

**REPORT OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE
ON REBUTTABLE PRESUMPTIONS IN CRIMINAL STATUTES**

December 2, 2022

In March 2022, Rep. Stephen Owens asked the Judicial Council to study the topic of changing rebuttable presumptions to permissive inferences in criminal statutes. (Study request attached.) The topic was brought to Rep. Owens' attention by H.B. 2705, a bill requested by the Reno County District Attorney's office in response to a recent Kansas Supreme Court decision, *State v. Holder*, 314 Kan. 799, 502 P. 3d 1039 (2022). In *Holder*, the Supreme Court held that a jury instruction permitting the jury to infer intent to distribute based on the drug amount did not fairly and accurately state the law, because K.S.A. 21-5705(e) provides a rebuttable presumption rather than a permissive inference. While the Court did not reach the defendant's argument that the statutory rebuttable presumption unconstitutionally shifted the burden of proof, there was concern that the Court might find the presumption to be unconstitutional in a future case. Thus, H.B. 2705 would have changed the rebuttable presumption of intent to distribute in K.S.A. 21-5705(e) to a permissive inference. The Judicial Council assigned the study to the Criminal Law Committee.

COMMITTEE MEMBERSHIP

The members of the Criminal Law Advisory Committee (Committee) are:

Victor Braden, Chair, Deputy Attorney General; Topeka

Aaron Breitenbach, Deputy District Attorney for Sedgwick County; Wichita

Natalie Chalmers, Assistant Solicitor General; Topeka

Randall Hodgkinson, Kansas Appellate Defender Office & Visiting Assistant Professor of Law at Washburn University School of Law; Topeka

Sal Intagliata, Member at Monnat & Spurrier, Chartered; Wichita

Christopher M. Joseph, Partner at Joseph Hollander & Craft, LLC; Topeka

Ed Klumpp, Chief of Police-Retired, Topeka Police Department; Topeka

Hon. Cheryl A. Rios, District Court Judge in the Third Judicial District;
Topeka

Ann Sagan, Director of Special Projects, Kansas State Board of Indigents'
Defense Services; Lawrence

Kirk Thompson, Director of the Kansas Bureau of Investigation; Topeka

Rep. John Wheeler, Kansas House of Representatives, District 123; Garden
City

Ronald Wurtz, Retired Public Defender (Federal and Kansas); Topeka

Prof. Corey Rayburn Yung, KU School of Law Professor; Lawrence

SUMMARY

Rather than replacing the rebuttable presumption of intent to distribute in K.S.A. 21-5705(e) with a permissive inference – the approach taken by H.B. 2705 -- a majority of the Committee recommends striking the presumption entirely. Even without a statutory presumption or inference, prosecutors are free to argue that a jury should infer intent to distribute based on drug quantity, but they should do so only after presenting evidence about what drug amount is typically for personal use versus distribution.

Many other criminal statutes also contain presumptions. Rather than evaluate each of those presumptions individually, the Committee proposes a new evidentiary rule that would treat all presumptions against a defendant in a criminal case as permissive inferences, which are constitutionally sound.

DISCUSSION

Constitutionality of Rebuttable Presumptions in Criminal Cases

Rebuttable presumptions in criminal cases are unconstitutional “if they relieve the State of its burden of persuasion on an element of an offense or if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.” A permissive inference, on the other hand, “does not relieve the State of its burden because it still requires the State to convince the jury that an element, such as intent, should be inferred based on the facts proven.” *State v. Harkness*, 252 Kan. 510, Syl. ¶¶ 13-14, 847 P.2d 1191 (1993).

This difference between rebuttable presumptions and permissive inferences was explored in the recent Kansas Supreme Court opinion, *State v. Holder*, 314 Kan. 799, 502 P. 3d 1039 (2022). In *Holder*, the defendant was convicted by a jury of possession with intent to distribute and conspiracy to distribute a controlled substance (44 pounds of marijuana). The jury was instructed based on PIK Crim. 4th 57.022 that a permissive inference could be drawn about Holder’s intent based on the amount of marijuana in his possession, that the jury could accept or reject that inference in determining whether the State had met its burden of proof, and that the burden never shifted to the defendant.

The Supreme Court held that the jury instruction did not fairly and accurately reflect the law, because K.S.A. 21-5705(e) creates a rebuttable presumption of intent to distribute, not a permissive inference. That statute provides that “there shall be a rebuttable presumption of an intent to distribute if any person possesses . . . 450 grams or more of marijuana.” Other provisions in that statute create the same rebuttable presumption based on different amounts for other controlled substances. The Court also said that the 450-gram threshold had no connection to the evidence in the case. *Holder*, 314 Kan. at 806.

