The minutes of the Judiciary Committee at 5:35 p.m.on March 21, 2011, in Room 346-S of the Capitol.

amendment to K.S.A. 22-4902 (Attachment 5).

Written testimony in support of **HB 2318** was submitted by Patrick Vogelsberg, Kansas County and District Attorneys Association (Attachment 6).

No testimony in opposition to **HB 2318** was submitted.

The Chairman called the committee's attention to the fiscal note for **HB 2318**.

The Chairman closed the hearings on **HB 2318**.

Committee Action:
The Chairman announced that the committee still lacked a quorum, but it was his intent to convene at a later time this afternoon or evening in order for the committee to take action on bills previously heard. Notice of the time and location of the meeting will be announced from the floor of the Senate and will be emailed to everyone who is on the committee agenda email list.

Meeting recessed at 1:15 P.M. The committee will reconvene on the call of the Chairman.

Evening Session

The Chairman reconvened the meeting at 5:35 P.M. on March 21, 2011, in Room 346-S of the Capitol.

All members were present at the evening session, except Senator Donovan, who was excused

Committee staff present:
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Jason Thompson, Office of Revisor of Statutes
Jason Long, Office of Revisor of Statutes
Theresa Kiernan, Committee Assistant

Others attending:
See attached list.

Committee Action:

The Chairman called the committee's attention to **HB 2339 -- Criminal code trailer bill**.

Senator Vratil moved, Senator Kelly seconded, that HB 2339 be passed. The motion was adopted.

The Chairman called the committee's attention to **HB 2318 -- Amendments to the recodified criminal controlled substances provisions and the drug-sentencing grid**.

Senator Bruce proposed the following conceptual amendments to **HB 2318:**

- On page 6, in line 20, change the severity level 1 to severity level 2
- Treat cocaine in the same manner as methamphetamine and heroine (Page 8, lines 22-26 and page 9, line 25)
- In regard to "crack", sales in a quantity of 1/10 of gram in weight (Page 8)
- Treat "crack" as a quantity
- In the case of precursors and paraphernalia, change severity level 1 to severity level 3 (Page 12)

After a brief discussion relating to the number of proposed amendments and whether or not there was time to consider the consequences of the amendments, Senator Bruce stated he was willing to delay any action until the 2012 Legislative session.

Senator Vratil moved, Senator Kelly seconded, that no action be taken on **HB 2318** during the 2011

The minutes of the Judiciary Committee at 5:35 p.m.on March 21, 2011, in Room 346-S of the Capitol.

session. The motion was adopted.

The Chairman called the committee's attention to **HB 2035 -- Amending statutes regulating late-term and partial birth abortion**.

Senator Pilcher-Cook distributed copies of an amendment, which would redefine the term "abortion" so that it includes the use of a drug or substance to terminate a pregnancy (Attachment 7).

Senator Pilcher-Cook moved, Senator Lynn seconded, that the amendment be adopted.

Senator Haley asked, "Does this expand the current definition? Does the language currently in the bill restrict the inclusion of RU-486?"
Senator Pilcher-Cook responded, "This amendment would clarify that RU-486 is included within the definition."

Senator Haley asked, "Has there been a failure to report non-surgical methods to terminate a pregnancy as currently defined?"
Senator Pilcher-Cook responded, "No, this is a clarification."

Senator Haley asked, "What is the source of the proposed language?"
Senator Pilcher-Cook responded, "It is from the National Right to Life. The language is used in other states' abortion laws and it is used in **HB 2218**."

Senator Kelly asked, "Is it illegal for a pharmacist to prescribe RU-486?"
Senator Pilcher-Cook responded, "It is not."

Senator Kelly expressed concern for the unintended consequences of the amendment.

Senator Haley asked, "Why is the phrase "to preserve life or health of child after live birth" in the definition?"
Senator Pilcher-Cook responded, "It ensures that a child born alive is not left to die."

Senator Haley asked, "Would this not be addressed in the homicide statutes?"
No response given.

Senator Haley asked, "What is the age of an "unborn child" as that term is used in the definition of abortion?"
Senator Pilcher-Cook responded, "Any living organism in utero."

Senator Haley asked, "At what age is an organism in utero an unborn child?"
Senator Pilcher-Cook responded, "From the moment of conception."

Senator Kelly made a substitute motion, Senator Vratil seconded, that the amendment be rejected. The motion was adopted.

Senator Vratil moved, Senator Schodorf seconded, to change the effective date of the bill from publication in the statute book to publication in the Kansas register. The motion was adopted.

Senator Kelly distributed copies of an amendment, which provides if the court orders an evaluation of a minor prior to the judicial by-pass proceeding, the evaluation would be conducted by a psychiatrist (Attachment 8).

Senator Kelly moved, Senator Vratil seconded, that the amendment be adopted.

Senator Bruce made a substitute motion, Senator Lynn seconded, that a psychiatrist, licensed psychologist or licensed clinical social worker be required to conduct the evaluation. The motion was adopted.

Senator Pilcher-Cook moved, Senator King seconded, that **HB 2035** be passed as amended. The motion was adopted.

Senator Umbarger voted yes on the motion and asked that his vote be so recorded.

The Chairman called the committee's attention to **HB 2218 -- Abortion regulation based on capacity of unborn child to feel pain**.

Senator Pilcher-Cook distributed copies of an amendment, which would insert wording that was inadvertently omitted, as follows: On page 1, in line 10, following "fertilization" by inserting ", the unborn child reacts to touch. By 20 weeks after fertilization"; also on page 2, line 40, strike "would" and insert "she intends"; also on page 3, line 23, strike "would" and insert "she intends" (Attachment 9).

Senator Haley asked, "Is the language from a medical source?"
Senator Pilcher-Cook responded, "There is scientific evidence supporting the claim that an unborn child responds to pain by 20 weeks. Testimony to the contrary was based on old literature."

Senator Haley asked, "Is the term "unborn child used in our abortion statutes or other statutes?"

Senator Pilcher-Cook responded, "Yes, in the woman's right to know act."

Senator Haley asked, "Is gestational age used in that act?"
Senator Pilcher-Cook responded, "No."

Senator Kelly offered a substitute motion, Senator Vratil seconded, to reject the amendment.

Senator Pilcher-Cook stated that we should give respect to the latest scientific literature.

