, Office of the Revisor of Statutes
Jerry Donaldson – Principal Analyst – Kansas Legislative Research Department
Athena Andaya – Principal Analyst – Kansas Legislative Research Department

Also Present

Ed Britton

Thursday, October 16

Judge White reviewed the number of statutes that lie ahead for the subcommittee and full commission. He concluded that statutes per meeting needed to be completed. *Professor Stacy moved to approve the minutes from the previous meeting. The motion was seconded and passed unanimously.*

Property Crimes Definition Section

Judge White noted that he included a definition of “services” and “tampering” was moved from other statute. Professor Stacy asked whether some definitions would duplicate those in the general definitions section. Judge White said he would include cross references to the definitions in the general definition section. Ms. Wolters said that would be the best approach. Mr. Opat asked why there should be a definition section for each article. Judge White noted that some definitions are germane only to a particular article. *Professor Stacy moved to approve the section. The motion was seconded and passed unanimously.*

Jurisdictional applicability

Professor Stacy moved that the phrase “occurs within the state” in subsection (b) should apply to the entire statute. Judge White said that “the” in b(3) should be “a.” Professor Stacy accepted this as a friendly amendment to his motion. The motion was seconded and passed unanimously.

Time limits

Professor Stacy noted that the different time limits were a substantive change. That would have to be a recommendation to the full commission. *He moved approval of the statute with the time limits changed to reflect existing statute. The motion was seconded and passed unanimously.*

Judge White asked if there should be a vote on the recommended time limits. Professor Stacy said that the commission already approved the policy so the draft should be submitted to full commission for its approval.

Mr. Opat raised a concern over the term identity in subsection (c). He expressed concern over what the term “conclusively” meant. He also questioned whether the tolling provisions should only apply to sexually violent crimes and not attendant crimes that are part of the same set of circumstances, such as burglary where the underlying felony is rape.

Professor Stacy asked why the State should be able to prosecute the non-sex crimes. Because, according to Mr. Opat, they are part of the res gestae of the offense. He recalled a case where the lab report arrived 6 years after the offense so he could charge rape but no other offenses.

Professor Stacy suggested that the policy behind the statute was to have a special rule that would allow prosecution for sex offenses. If you allowed other crimes to be tolled then plea bargaining would eliminate the sex offenses in exchange for the lesser crimes, thus thwarting legislative intent. Mr. Opat responded that sometimes these cases are so old that DNA is the only evidence available and plea bargaining should be allowed. Professor Stacy suggested that the term conclusively could be eliminated and the language from the joinder statute could be used to bring in non-sex offenses.

Burden of Proof

Mr. Opat moved to approve the statute. The motion was seconded and passed unanimously.

Stacy Memo – Specific/General Offense Doctrine

Professor Stacy introduced his memo. First he argued that there is not a statutory provision regarding the specific versus general offense doctrine. As this is part of Kansas case law it is sensible to incorporate it into the statutes as part of recodification. He stated that his proposed language should be added to 21-3107.

Representative Pauls objected to the term “legislative intent” and said that the proposal should use refer to specific statutory language. She claimed that the phrase “legislative intent” is too vague. Professor Stacy said he used that language because it restates the case law.

Mr. Opat suggested that this language could cause multiplicity problems based on the same conduct. He cited aggravated battery and aggravated robbery as an example. Professor Stacy disagreed; he stated that his proposal only applied to the general versus specific offense issue and aggravated robbery and aggravated battery did not raise this issue. *Representative Pauls moved to approve the proposal. The motion was seconded and passed unanimously.*

Second, Professor Stacy proposed to eliminate the identical offense doctrine found in cases such as *McAdam*. He noted that he did not know any other state that has this doctrine and it leads to repetitive litigation and it serves no useful function. Due to the absence of Judge Smith, the subcommittee tabled the issue for consideration on the next day.

21-3105

Judge White asked if this should be in article 31 or if it should be in the sentencing statutes. Mr. Opat said that it should stay where it is.

21-45-101

Judge White explained that this statute does not reflect current sentencing philosophy regarding individual treatment. He suggested eliminating it or placing it in article 46 with other pre-guideline statutes. *Mr. Opat moved to move it to article 46.* Madden “shall be committed for at least a minimum term within the limits provided by law” is consistent with the guidelines.

Mr. Klumpp asked if moving this statute would adversely effect how article 46 is interpreted. Judge White said no, it states pre-guideline philosophy. Mr. Opat agreed it has no applicability to the guidelines and the guidelines are not liberally construed. He also noted that there was only one reported case regarding the statute.