The Court discussed the different types of inferences and presumptions, explaining that Kansas recognizes three different categories:

“A presumption may be either mandatory or rebuttable. A mandatory presumption removes the presumed element from the case because the State has proven the predicate facts giving rise to the

presumption. That is, once the State proves certain facts, a jury must infer [the element] from such facts and the accused cannot rebut the inferences.

‘A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the accused persuades the jury otherwise. That is, once the State proves certain facts, the jury must infer [the element] from those facts, unless the accused proves otherwise. ...

‘An instruction containing a permissive inference does not relieve the State of its burden because it still requires the State to convince the jury that an element, such as intent, should be inferred based on the facts proven.’” *Holder*, 314 Kan. at 805, citing *State v. Harkness*, 252 Kan. 510, Syl. ¶¶ 12-14 (1993).

The Court recognized that presumptions in criminal law can be problematic “when an adverse presumption in a jury instruction is seen as relieving or reallocating the prosecution’s burden to prove all elements of an offense beyond a reasonable doubt.” *Holder*, 314 Kan. at 802 (citing *Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S. Ct. 2450, 61 L. Ed. 2d 39 [1979]). While inferences and presumptions are valuable evidentiary devices, “in criminal cases, the ultimate test of any device’s constitutional validity in a given case remains constant: the device must not undermine the fact finder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” *Holder*, 314 Kan. at 803 (citing *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213, 60 L. Ed. 2d 777 [1979]).

Although the *Holder* Court found that the jury instruction was erroneous because it provided a permissive inference rather than the statutory rebuttable presumption, the Court upheld the defendant’s convictions, holding that the jury would have reached the same verdict even without the instructional error. *Holder*, 314 Kan. at 807.

Other statutes

The Committee identified many other statutes that also contain presumptions that operate against a criminal defendant. A few examples include:

- K.S.A. 21-5611(d) (unlawful transmission of visual depiction of child) contains a rebuttable presumption of intent to harass if the offender transmitted the visual depiction of a child to more than one person.
- K.S.A. 21-5427(c) (stalking) provides that a person who is served with a protective order or warned by a law enforcement officer about stalking actions shall be presumed to have acted knowingly as to any like future act targeted at the specific person named in the order or as advised by the officer.
- K.S.A. 21-5804 provides that, in property crime prosecutions (*e.g.* theft), certain facts shall constitute prima facie evidence of intent to permanently deprive an owner of property; for example, the giving of a false name or address at the time of buying or selling the property. This statute was interpreted as creating a rebuttable presumption in *State v. DeVries*, 13 Kan. App. 2d 609, 780 P.2d 1118 (1989).

Some other statutes containing presumptions that operate against a criminal defendant include:

- K.S.A. 21-5823. Forgery
- K.S.A. 21-6401. Promoting Obscenity
- K.S.A. 21-6423. Violation of Consumer Protection Order
- K.S.A. 21-5714. Unlawful Representation that Noncontrolled Substance is Controlled Substance
- K.S.A. 21-5805. Unlawful Acts Involving Theft Detection Shielding Devices
- K.S.A. 21-5821. Giving a Worthless Check
- K.S.A. 21-5825. Counterfeiting
- K.S.A. 21-6407. Dealing in Gambling Devices
- K.S.A. 8-1005. Evidence of Blood Alcohol Concentration Test

Rather than review each of these statutes individually, the Committee recommends that the legislature adopt a single evidentiary rule that would treat all presumptions against a defendant in a criminal case as permissive inferences, which are constitutionally sound.

The Committee proposes the following amendment to K.S.A. 60-416:

“(a) A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by K.S.A. 60-414 or 60-415 and the burden of proof to overcome it continues on the party against whom the presumption operates.

(b) In a criminal case, the following rules shall apply to any presumption or inference against the accused, recognized at common law or created by statute, including a statute that provides that certain facts are prima facie evidence of another fact or of guilt:

- (1) A presumption or inference against the accused is permissive only. The trier of fact is free to accept or reject the presumption or inference in each case, and the judge is not authorized to direct the jury to find a fact against the accused. The judge may instruct the jury on the presumption or inference only if the presumption or inference is supported by the facts.
- (2) When the judge instructs the jury on a presumption or inference against the accused, the judge shall instruct the jury that it may consider the presumption or inference along with all the other evidence in the case, that it may accept or reject the presumption or inference in determining whether the prosecution has met its burden of proof, and that the burden of proof never shifts to the defendant.”

The proposed amendment, which is based on similar statutes from Michigan and Rhode Island, would enact a new evidentiary rule that would apply to all presumptions or inferences against an accused contained in criminal statutes.