Senator Kelly stated that relying on Dr. Bollier's testimony, a fetus does not have capacity to feel pain before 26 weeks gestational age.

The substitute motion failed on a 5-5 vote.

Senators Bruce, King, Lynn, Pilcher-Cook and Umbarger voted no on the motion and asked that their votes be so recorded.

Senator Pilcher-Cook renewed her motion to amend, Senator Lynn seconded.

Senator Haley offered a substitute motion, Senator Schodorf seconded, to table **HB 2218**. The motion failed.

Senator Pilcher-Cook renewed her motion to amend, Senator Lynn seconded. The motion failed.

Senators Bruce, King, Lynn and Pilcher-Cook voted yes on the motion and asked that their votes be so recorded.

Senator Kelly distributed copies of an amendment (Attachment 10), which would delete section 1; change the term "unborn child" to "fetus" throughout the bill; change "22" to "26" when referencing the age of the fetus; and require that the fetus has a functioning cerebral cortex in order to be pain capable.

Senator Kelly moved, Senator Vratil seconded, that the amendment be adopted. The motion failed.

Senators Bruce, King, Lynn, Owens, Pilcher-Cook and Umbarger voted no on the motion and asked that their votes be so recorded.

Senator King moved, Senator Lynn seconded, that **HB 2218** be passed.

Senator Haley offered a substitute motion, Senator Kelly seconded, to table **HB 2218**. The motion failed.
Senator King renewed his motion, Senator Lynn seconded. The motion was adopted.

The Chairman called the committee's attention to **HB 2312 -- Regulated scrap metal; licensing scrap**

The minutes of the Judiciary Committee at 5:35 p.m.on March 21, 2011, in Room 346-S of the Capitol.

metal dealers; unlawful acts; criminal penalties.

Senator Vratil moved, Senator Bruce seconded, that no action be taken on **HB 2312** this session. The motion was adopted.

Meeting adjourned at 7:55 P.M. No further meetings have been scheduled.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: MON. MARCH 21, 2011 a.m. meeting

NAME	REPRESENTING
Whitney Damron	City of Topeka
Natalie Gibson	KS. Judicial Council
DAVID HUTCHINGS	KBI
ED KLUMPP	KACP/KSA/KPOA AND TODAY KS JUDICIAL COUNCIL
Kathleen Ortlan	KSWA
Anna Lambertson	KS. Health Consumer Coalition
Charles Hunt	KDHE
Lou Saade	KDHE
Priscilla Miller	self
Jane Horst	self
Colin Curtis	Sandstone Group
Joan Basket	Self
Randy Hauge	Self
Kathie Sinnick	Self
Phillis Setchell	self
Sarah Gilloo	PPLM
Rachel Whitten	Kansas Reporter
TRAVIS LOVE	CAPITOL GOV RELATIONS
SEAN MILLER	CAPITOL STRATEGIES

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
Kari Presley	Kearney & Associates Inc.
Patrick Vogelsberg	KCOAA
Alan Tucker	Intern
Nathan Bainbridge	KDHE
Jennifer Roth	KACDL
Melissa Ward	Hein law Firm
Michael Schuttloffel	KS Catholic Conference
Tom + Sylda Nichols	Flint Hills TEA Party
Chris Tawney	Flint Hills Tea Party
Sarah Fertig	KSC
Dustin Bradley	KDOT
LARRY BERG	MIDWEST ENERGY
Joann Bond	KPL
Jessie Daniel	KFL
Kathy Ostrowski	KPL
Megan Pinegar	KSAG
Kyle Smith	KSAG
Leslie Moore	KBI

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon March 21st

NAME	REPRESENTING
Kevin Bevne	The Cap Lobby Grp
Sue Claridge	self
Jon Packard	self
Edward Larson	KS Catholic Conference
Susan Allen	Legis

* Some guests who attended earlier session did not sign guest list for evening session.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon March 21, 2011 P.M. session of meeting

NAME	REPRESENTING
Patrick Vogelsberg	KCDAA
Steve Fabert	Pawnee County
Phillis Setchell	self
Berend Koops	Hein Law Firm
Travis Lowe	Little Gov Relations
Whitney Jamison	City of Topeka
Edward Larson	KS Catholic Conference
Michael Schuttloffel	"
~~TOM FOLEY~~	KCWS
Natalie Gibson	KS Judicial Council
[illegible]	KSAG
DAVID HUTCHINGS	KBI
Lindsey Douglas	KDOT

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MEMORANDUM

To: Senate Committee on Judiciary
From: Jill Ann Wolters, Senior Assistant Revisor
Date: 21 March, 2011
Subject: House Bill No. 2339, Criminal Code trailer bill

During the 2010 Session, HB 2668 was enacted into law, making revisions to the Kansas criminal code. The revised code is the work product of the Criminal Justice Recodification, Rehabilitation and Restoration Project and the Criminal Code Recodification Commission.

The provisions of HB2339 fall into three categories

1. Errors and omissions in 2010 HB 2668. In reviewing the bill, some crimes were missing culpability terms, penalties or special sentencing rules. These omissions have been addressed. Example: Sec. 28, Blackmail. The culpability term assigned is 'intentional'.
2. Curing conflicts with other bills that were passed in the 2010 Session. Examples: House Sub. for SB 381, use of force; HB 2517, domestic violence designation; SB 67, mistreatment of dependent adults; Sub. SB 353, human trafficking; SB 434, traffic in contraband in a correctional institution or care and treatment facility;
3. Searching all the statutes outside of chapter 21, finding the references in those statutes, making a determination whether the prior law references need to be retained, and updating the references to the revised code.

The House floor amendment contained corrections to errors in the bill and corrections that were noticed after the bill had been printed.

MEMORANDUM

To: Chairman Owens and Members of the Senate Judiciary Committee
From: Jason Thompson, Senior Assistant Revisor
Date: March 21, 2011
Subject: Substitute for HB 2318

The controlled substances act was recodified and moved from chapter 65 to chapter 21 in 2009, as a prelude to the recodification of the entire criminal code. Suggested policy changes were not made at that time, and were also deferred last year when the legislature passed a cleanup bill concerning the recodified drug code. Substitute for HB 2318 contains those policy recommendations, made by the Kansas Criminal Code Recodification Commission and approved by the Kansas Judicial Council.

The House Corrections and Juvenile Justice Committee made many of the policy changes contained in the original draft, but also created a drug sentencing grid with five levels. This required a few changes to drug crime penalties and a number of technical changes in other statutes. Below is a summary of each section of the substitute bill.