The motion was seconded and passed unanimously.

21-45-102

Judge White noted that this statute could be moved to article 47, but he left it alone in order to be consistent. *Mr. Opat moved to approve the statute. The motion was seconded and passed unanimously.*

21-45-103

Judge White noted that the definitions are in alphabetical article and they come from 21-4603(b) without change.

He asked Mr. Madden if striking out material in the definition of “correction institution” would be a problem. Mr. Madden said no, so long as the phrase “institution established by the state,” the deleted material was redundant.

Judge White noted that subsection (g) and (h) used the phrase “convicted of a crime.”

Mr. Klumpp moved to approve. The motion was seconded and passed unanimously.

21-45-201

Judge White suggested that this long statute might be split into two based on the mandatory and permissive elements. Also, he noted, subsection (n) repeats the language of a guideline statute.

Ms. Wolters said that subsection (n) is in two separate places because in one instance it is an unfunded mandate, the other version is SB 123, which is funded.

Based on that, Judge White suggested it should remain to distinguish between different groups.

Mr. Klumpp moved to approve. The motion was seconded and passed unanimously.

21-45-301

Judge White noted that the current caption for this statute says “after July 1, 1993” but that language is not in the statute. He noted the use of the term “judgment forms” and asked whether such forms are ever used any more. Mr. Opat said he only thought journal entries are used. Ms. Wolters said she would make some calls to determine if these forms are still in use. Mr. Klumpp suggested that more work should be done on this statute and the subcommittee should delay any action until if found out if the statute is still useful or necessary.

21-45-302

Judge White did not do anything to this statute except add letters to paragraphs. *Mr. Klumpp moved to approve. The motion was seconded and passed unanimously.*

21-45-303

Judge White noted that there was no change but he suggested coming back to this statute when Professor Stacy was present to discuss his memo.

21-45-401

Mr. Opat moved approve, striking subsection (b). The motion was seconded and passed unanimously.

21-45-402

Judge White asked if the first part of subsection (a) has any application except for misdemeanors. He noted that subsection (c) addresses felony cases. *Mr. Madden moved to strike (a) except for the material relevant to misdemeanors. The motion was seconded and passed unanimously.*

21-45-403

Judge White said it might be better to use the phrase “designated in article 34 or 35 as a class A or B felony” and strike the term “Kansas criminal code.” Mr. Opat suggested the phrase “category A or B” rather than “class A or B.”

Judge White noted that (b)(1) and (2) was moved to definitions section.

He asked about subsection (a)(2) which says, “no inmate shall be placed under house arrest . . .” Mr. Madden said he thought this only applies to people who are in the custody of the Secretary of Corrections.

Mr. Klumpp moved approval the statute with the changes noted. The motion was seconded and passed unanimously.

21-45-404

Judge White noted that this section has already been incorporated into 21-4610.

21-45-405

Judge White noted that he changed numbers for letters and used the term “jurisdiction” in subsection (b). *Mr. Opat moved to approve. The motion was seconded and passed unanimously.*

21-45-501

Judge White noted no change. *Mr. Madden moved to approve. The motion was seconded and passed unanimously.*

21-45-502

Ms. Wolters noted that letters should be used instead of numbers.

Mr. Madden asked if there is an inconsistent statute that allows a fine and a prison sentence. Ms. Wolters found 21-4603 (21-45-201) which might conflict. Judge White said that both statutes worked in conjunction, one tells you what you can do, the other requires findings. Ms. Wolters said that the court in State v. Bastian, 37 Kan. App. 2d 156, said that findings must be made or fines will be vacated. In that case the state conceded that the statute was part of the guidelines act.

Mr. Klumpp suggested adding a subsection saying that the finding has to be on the record. The phrase "the court is of the opinion" seemed strange to him. He suggested staff conduct more work on this statute before it is approved.

21-45-601

Mr. Opat moved approved. The motion was seconded and passed unanimously.

21-45-602

Mr. Opat moved approved. The motion was seconded and passed unanimously.

21-45-701

Judge White first part of the statute could be reformed to refer to any situation where the defendant is sentenced to confinement. He said the purpose of the statute was to establish a firm date to begin counting the defendant's jail credit.