About half of the states have a provision like this one addressing presumptions in criminal cases. Wright & Miller, *Federal Practice & Procedure*, Evidence § 5141.1 (2d ed.). Subsection (b)(2) of the amendment adopts the same language that the PIK Committee is already using to instruct juries on presumptions. See, e.g., PIK Crim. 4th 57.022, Controlled Substances and Their Analogs – Inference of Intent to Distribute from Quantity Possessed, and PIK Crim. 4th 58.090, Statutory Inference of Intent to Deprive.

The effect of the proposed amendment would essentially be to convert all presumptions against the accused to permissive inferences, which are constitutionally sound. It would also have the advantage of eliminating the need for the legislature to evaluate each statutory presumption individually.

The Committee voted to recommend the proposed amendment by a vote of 8-1. The Committee member who voted no believes that courts should not instruct the jury on either presumptions or inferences. His minority report follows.

MINORITY REPORT

A minority of the committee would support a recommendation that, at least in criminal cases, juries should not be instructed regarding presumptions or inferences, especially as it relates to elements of the charged offense. As noted in commentary to the Uniform Rule of Evidence 303, “[p]resumptions in criminal cases pose special problems. The major constitutional concern is that a presumption in a criminal case must not be allowed to undermine the government’s responsibility to prove certain elements of an offense beyond a reasonable doubt. Any rule that is adopted must come to terms with a series of Supreme Court cases which can charitably be described as not supplying a bright line test of constitutionality for presumptions directed against a criminal accused.” Evidence in America, Rule 303.

The Oregon Supreme Court recognized the practical and theoretical difficulty with adopting any sort of jury instruction telling the jury how to consider evidence:

“[W]hen used against a defendant with reference to an element of the crime, an instruction on an inference ought not be used.

Acknowledging that it is theoretically possible to employ an instruction on an inference, the instruction would likely be so abstract, perhaps incomprehensible, as to be of little or no help to the jury. But even an abstract or general inference instruction applied to an element of the crime may conflict with the more-likely-than-not or beyond-a-reasonable-doubt standard set forth above. On the other hand, should the instruction be sufficiently concrete to assist the jury, it would violate the longstanding statutory provision prohibiting a trial judge from instructing the jury in respect of matters of fact or commenting thereon. . . .

“It is the task of the advocate, not the judge, to comment on inferences. The advocate must do so without reference to any statute, but merely from the evidence in the case. Inferences when used against the defendant should be left to argument without any instruction.” *State v. Rainey*, 693 P.2d 635, 640 (Or. 1985).

A minority of the committee believes that the Oregon Supreme Court is correct. Parties can always argue inferences from facts in any case. But any instruction on inferences in criminal cases will risk the possibility of moving the needle in favor of the prosecution, which is prohibited by the federal and state constitutions. And even if the instruction is so abstract that it is itself constitutional, the risk of a prosecutor *using* the instruction in an unconstitutional way persists and will likely result in claims of error.

In short, a minority of the committee believes that trial judges should instruct the jury on the law, not on facts. The minority believes it is bad policy for judges to comment particularly on facts favorable to the prosecution in a criminal case. Let the advocates argue inferences from evidence.

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STEPHEN OWENS
74TH DISTRICT

March 15, 2022

Nancy Strouse, Executive Director
Kansas Judicial Council
301 SW 10th Avenue
Topeka, Kansas 66612

Dear Nancy:

I am writing to request Judicial Council study of a topic that arose during the consideration of legislation by the House Committee on Corrections and Juvenile Justice during the 2022 Session. I believe that in-depth consideration by the Judicial Council of the topic (changing rebuttable presumptions to permissive inferences in criminal statutes) raised by the legislation would be appropriate and helpful before additional consideration of legislation regarding the topic by the Legislature.

The bill raising the topic was **HB 2705 -- Removing the rebuttable presumption of an intent to distribute controlled substances and replacing it with a permissive inference.**

HB 2705 was brought to us by Thomas Stanton, Reno County District Attorney, who testified the bill was intended to address an issue raised during oral arguments before the Kansas Supreme Court during the case *State v. Dominic Holder*, No. 120,464. In *Holder*, the Kansas Supreme Court held that "permissive inference" language in PIK Crim. 4th 57.020 does not fairly and accurately state the applicable law – a rebuttable presumption of intent to distribute – in KSA 2020 Supp. 21-5705(e), when a defendant possesses certain quantities of controlled substances. Although the defendant in *Holder* also challenged the statutory rebuttable presumption as an unconstitutional shifting of the burden of proof to the defendant, the Kansas Supreme Court did not address this issue on its merits, stating any potential constitutional defect in the statute was harmless for several reasons, including that the rebuttable presumption was not actually applied to the defendant.

Although the Kansas Supreme Court did not reach the merits of the constitutional challenge to the rebuttable presumption in *Holder*, Mr. Stanton and the Office of the Attorney General indicated that defense attorneys continue to raise this issue in criminal appeals involving rebuttable presumptions, and that they expect the Kansas Supreme Court will address the issue in the future and may determine the language is unconstitutional. Thus, HB 2705 would change the rebuttable presumption in KSA 21-5705 to a permissive inference.