Sec. 1. K.S.A. 21-36a01, definitions.

Changes definition of "manufacture" on page 4. Lines 18-19, removes packaging and repackaging, leaves those acts as distribution. Lines 32-34, excludes "cutting" as well.

Sec. 2. K.S.A. 21-36a03, unlawful manufacturing of controlled substances.

Page 6, line 13, subsection (b), drug severity level 1 felony changes to: 1st offense, drug SL 2 felony; 2nd offense, drug SL 1 felony; 1st offense if manufacturing methamphetamine, drug SL 1 felony.

Sec. 3. K.S.A. 21-36a05, unlawful cultivation or distribution of controlled substances. Moves cultivation to subsection (c), creates separate penalty. Page 8, divides penalties into levels based on the quantity of material. Subsection (d)(1) is general violations, (d)(2) for material containing marijuana, (d)(3) for material containing heroin or methamphetamine, and (d)(4) for material distributed by dosage unit. Subsection (d)(5), school zone enhancement, removes requirement that offender must be 18 or older. Subsection (d)(6), penalty for schedule V drugs, and (d)(7) enhances that penalty if distribution was to a minor. Subsection (d)(8), penalty for cultivation. Subsection (e), creates rebuttable presumption of intent to distribute if a person possesses certain quantities.

Sec. 4. K.S.A. 21-36a06, unlawful possession of controlled substances. Page 10, line 40, subsection (c)(1), drug SL 4 felony, changes to drug SL 5 felony. Lines 41-43, subsection (c)(2), misdemeanor, no change; 2nd offense, SL 4, changes to SL 5.

Sec. 5. K.S.A. 21-36a09, unlawful possession of certain precursors and paraphernalia. Page 12, paraphernalia crimes become attempted violations of other crimes. Attempted manufacture would be punished the same as actual manufacturing, while all other attempts would be punished with a 6-month reduction of the prescribed prison term (See section 33 of chapter 136, attempt).

Sec. 6. K.S.A. 21-36a10, unlawful distribution of certain precursors and paraphernalia. Page 13, penalties in subsection (e). Subsection (e)(1), SL 2 becomes SL 3; (e)(2), SL 4 becomes SL 5. Subsection (e)(3), school zone violation, SL 3 becomes SL 4, also removes requirement that offender must be 18 or older. Subsection (e)(4), SL 9, nonperson felony, no change. Subsection (e)(5), school zone violation, SL 4 becomes SL 5, also removes requirement that offender must be 18 or older.

Sec. 7. K.S.A. 21-36a13, unlawful distribution or possession of simulated controlled substance.

School zone change, removes requirement that offender must be 18 or older.

Sec. 8. K.S.A. 21-36a14, unlawful representation that substance is controlled substance.

Refers to definition of "minor" and clarifies that theft may also be charged.

Sec. 9. K.S.A. 21-36a16, unlawful acts involving proceeds derived from violations.

Page 16, penalties in subsection (e). Subsection (e)(1), value of the proceeds is less than $5,000, SL 4 becomes SL 5; (e)(2), at least $5,000 but less than $100,000, SL 3 becomes SL 4. Subsection (e)(3), at least $100,000 but less than $500,000, SL 2, split into 2 levels: (e)(3), at least $100,000 but less than $250,000, SL 3; and (e)(4), at least $250,000 but less than $500,000, SL 2. Subsection (e)(4) becomes (e)(5), $500,000 or more, remains a SL 1.

Sec. 10. K.S.A. 21-36a17, uniformity of act.

Removes reference to K.S.A. 21-36a09 because penalties are removed.

Sections 11 through 25: Technical cleanup related to sentencing grid change.

Sec. 26. Section 286 of chapter 136 of the 2010 Session Laws, drug sentencing grid.

Page 66, shows new grid with 5 levels.

Sections 27 through 30: Technical cleanup related to sentencing grid change.

Sections 31 and 32: Repealer and effective date (July 1, 2011).

KANSAS JUDICIAL COUNCIL

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TO: Senator Tim Owens, Chair, Senate Judiciary Committee

From: Criminal Law Advisory Committee, Kansas Judicial Council

Re: Testimony in support of 2011 Substitute for House Bill 2318

Date: March 18, 2011

TESTIMONY OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE ON 2011 SUBSTITUTE FOR HOUSE BILL 2318

In June, 2010, the Kansas Judicial Council Criminal Law Advisory Committee (Advisory Committee) was asked to study comments received regarding 2010 House Bill 2668. The comments included some concerns that the Recodification Commission had already addressed but also pointed out some apparent errors or omissions in the bill. The Advisory Committee also reviewed the policy recommendations included in Vol. II of the Recodification Commission's report. The Advisory Committee considered and discussed the Commission's recommendations and subsequently agreed with many of them. House Bill 2318 as originally proposed by the Advisory Committee would implement the Commission's recommendations pertaining to the drug code.

Senate Judiciary
3-21-11
Attachment 3

During the hearing on HB 2318 in the House Corrections and Juvenile Justice Committee, the Kansas County and District Attorney Association proposed a balloon amendment to the bill. The balloon amended the drug code to add an additional sentencing severity level to the drug grid. The Judicial Council Criminal Law Advisory Committee did not have an opportunity to review or consider this proposal and therefore did not take a formal position on the proposed balloon.

The balloon amendment was approved by the House Committee and subsequently required a substitute bill in order include all of the statutes referencing the drug grid severity levels and to ensure that severity levels of drug crimes were amended to maintain proportionality and consistency. The resulting legislation is encompassed in Substitute for House Bill 2318. The following is a brief explanation of each section of the bill as amended by the House Committee.

- **Section 1.** This section remains as proposed by the Council Advisory Committee. The definition of "manufacture" in the drug code should be revised. The proposed language would exclude the actions of packaging, repackaging and cutting controlled substances. Packaging, repackaging and cutting are not properly part of criminal drug manufacturing, but rather, they are acts more closely associated with drug distribution.
- **Section 2.** This section was added to the substitute bill due to the balloon proposal. The section would amend severity levels of the crimes in response to the addition of a severity level on the drug grid.
- **Section 3.** This section remains as proposed by the Council Advisory Commitee. The severity of drug distribution should be determined by the quantity of the drug.