Representative Pauls noted that the current statute refers to the Kansas Parole Board but good time now is done by Secretary of Corrections. *She moved amend line 13 to refer to the rules established by the Secretary of Corrections. The motion was seconded and passed unanimously.*

Mr. Klumpp said the statute should be tabled until more work is done on it.

21-45-702

Judge White noted that this might be combined with 21-45-701. Mr. Klumpp suggested tabling both.

21-45-703

Judge White noted that this statute was before the unification of the Kansas courts. Professor Stacy asked what authority is there for a district court judge to parole an offender who is sentenced by a magistrate, other than this statute. Judge White and Mr. Opat stated that district court judges have inherent authority over magistrates. Mr. Opat said everything a magistrate does is reviewable by the district court by appeal or motion. Professor Stacy said this statute made that authority clear.

Mr. Opat moved to strike the statute. The motion failed due to lack of a second. Representative Pauls moved to approve. The motion was seconded and passed unanimously.

Stacy Memo – Consecutive and Concurrent Sentences

Professor Stacy introduced his memo on consecutive and concurrent sentences. He said that his proposed revision would give more guidance to judges regarding when to impose concurrent sentences. He also explained that his proposal would allow the district court judges to impose any sentence within the range of time established by a consecutive sentence, thus providing more judicial discretion. He claimed that judicial behavior, which avoids consecutive sentences, thwarts the legislative determination of what a proper sentence should be.

Mr. Klumpp noted that when battery on a LEO is committed the practical difference between battery is insignificant because the penalty is not higher.

Judge White noted that, as a judge, he never had a request for consecutive sentences.

The subcommittee did not take action on the memo.

Friday, October 17

21-3107 Multiple Prosecutions for the Same Offense

Mr. Opat explained the Morton case – explaining the difference between felony murder and first degree murder. They are not identical offenses; however the court did not treat them as separate and distinct offenses. They are two different theories under which first degree murder can be found. Essentially, the underlying felony substitutes for the premeditation necessary to find first degree murder. Professor Stacy suggested adding a subsection (e) “Defendant may not be convicted of identical offenses based upon the same conduct. The prosecution may choose which such offense to charge and, upon conviction, the defendant shall be sentenced according to the terms of that offense.”

Mr. Opat asked if this could possibly change the way the courts looked at the difference between first-degree premeditated murder and felony murder, and Professor Stacy said that the two offenses were sufficiently distinct in their elements. *Professor Stacy moved to make this recommendation to the full commission to add this language in their recommendation to the legislature, Mr. Opat seconded, and the motion carried unanimously.*

21-45-701 Deduction of Time Spent in Confinement

Mr. Madden moved to delete the last sentence, lines 15-17, from this statute. Mr. Klumpp seconded, and the motion carried unanimously.

Mr. Opat asked about the term “judgment forms.” He said the procedure for handling judgments had changed since this statute was last amended.

Ms. Wolters said that she spoke to Cathy Porter, who felt like she thought it would be appropriate to change the terminology, but she wanted to check her files to make sure the change wouldn't create any unforeseen conflict.

21-45-801 Death Penalty Procedure

This statute laid out the procedure for capital murder, death sentence, and life without parole cases. Lines 14-15 stated that seeking the death penalty required a separate sentencing hearing. Judge White asked whether this hearing was contemplated by the notice provision in subsection (a), and whether (b) required a separate motion for death penalty cases. He said he was fairly certain that subsection (b) was required, and was satisfied with this statute.

Representative Pauls said they addressed this in their revisions involving the *Apprendi* holding. Ms. Wolters consulted Jared Maag, solicitor general, who reaffirmed that the statute contemplates the filing of two different motions in a capital murder trial.

Judge White said that this statute is really more or less a repetition of article 22 statutes dealing with trial by jury and similar statutes. He said he would look into combining this statute into article 22-3201 or a similarly situated statute. Judge White suggested leaving the statute as it was for the time being, with the possibility of re-organizing at some point down the road if the commission found it necessary.

Professor Stacy moved to approve the statute, Mr. Opat seconded, and the motion carried unanimously.

21-45-802

Professor Stacy moved to approve, Mr. Opat seconded, and the motion carried unanimously.

21-45-803

Judge White said he might recommend changing lines 5 and 6, because he felt the language was unnecessary. *Professor Stacy moved to approve the statute without making the change, Mr. Opat seconded, and the motion carried unanimously.*

21-45-804

Mr. Opat moved to approve the statute, Mr. Klumpp seconded, and the motion carried unanimously.

21-45-805

Mr. Klumpp moved to approve, Mr. Opat seconded, and the motion carried unanimously.

21-45-806

Judge White recommended merging current statutes 21-4623 and 4624, which enumerated the same procedures for death penalty and hard 40 or 50 sentences regarding mentally retarded defendants. Judge White and Representative Pauls scoffed at the language "mentally retarded" but noted that the term was still employed by the courts.

Professor Stacy moved to approve the proposed statute, on pages 2-3, Mr. Opat seconded, and the motion carried unanimously.

21-45-807

Professor Stacy moved to approve, Mr. Opat seconded, and the motion carried unanimously.

21-45-808

This was a proposal to combine 21-4625 and 21-4636, regarding aggravated circumstances. The only difference was subsection (f), which was not included in 4625. But, section 6 in 4625 started in the same manner as 4636(f), only 4636(f) went into more detail than 4625. Judge White said he thought that 4636(f) had been changed at a later date than 4625, and that the update was overlooked regarding 4625. Jill Wolters said that (f)(1-7) was added in 1999, and it was the only change that was made to the statute at that time. Judge White said that combining these two statutes would not constitute a substantive change.

Professor Stacy moved to replace subsection (f) (sentence beginning with "In"(line 17)) to 13 "Conduct which is heinous...may include but is not limited to"...and to remove (7). Mr. Opat seconded, and the motion carried unanimously.

21-45-809

Judge White proposed combining 21-4626 and 21-4637 into the new statute. *Professor Stacy moved to amend (b) to "shall include circumstances listed in 4626 subsection (9)" and approve the statute as amended. Mr. Klumpp seconded, and the motion carried unanimously.*

21-45-810

Mr. Opat moved to approve, Mr. Klumpp seconded, and the motion carried unanimously.

21-45-811

Mr. Opat moved to approve, Mr. Klumpp seconded, and the motion carried unanimously.

21-45-812

Judge White mentioned that the term "in this act" had been changed to reflect specific statute numbers. *Mr. Opat moved to approve, Professor Stacy seconded, and the motion carried unanimously.*

21-45-813

Mr. Opat moved to approve, Mr. Klumpp seconded, and the motion carried unanimously.

21-45-814

Professor Stacy said there were numerous severability statutes throughout section 21. He asked whether it would be better to have just one general severability statute. Judge White said there was such a severability statute found at 21-31-104.

Ms. Wolters said that the Revisor's office preferred to use uniform language wherever possible and would like to maintain uniformity within the severability statutes, wherever they may appear in the criminal code.

Mr. Klumpp moved to amend 21-31-104 to the language of the proposed statute 21-45-814, change the word "act" to "code," and eliminate 21-45-814 from the code. Mr. Opat seconded, and the motion carried unanimously.

21-45-815

Ms. Wolters said that she didn't think subsection (a) was necessary, but the other subsections would be useful for practicing attorneys. Professor Stacy moved to adopt Ms. Wolter's recommendation, Mr. Opat seconded, and the motion carried unanimously.

The meeting adjourned for lunch at 12:00 noon.

The meeting resumed at 1:30 p.m. Judge White moved forward to Article 46. He said that no real changes were recommended, except for several statutes that he found to be completely unnecessary.

21-46-101

This statute dealt with crimes committed before July 1, 1993. Professor Stacy said that this statute should be kept, because for crimes such as murder, there was no statute of limitations. Mr. Opat said he hadn't in recent memory prosecuted a murder that had been committed prior to July 1, 1993, or heard of such a prosecution in Kansas. Judge White agreed that such instances were unlikely, but could still occur. *Professor Stacy moved to approve this statute, Mr. Opat seconded, and the motion carried unanimously.*

21-46-102

Mr. Madden said that this statute could be repealed without consequence. *Representative Pauls moved to repeal it, Mr. Madden seconded, and the motion carried unanimously.*

21-46-201

Mr. Opat questioned the usefulness of this statute. Professor Stacy said that in particular subsection (a) could be eliminated. There was discussion about what parts of this statute could still be relevant, and whether the terminology was correct. Mr. Madden said that the term "correctional facility" should replace "Topeka correctional facility" and "secretary of corrections" should replace any reference to "custody of the state" or "state facility." Professor Stacy asked if the language should

be changed, and Mr. Opat said that the recommended changes could have the unintended effect of giving this statute new life, even though it was generally outdated.

Professor Stacy moved to approve the statute as it stood, Mr. Opat seconded, and the motion carried unanimously.