The idea for using quantity originated at the Kansas Sentencing Commission Proportionality Subcommittee and was supported by the Recodification Commission. These two groups agreed to let the Commission determine the proper quantity levels and the Criminal Law Advisory Committee agrees with their proposals.

Currently, the severity level for distribution is based on recidivism of the offender. However, the recidivism enhancement was created before the sentencing guidelines. Since the guidelines account for an offender's criminal history, drug quantity is a preferable alternative method of determining the severity level of the offense. Of the four states that border Kansas, each ranks the severity of its drug distribution offense by quantity in some way.

The Commission conducted a substantial amount of research and carefully considered the proposed language. In 2008, staff members consulted with the KBI, the DEA, Kansas law enforcement officers along with Kansas prosecutors and district court judges regarding the proposal. The Commission also employed Kyle Smith, formerly of the KBI, as a staff attorney to work on this proposal.

The quantity thresholds are based on four classifications: small, medium, large and super large. The quantity thresholds are based on quantities that represent distribution units. Subsection (c)(1) creates a generic quantity threshold into which drugs such as cocaine fall. There is a specific quantity threshold for heroin and methamphetamine, due to its smaller distribution unit, and drugs sold by dosage unit such as LSD or prescription drugs. Subsection (g)(2) defines a dosage unit similarly to the definition used in the Drug Tax Stamp Act.

Subsection (e) contains a presumption of intent to distribute if certain quantities are possessed. A defendant may rebut the presumption; however, it allows a jury to infer, from the quantity alone, that a defendant intended to distribute.

- **Section 4.** This section was added to the substitute bill due to the balloon proposal. The section would amend severity levels of the crimes in response to the addition of a severity level on the drug grid.
- **Section 5.** This section remains as proposed by the Council Advisory Committee. The proposed language is recommended in lieu of K.S.A. 21-36a09. 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*. A method of clarifying the relationship between these offenses is to 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.
- **Sections 6 and 7.** These sections generally remain as proposed by the Council Advisory Committee. After passage of the drug code recodification, the provisions of the 1,000 feet of school enhancement in K.S.A. 21-36a05, K.S.A. 21-36a09 and K.S.A. 21-36a10 were unintentionally changed. The previous version of the school property enhancement required the offender to be 18 or more years of age.

Legislation was submitted in 2010 to correct the error; however, the Recodification Commission has since discovered that several prosecutors are in favor of removing this offender age element and in retrospect; the Commission determined that 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. Therefore, the recommendation is to remove the 18 year offender age requirements from the 1,000 feet of school property enhancements.

In addition, section 6 now includes amendments to severity levels of the crimes due to the balloon proposal to add a severity level on the drug grid.

- **Section 8.** This section remains as proposed by the Council Advisory Committee. The recommendation is to add subsection (d) in order to permit dual prosecution for this offense and theft by deception. The remaining amendments are technical in nature.
- **Sections 9 through 30.** These sections were added to the substitute bill due to the amendment to the drug grid. The amendments in these sections generally relate to statutory cross-references and to amending severity levels to maintain proportionality and consistency. The Council Advisory Committee does not take a formal position on these sections.

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:

Description of offense	Current penalty	Proposed penalty
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,

Jennifer Roth
rothjennifer@yahoo.com
785.550.5365

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

Proposed Balloon Amendment with Rationale

Proposed balloon amendment:
(the actual change is on page 2, but all of K.S.A. 22-4902 is provided)

22-4902. Definitions. As used in this act, unless the context otherwise requires:

(a) "Offender" means: (1) A sex offender as defined in subsection (b);

(2) a violent offender as defined in subsection (d);

(3) a sexually violent predator as defined in subsection (f);

(4) any person who, on and after the effective date of this act, is convicted of any of the following crimes when the victim is less than 18 years of age:

(A) Kidnapping as defined in K.S.A. 21-3420 and amendments thereto, except by a parent;

(B) aggravated kidnapping as defined in K.S.A. 21-3421 and amendments thereto; or

(C) criminal restraint as defined in K.S.A. 21-3424 and amendments thereto, except by a parent;

(5) any person convicted of any of the following criminal sexual conduct if one of the parties involved is less than 18 years of age:

(A) Adultery as defined by K.S.A. 21-3507, and amendments thereto;

(B) criminal sodomy as defined by subsection (a)(1) of K.S.A. 21-3505, and amendments thereto;

(C) promoting prostitution as defined by K.S.A. 21-3513, and amendments thereto;

(D) patronizing a prostitute as defined by K.S.A. 21-3515, and amendments thereto;

(E) lewd and lascivious behavior as defined by K.S.A. 21-3508, and amendments thereto; or

(F) unlawful sexual relations as defined by K.S.A. 21-3520, and amendments thereto;

(6) any person who has been required to register under any federal, military or other state's law or is otherwise required to be registered;

(7) any person who, on or after July 1, 2006, is convicted of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony;

(8) any person who has been convicted of an offense in effect at any time prior to the effective date of this act, that is comparable to any crime defined in subsection (4), (5), (7) or (11), or any federal, military or other state conviction for an offense that under the laws of this state would be an offense defined in subsection (4), (5), (7) or (11);

(9) any person who has been convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of an offense defined in subsection (4), (5), (7) or (10);

(10) any person who has been convicted of aggravated trafficking as defined in K.S.A. 21-3447, and amendments thereto; or

(11) any person who has been convicted of: (A) Unlawful manufacture or attempting such of any controlled substance or controlled substance analog as defined by K.S.A. 65-4159, prior to its repeal or K.S.A. 2009 Supp. 21-36a03, and amendments thereto, unless the court makes a finding on the record that the manufacturing or attempting to manufacture such controlled substance was for such person's personal use;

(B) 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 by K.S.A. 65-7006, prior to its repeal or K.S.A. 2009 Supp. 21-36a09 or 21-36a10, and amendments thereto, unless the court makes a finding on the record that the possession of such product was intended to be used to manufacture a controlled substance for such person's personal use; or

(C) 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 and after July 1, 2009, through the effective date of this act.

Convictions which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this section. A conviction from another state shall constitute a conviction for purposes of this section.

(b) "Sex offender" includes any person who, after the effective date of this act, is convicted of any sexually violent crime set forth in subsection (c) or is adjudicated as a juvenile offender for

an act which if committed by an adult would constitute the commission of a sexually violent crime set forth in subsection (c).