21-46-202

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-203

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-301

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-302

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-303

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-401

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-402

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-501

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-701

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-46-702

Mr. Opat moved to approve the statute, Professor Stacy seconded, and the motion carried unanimously.

21-47-101

Professor Stacy moved to adopt, Mr. Opat seconded, and the motion carried unanimously.

21-47-102

Ms. Wolters explained that the statutory language was intended to make it clear that the sentencing guidelines would be uniformly followed. She said this particular language was employed pursuant to some concerns that race and other improper factors had been involved in some instances of sentencing. Mr. Opat thought that this language was too political and should be eliminated. Mr. Klumpp also thought it was unnecessary.

Mr. Opat moved to delete the phrase on lines 5-6 , “shall apply equally...” Professor Stacy seconded, and the motion carried unanimously. Mr. Opat then moved to approve the statute as amended, Mr. Klumpp seconded and the motion carried unanimously.

21-47-103

Judge White proposed a change to the definition of “Aggravating factors” in subsection (a). Professor Stacy thought that the revision may not be as clear. *Mr. Klumpp moved to reinstate the previous language and strike everything after the word “departures.” Professor Stacy seconded, and the motion carried unanimously.*

Judge White rewrote subsection (c) to make it smoother. *Mr. Klumpp moved to approve the change, Professor Stacy seconded and the motion carried unanimously.*

Mr. Klumpp moved to change subsection (d) to reinstate words “and sentencing guidelines grid” and remove everything after that. Professor Stacy seconded, and the motion carried unanimously.

Mr. Opat moved to approve subsection (g) with the changes proposed by Judge White. Mr. Klumpp seconded and the motion carried unanimously.

Professor Stacy moved to approve Judge White's proposed changes to subsection (h), Mr. Klumpp seconded, and the motion carried unanimously.

Professor Stacy moved to approve subsection (i), Mr. Opat seconded, and the motion carried unanimously.

Professor Stacy moved to approve (j), Mr. Madden seconded, and the motion carried unanimously.

Mr. Klumpp moved to change (n) to reinstate crossed out language up to the word "departure", and then remove everything following. Mr. Opat seconded, and the motion carried unanimously.

Mr. Opat moved to change (h) to eliminate the phrase "for non-drug crimes and sentencing guidelines grid for drug crimes." This change reflected the fact that the sentencing grids had been recommended to merge.

Mr. Opat moved to approve Judge White's change to subsection (q). Professor Stacy seconded, and the motion carried unanimously.

Mr. Klumpp then moved to approve those subsections that had not been altered. Professor Stacy seconded, and the motion carried unanimously.

21-47-104

Judge White recommended a number of largely cosmetic changes to this statute. He explained each recommendation. Mr. Opat recommended that the word "enter" replace the word "impose" in the statute in the interest of keeping the terminology uniform. *Professor Stacy moved to remove the phrase "as provided in this act" in subsection (d) as unnecessary, Mr. Opat seconded, and the motion carried unanimously.*

Professor Stacy then questioned what he viewed as a contradiction in subsection (e) between the ideas that the judge "has discretion" but also "shall" select the center of the range in the usual case. *Professor Stacy moved to change the wording of this statute to resolve this conflict. Judge White volunteered to hammer out the actual language of the statute to reflect this change. Mr. Opat seconded, and the motion carried unanimously.*

Mr. Klumpp asked whether the definition of "criminal street gang" in subsection (k) should be moved to a general definitions section. Ms. Wolters thought that it would make more sense to put the definition in what is currently 21-3110. *Professor Stacy moved to act on Ms. Wolter's recommendation, Mr. Opat seconded, and the motion carried unanimously.*

Professor Stacy then asked about subsection (j) which used the term "persistent sex offender." There was some discussion about the difference between a "habitual" and "persistent" sex offender. The term "persistent sex offender" was found only in this statute, so it was determined that it should not be placed in the general definitions section.

Mr. Opat moved to approve all subsections in the statute, Mr. Klumpp seconded, and the motion carried unanimously.

21-47-105

Mr. Klumpp noticed that in line 5 “nondrug” should actually be “drug.” After discussion, Judge White volunteered to work on the wording of the subsections, and come back with a revision that reflected the concerns of the subcommittee. The meeting adjourned at 4:30. The next full commission meeting was scheduled for Wednesday, October 22, 2008.

Prepared by Brett Watson

Approved on November 18, 2008.