(c) "Sexually violent crime" means:

(1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;

(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;

(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;

(6) indecent solicitation of a child as defined by K.S.A. 21-3510 and amendments thereto;

(7) aggravated indecent solicitation of a child as defined by K.S.A. 21-3511 and amendments thereto;

(8) sexual exploitation of a child as defined by K.S.A. 21-3516 and amendments thereto;

(9) sexual battery as defined by K.S.A. 21-3517 and amendments thereto;

(10) aggravated sexual battery as defined by K.S.A. 21-3518 and amendments thereto;

(11) aggravated incest as defined by K.S.A. 21-3603 and amendments thereto; or

(12) electronic solicitation as defined by K.S.A. 21-3523, and amendments thereto, committed on and after the effective date of this act;

(13) any conviction for an offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent crime as defined in subparagraphs (1) through (11), or any federal, military or other state conviction for an offense that under the laws of this state would be a sexually violent crime as defined in this section;

(14) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of a sexually violent crime, as defined in this section; or

(15) any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated. As used in this subparagraph, "sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(d) "Violent offender" includes any person who, after the effective date of this act, is convicted of any of the following crimes:

(1) Capital murder as defined by K.S.A. 21-3439 and amendments thereto;

(2) murder in the first degree as defined by K.S.A. 21-3401 and amendments thereto;

(3) murder in the second degree as defined by K.S.A. 21-3402 and amendments thereto;

(4) voluntary manslaughter as defined by K.S.A. 21-3403 and amendments thereto;

(5) involuntary manslaughter as defined by K.S.A. 21-3404 and amendments thereto; or

(6) any conviction for an offense in effect at any time prior to the effective date of this act, that is comparable to any crime defined in this subsection, or any federal, military or other state conviction for an offense that under the laws of this state would be an offense defined in this subsection; or

(7) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of an offense defined in this subsection.

(e) "Law enforcement agency having jurisdiction" means the sheriff of the county in which the offender expects to reside upon the offender's discharge, parole or release.

(f) "Sexually violent predator" means any person who, on or after July 1, 2001, is found to be a sexually violent predator pursuant to K.S.A. 59-29a01 et seq. and amendments thereto.

(g) "Nonresident student or worker" includes any offender who crosses into the state or county for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year, for the purposes of employment, with or without compensation, or to attend school as a student.

(h) "Aggravated offenses" means engaging in sexual acts involving penetration with victims of any age through the use of force or the threat of serious violence, or engaging in sexual acts involving penetration with victims less than 14 years of age, and includes the following offenses:

(1) Rape as defined in subsection (a)(1)(A) and subsection (a)(2) of K.S.A. 21-3502, and amendments thereto;

(2) aggravated criminal sodomy as defined in subsection (a)(1) and subsection (a)(3)(A) of K.S.A. 21-3506, and amendments thereto; and

(3) any attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of an offense defined in this subsection.

(i) "Institution of higher education" means any post-secondary school under the supervision of the Kansas board of regents.

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 truly drug dealers.[1]

Current law provides that anyone convicted of distribution/possession with intent to distribute opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 – regardless of the amount of drug involved – must register under the Kansas Offender Registration Act. 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. People convicted before the registry even included drugs were suddenly subject to the registry and all of its requirements and penalties. The current minimum time period is ten years (although pending HB 2322 would increase the minimum period for all registrants to 15 years). Failure to comply with the registration requirements is a severity level 5 person felony. Obviously, being on a public offender registry (and, until recently, having a driver's license branded with "OFFENDER") presents its own challenges to people's rehabilitation.

As a result of the growing offender registry population, we have seen an impact on the number of people sent to prison for severity level 5 crimes. "Nondrug severity level V represents the third largest increase of prison population during the ten-year forecast period." (Kansas Sentencing Commission Fiscal Year 2010 Adult Inmate Prison Population Projections Report, p. 3). During FY 2010, 166 offenders were convicted of registration offenses. Of this number, 47 offenders were sentenced to prison and 119 offenders were sentenced to probation. (Kansas Sentencing Commission HB 2322 Bed Impact Statement). This number will continue to grow.

Earlier this month, the House Corrections and Juvenile Justice Committee held hearings on HB 2322, a bill that would dramatically change the offender registry. According to the fiscal note, the changes 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, I have little doubt our registry has a large number of people on it for drug offenses – and that a good chunk of that 2,150 people/year will also be drug offenders.

Sub for House 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 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).

Kansas
County and District Attorneys Association

TO: The Honorable Senators of the Senate Committee on Judiciary

FROM: Patrick Vogelsberg
Kansas County and District Attorneys Association

RE: House Bill 2318

DATE: March 21, 2011

Chair Owens and Members of the Committee:

Thank you for allowing me to submit testimony regarding House Bill 2318. This bill creates a new sentencing structure for drug distribution crimes based on the quantities of controlled substances possessed for sale or sold in Kansas.

The bill was originally drafted by the Recodification Committee, and established four levels of liability for drug distribution crimes. The House Corrections and Juvenile Justice Committee amended the bill to incorporate a 5-level drug grid. The KCDAA supports a 5-level drug grid and urges this committee to support HB 2318.

The current drug grid only contains four levels. Currently, drug distribution and manufacturing crimes are designated in levels one through three of the grid, while crimes involving the simple possession of certain drugs are designated as level four crimes. With the four-level grid that was originally offered, possession of small amounts of controlled substances for sale, or sale of those substances, would be level four drug crimes, the same level as simple possession for personal use. It makes no sense to punish those convicted of possession for personal use at the same level as those convicted of possessing drugs for sale.

HB 2318, as amended, would modify the law to encompass the five-level grid as I have proposed. The new grid creates a level of sentencing which falls precisely between the current first and second levels of the drug grid. This would alleviate the internal inconsistency which currently exists in HB 2318.

The five-level grid has an additional benefit. There has been concern expressed by some over the years that a level one designation for manufacture of methamphetamine is too harsh. My proposal would make the first-time conviction for manufacture of methamphetamine a level two

drug felony, which is the level that falls between the current levels one and two of the grid. This deals with the proportionality issue that has been raised regarding this crime. A second-time conviction for manufacture of methamphetamine would then be sentenced as a level one drug felony. The House chose to continue with first time drug manufacturing being at a level one. The KCDAA will leave it to the wisdom of this committee to decide where to place first time manufacturers on the five level grid.

I urge you to pass HB 2318 with the five level drug grid.

Respectfully submitted,

Patrick Vogelsberg

As Amended by House Committee

Session of 2011

HOUSE BILL No. 2035

By Representatives Kinzer, Rubin, Arpke, Billinger, A. Brown, Brunk, Burgess, Calloway, Carlson, Cassidy, Collins, Crum, DeGraaf, Donohoe, Fund, Garber, Goico, Goodman, Grange, Gregory, Gonzalez, Grosserode, Henry, Hermanson, Hildabrand, Hoffman, M. Holmes, Howell, Huebert, Kelley, Kerschen, Kiegerl, Knox, Landwehr, Mast, McLeland, Meier, Meigs, Montgomery, O'Brien, O'Hara, O'Neal, Osterman, Otto, Patton, Pauls, Peck, Powell, Rhoades, Ryckman, Scapa, Schwab, Siegfreid, Smith, Suellentrop, Swanson, Tyson, Vickrey, Weber, Wetta, Williams and B. Wolf

1-19

AN ACT concerning abortion; regarding certain prohibitions on late-term and partial birth abortion; amending K.S.A. 65-445, 65-6701, 65-6703, 65-6705 and 65-6721 and K.S.A. 2010 Supp. 65-6709 and 65-6710 and repealing the existing sections; also repealing K.S.A. 65-6713.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 65-445 is hereby amended to read as follows: 65-445. (a) Every medical care facility shall keep written records of all pregnancies which are lawfully terminated within such medical care facility and shall annually submit a written report thereon to the secretary of health and environment in the manner and form prescribed by the secretary. Every person licensed to practice medicine and surgery shall keep a record of all pregnancies which are lawfully terminated by such person in a location other than a medical care facility and shall annually submit a written report thereon to the secretary of health and environment in the manner and form prescribed by the secretary.

(b) Each report required by this section shall include the number of pregnancies terminated during the period of time covered by the report, the type of medical facility in which the pregnancy was terminated, information required to be reported under *subsections (b) and (c) of* K.S.A. 65-6703, *subsection (j) of K.S.A. 65-6705 and subsection (c) of K.S.A. 65-6721,* and amendments thereto, if applicable to the pregnancy terminated, and such other information as may be required by the secretary of health and environment, but the report shall not include the names of the persons whose pregnancies were so terminated. *Each report required by subsections (b) and (c) of K.S.A. 65-6703, subsection (j) of K.S.A. 65-6705 and subsection (c) of K.S.A. 65-6721, and amendments thereto, shall specify the medical diagnosis and condition constituting a substantial and irreversible impairment of a major bodily function or the*

Balloon Amendments

Prepared by: Jason B. Long

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secretary of health and environment shall adopt rules and regulations to implement this section. Such rules and regulations shall prescribe, in detail, the information required to be kept by the physicians and hospitals and the information required in the reports which must be submitted to the secretary.

(g) The department of social and rehabilitation services shall prepare and publish an annual report on the number of reports of child sexual abuse received by the department from abortion providers. Such report shall be categorized by the age of the victim and the month the report was submitted to the department. The name of the victim and any other identifying information shall be kept confidential by the department and shall not be released as part of the public report.

Sec. 2. K.S.A. 65-6701 is hereby amended to read as follows: 65-6701. As used in this act:

(a) "Abortion" means the use of any means to intentionally terminate a pregnancy except for the purpose of causing a live birth. Abortion does not include: (1) The use of any drug or device that inhibits or prevents ovulation, fertilization or the implantation of an embryo; or (2) disposition of the product of *in vitro* fertilization prior to implantation.

the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.

(b) "Counselor" means a person who is: (1) Licensed to practice medicine and surgery; (2) licensed to practice psychology; (3) licensed to practice professional or practical nursing; (4) registered to practice professional counseling; (5) licensed as a social worker; (6) the holder of a master's or doctor's degree from an accredited graduate school of social work; (7) registered to practice marriage and family therapy; (8) a licensed physician assistant; or (9) a currently ordained member of the clergy or religious authority of any religious denomination or society. Counselor does not include the physician who performs or induces the abortion or a physician or other person who assists in performing or inducing the abortion.

(c) "Department" means the department of health and environment.

(d) "Gestational age" means the time that has elapsed since the first day of the woman's last menstrual period.

(e) "Medical emergency" means that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(f) "Minor" means a person less than 18 years of age.

(g) "Physician" means a person licensed to practice medicine and surgery in this state.

7-8

Balloon regarding determination of mental capacity

Prepared by: Jason B. Long

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Senate Judiciary
3-21-11
Attachment 8

As Amended by House Committee

Session of 2011

HOUSE BILL No. 2035

By Representatives Kinzer, Rubin, Arpke, Billinger, A. Brown, Brunk, Burgess, Calloway, Carlson, Cassidy, Collins, Crum, DeGraaf, Donohoe, Fund, Garber, Goico, Goodman, Grange, Gregory, Gonzalez, Grosserode, Henry, Hermanson, Hildabrand, Hoffman, M. Holmes, Howell, Huebert, Kelley, Kerschen, Kiegerl, Knox, Landwehr, Mast, McLeland, Meier, Meigs, Montgomery, O'Brien, O'Hara, O'Neal, Osterman, Otto, Patton, Pauls, Peck, Powell, Rhoades, Ryckman, Scapa, Schwab, Siegfreid, Smith, Suellentrop, Swanson, Tyson, Vickrey, Weber, Wetta, Williams and B. Wolf

1-19

AN ACT concerning abortion; regarding certain prohibitions on late-term and partial birth abortion; amending K.S.A. 65-445, 65-6701, 65-6703, 65-6705 and 65-6721 and K.S.A. 2010 Supp. 65-6709 and 65-6710 and repealing the existing sections; also repealing K.S.A. 65-6713.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 65-445 is hereby amended to read as follows: 65-445. (a) Every medical care facility shall keep written records of all pregnancies which are lawfully terminated within such medical care facility and shall annually submit a written report thereon to the secretary of health and environment in the manner and form prescribed by the secretary. Every person licensed to practice medicine and surgery shall keep a record of all pregnancies which are lawfully terminated by such person in a location other than a medical care facility and shall annually submit a written report thereon to the secretary of health and environment in the manner and form prescribed by the secretary.

(b) Each report required by this section shall include the number of pregnancies terminated during the period of time covered by the report, the type of medical facility in which the pregnancy was terminated, information required to be reported under *subsections (b) and (c) of* K.S.A. 65-6703, *subsection (j) of K.S.A. 65-6705 and subsection (c) of K.S.A. 65-6721,* and amendments thereto, if applicable to the pregnancy terminated, and such other information as may be required by the secretary of health and environment, but the report shall not include the names of the persons whose pregnancies were so terminated. *Each report required by subsections (b) and (c) of K.S.A. 65-6703, subsection (j) of K.S.A. 65-6705 and subsection (c) of K.S.A. 65-6721, and amendments thereto, shall specify the medical diagnosis and condition constituting a substantial and irreversible impairment of a major bodily function or the*

(g) An expedited anonymous appeal shall be available to any minor. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of the notice to appeal.

(h) The supreme court shall promulgate any rules it finds are necessary to ensure that proceedings under this act are handled in an expeditious and anonymous manner.

(i) No fees shall be required of any minor who avails herself of the procedures provided by this section.

(j) (1) No ~~notice~~ *consent* shall be required under this section if~~:~~

~~(A) The pregnant minor declares that the father of the fetus is one of the persons to whom notice may be given under this section;~~

~~(B)~~ in the best medical judgment of the attending physician based on the facts of the case, an emergency exists that threatens the health, safety or well-being of the minor as to require an abortion~~; or~~

~~(C) the person or persons who are entitled to notice have signed a written, notarized waiver of notice which is placed in the minor's medical record.~~ .

(2) ~~A physician who does not comply with the provisions of this section by reason of the exception of subsection (j)(1)(A) must inform the minor that the physician is required by law to report the sexual abuse to the department of social and rehabilitation services. A physician who does not comply with the requirements of this section by reason of the exception of subsection (j)(1)(B)~~ *A physician acting pursuant to this subsection* shall state in the medical record of the abortion the medical indications on which the physician's judgment was based. *The medical basis for the determination shall also be reported by the physician as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.*

(k) Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally and knowingly fails to conform to any requirement of this section, is guilty of a class A person misdemeanor.

(l) Except as necessary for the conduct of a proceeding pursuant to this section, it is a class B person misdemeanor for any individual or entity to willfully or knowingly: (1) Disclose the identity of a minor petitioning the court pursuant to this section or to disclose any court record relating to such proceeding; or (2) permit or encourage disclosure of such minor's identity or such record.

(m) Prior to conducting proceedings under this section, the court may require the minor to participate in an evaluation and counseling session with a mental health professional. Such evaluation and

psychiatrist

counseling session shall be for the purpose of developing trustworthy and reliable expert opinion concerning the minor's sufficiency of knowledge, insight, judgment and maturity with regard to her abortion decision in order to aid the court in its decision and to make the state's resources available to the court for this purpose. Persons conducting such sessions may employ the information and materials referred to in K.S.A. 65-6708 et seq., and amendments thereto, in examining how well the minor is informed about pregnancy, fetal development, abortion risks and consequences and abortion alternatives, and should also endeavor to verify that the minor is seeking an abortion of her own free will and is not acting under intimidation, threats, abuse, undue pressure or extortion by any other persons. The results of such evaluation and counseling shall be reported to the court by the most expeditious means, commensurate with security and confidentiality, to assure receipt by the court prior to or at the proceedings initiated pursuant to this section.

(n) In determining if a minor is mature and well-enough informed to make the abortion decision without parental consent, the court shall take into account the minor's experience level, perspective and judgment. In assessing the minor's experience level, the court shall consider, along with any other relevant factors, the minor's age, experience working outside the home, living away from home, traveling on her own, handling personal finances and making other significant decisions. In assessing the minor's perspective, the court shall consider, along with any other relevant factors, what steps the minor has taken to explore her options and the extent to which she considered and weighed the potential consequences of each option. In assessing the minor's judgment, the court shall consider, along with any other relevant factors, her conduct since learning of her pregnancy and her intellectual ability to understand her options and to make informed decisions.

(o) The judicial record of any court proceedings initiated pursuant to this section shall upon final determination by the court be compiled by the court. One copy of the judicial record shall be given to the minor or an adult chosen by the minor to bring the initial petition under this section. A second copy of the judicial record shall be sent by the court to the abortion provider who performed or will perform the abortion for inclusion in the minor's medical records and shall be maintained by the abortion provider for at least 10 years.

(p) The chief judge of each judicial district shall send annual reports to the department of health and environment disclosing in a nonidentifying manner:

(1) The number of minors seeking a bypass of the parental consent requirements through court proceedings under this section;

8-3

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 2011

HOUSE BILL No. 2218

By By Representatives Kinzer, Arpke, Billinger, Boman, Brown, Brunk, Calloway, DeGraaf, Donohoe, Fund, Garber, Goico, Goodman, Gregory, Grosserode, Hedke, Henry, Hermanson, Hildabrand, Hoffman, M. Holmes, Howell, Kiegerl, Kleeb, Knox, Landwehr, Mast, McLeland, Meigs, Mesa, Montgomery, O'Brien, O'Hara, Otto, Patton, Peck, Rhoades, Rubin, Ryckman, Scapa, Schwab, Siegfreid, Smith, Suellentrop, Vickrey, Weber, Wetta and B. Wolf

2-8

AN ACT concerning abortion; relating to restrictions on late term abortions; amending K.S.A. 65-445 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. The legislature hereby finds and declares that:

(a) Pain receptors (nociceptors) are present throughout the unborn child's entire body by no later than 16 weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks;

(b) by eight weeks after fertilization, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling;

(c) in the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response;

(d) subjection to such painful stimuli is associated with long-term harmful neurodeveolopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life;

(e) for the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli is applied without such anesthesia;

(f) the position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007,

Balloon Amendments

Prepared by: Jason B. Long

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, the unborn child reacts to touch. By 20 weeks after fertilization

Senate Judiciary 3-21-19 Attachment

provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain;

(g) substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain;

(h) in adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does;

(i) substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing;

(j) consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization; and

(k) it is the purpose of the state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

New Sec. 2. As used in sections 1 through 3, and amendments thereto:

(a) "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.

(b) "Bodily function" means physical function. The term "bodily function" does not include mental or emotional functions.

(c) "Department" means the department of health and environment.

(d) "Gestational age" means the time that has elapsed since the first day of the woman's last menstrual period.

(e) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy without first determining gestational age to avert her death or for which a delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

she intends to

(f) "Pain-capable unborn child" means an unborn child having reached the gestational age of 22 weeks or more.

(g) "Physician" means a person licensed to practice medicine and surgery in this state.

(h) "Pregnant" or "pregnancy" means that female reproductive condition of having an unborn child in the mother's body.

New Sec. 3. (a) No person shall perform or induce, or attempt to perform or induce an abortion upon a pain-capable unborn child unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing, or attempting to perform or induce the abortion and both physicians provide a written determination, based upon a medical judgment arrived at using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances and that would be made by a reasonably prudent physician, knowledgeable in the field, and knowledgeable about the case and the treatment possibilities with respect to the conditions involved, that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

she intends to

(b) Except in the case of a medical emergency, a copy of the written documented referral and of the abortion-performing physician's written determination shall be provided to the pregnant woman no less than 30 minutes prior to the initiation of the abortion. The written determination shall be time-stamped at the time it is delivered to the pregnant woman. The medical basis for the determination shall also be reported by the physician as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto. Such determination shall specify:

(1) If the abortion is necessary to preserve the life of the pregnant woman and the medical basis of such determination, including the specific medical condition the physician believes would cause the death of the pregnant woman; or

(2) if a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman and the medical basis of such determination, including the specific medical condition the physician believes would constitute a substantial and irreversible impairment of a major bodily function of the

Balloon regarding medical statements

Prepared by: Jason B. Long

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Senate Judiciary
3-21-11
Attachment 10

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 2011

HOUSE BILL No. 2218

By By Representatives Kinzer, Arpke, Billinger, Boman, Brown, Brunk, Calloway, DeGraaf, Donohoe, Fund, Garber, Goico, Goodman, Gregory, Grosserode, Hedke, Henry, Hermanson, Hildabrand, Hoffman, M. Holmes, Howell, Kiegerl, Kleeb, Knox, Landwehr, Mast, McLeland, Meigs, Mesa, Montgomery, O'Brien, O'Hara, Otto, Patton, Peck, Rhoades, Rubin, Ryckman, Scapa, Schwab, Siegfreid, Smith, Suellentrop, Vickrey, Weber, Wetta and B. Wolf

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AN ACT concerning abortion; relating to restrictions on late term abortions; amending K.S.A. 65-445 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. The legislature hereby finds and declares that:

(a) Pain receptors (nociceptors) are present throughout the unborn child's entire body by no later than 16 weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks;

(b) by eight weeks after fertilization, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling;

(c) in the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response;

(d) subjection to such painful stimuli is associated with long-term harmful neurodeveolopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life;

(e) for the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli is applied without such anesthesia;

(f) the position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain;

(g) substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain;

(h) in adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does;

(i) substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing;

(j) consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization; and

(k) it is the purpose of the state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

New Sec. 21. As used in sections 1 through 3, and amendments thereto:

(a) "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.

(b) "Bodily function" means physical function. The term "bodily function" does not include mental or emotional functions.

(c) "Department" means the department of health and environment.

(d) "Gestational age" means the time that has elapsed since the first day of the woman's last menstrual period.

(e) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy without first determining gestational age to avert her death or for which a delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

(f) "Pain-capable unborn child" means an unborn child having reached the gestational age of 22 weeks or more.

and 2

fetus

a fetus

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and having a functioning cerebral cortex

(g) "Physician" means a person licensed to practice medicine and surgery in this state.

(h) "Pregnant" or "pregnancy" means that female reproductive condition of having an unborn child in the mother's body.

a fetus

New Sec. 32. (a) No person shall perform or induce, or attempt to perform or induce an abortion upon a pain-capable unborn child unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing, or attempting to perform or induce the abortion and both physicians provide a written determination, based upon a medical judgment arrived at using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances and that would be made by a reasonably prudent physician, knowledgeable in the field, and knowledgeable about the case and the treatment possibilities with respect to the conditions involved, that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

fetus

(b) Except in the case of a medical emergency, a copy of the written documented referral and of the abortion-performing physician's written determination shall be provided to the pregnant woman no less than 30 minutes prior to the initiation of the abortion. The written determination shall be time-stamped at the time it is delivered to the pregnant woman. The medical basis for the determination shall also be reported by the physician as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto. Such determination shall specify:

(1) If the abortion is necessary to preserve the life of the pregnant woman and the medical basis of such determination, including the specific medical condition the physician believes would cause the death of the pregnant woman; or

(2) if a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman and the medical basis of such determination, including the specific medical condition the physician believes would constitute a substantial and irreversible impairment of a major bodily function of the pregnant woman.

(c) (1) Except in the case of a medical emergency, prior to

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performing or inducing, or attempting to perform or induce an abortion upon a woman, the physician shall determine the gestational age of the unborn child according to accepted obstetrical and neonatal practice and standards applied by physicians in the same or similar circumstances. In making such a determination, the physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to gestational age. The physician shall document as part of the medical records of the woman the basis for the determination of gestational age. The physician shall report such determinations, the medical basis and the reasons for such determinations in writing to the medical care facility in which the abortion is performed **or induced** for inclusion in the report of the medical care facility to the secretary of health and environment under K.S.A. 65-445, and amendments thereto, or if the abortion is not performed **or induced** in a medical care facility, the physician who performs **or induces** the abortion shall report such determinations, the medical basis and the reasons for such determinations in writing to the secretary of health and environment as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.

fetus

(2) If the physician determines the gestational age of the unborn child is 22 or more weeks, then no abortion of the pain-capable unborn child shall be performed or induced, or attempted to be performed or induced except as provided for in subsection (a). In such event, the physician who performs **or induces** the abortion shall report such determinations, the medical basis and the reasons for such determinations, including the specific medical diagnosis for the determination that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman and the name of the referring physician required by subsection (a) in writing to the medical care facility in which the abortion is performed **or induced** for inclusion in the report of the medical care facility to the secretary of health and environment under K.S.A. 65-445, and amendments thereto, or if the abortion is not performed **or induced** in a medical care facility, the physician who performs **or induces** the abortion shall report such determinations, the medical basis and the reasons for such determinations, including the specific medical diagnosis for the determination that an abortion is necessary to preserve the life of the pregnant woman or that a

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