Although our Committee recommended HB 2705 favorably for passage, it remains unlikely it will be passed by the Legislature this year. Even if it is enacted, additional changes may be advisable to this statute, or to other criminal statutes that currently contain a rebuttable presumption.

Thus, I would request the Judicial Council review the issue of rebuttable presumptions in our criminal statutes, and I would appreciate the Judicial Council's recommendation regarding any statutory changes that could be made to ensure our statutes align with the applicable caselaw.

I have requested that the Kansas Legislative Research Department provide you with the *Holder* opinion and with the testimony we received regarding HB 2705. Please let me know if I can provide any further information or answer any questions regarding this request.

Thank you.

Sincerely,



Representative Stephen Owens
Chairman, House Committee on Corrections and Juvenile Justice

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 120,464

STATE OF KANSAS,
Appellee,

v.

DOMINIC O'SHEA HOLDER,
Appellant.

SYLLABUS BY THE COURT

1.

K.S.A. 2020 Supp. 21-5705(e) provides a rebuttable presumption for a defendant's possession with intent to distribute when that defendant is found to have possessed specific quantities of a controlled substance.

2.

A rebuttable presumption does not remove the presumed element from the case, but it requires the jury to find the presumed element unless the accused persuades the jury otherwise. That is, once the State proves certain facts, the jury must infer the element from those facts, unless the accused proves otherwise.

3.

A jury instruction with a permissive inference does not relieve the State of its burden of proof in a criminal case, because it still requires the State to convince the jury that an element should be inferred based on the facts proven.

4.

PIK Crim. 4th 57.022 (2013 Supp.) provides a jury instruction with a permissive inference the jury may accept or reject about a defendant's possession with intent to

distribute when that defendant is found to possess specific quantities of a controlled substance. This permissive instruction does not fairly and accurately reflect the statutory rebuttable presumption specified in K.S.A. 2020 Supp. 21-5705(e).

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 16, 2020. Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed January 28, 2022. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

James M. Latta, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Thomas R. Stanton, district attorney, argued the cause, and *Keith E. Schroeder*, former district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: A jury convicted Dominic O'Shea Holder of possession with intent to distribute and conspiracy to distribute a controlled substance after police seized 44 pounds of marijuana during a traffic stop of a vehicle he did not own or occupy. A Court of Appeals panel affirmed his convictions. See *State v. Holder*, No. 120,464, 2020 WL 6108359 (Kan. App. 2020) (unpublished opinion). He petitioned this court for review, and we agreed to consider two questions: (1) whether the instruction stating a permissive inference the jury "may accept or reject" about his intent to distribute marijuana fairly and accurately reflected applicable law; and (2) whether he could facially challenge K.S.A. 2020 Supp. 21-5705(e), which provides a rebuttable presumption for a defendant's possession with intent to distribute when that defendant is found to possess specific quantities of a controlled substance. We find no reversible error on the first question and do not reach the second's merits, so we affirm the convictions.

But we also recognize the district court followed PIK Crim. 4th 57.022 (2013 Supp.), which recites a permissive inference to be drawn from the evidence in drafting the instruction given, rather than the statutorily specified rebuttable presumption in K.S.A. 2020 Supp. 21-5705(e). This makes the instruction given legally inappropriate, as an instruction on the statutory presumption, because it does not align with the statute. See *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012) ("[A]n instruction must always fairly and accurately state the applicable law, and an instruction that does not do so would be legally infirm."). And as an instruction on permissive inference, the instruction as given also was legally inappropriate because the 450-gram threshold taken from K.S.A. 2020 Supp. 21-5705(e) lacked any evidentiary context to explain why that specific amount supported the inference. Nevertheless, the jury instruction given played to Holder's benefit as measured against the existing statute, and therefore based on the evidence we hold the jury would have reached the same verdict without the instructional error.

FACTUAL AND PROCEDURAL BACKGROUND

In 2017, South Hutchinson police officer Jake Graber saw two vehicles driving close together and speeding. He stopped one, but the other got away. Graber radioed for assistance to stop that car. Graber identified Holder from an Arizona driver's license as the driver he pulled over. Holder denied traveling with the other vehicle. Graber conducted a field sobriety test after Holder admitted to smoking marijuana before leaving Arizona. He passed the test and was allowed to go after Graber gave him a speeding ticket.

Meanwhile, assisting officers stopped the other car and identified its driver as Alyssa Holler, who was also from Arizona. Officer Graber arrived and asked if she was traveling with Holder, which she denied. She allowed officers to search the car, where

they found some 44 pounds of marijuana, but no paraphernalia. Officers detained Holler, who eventually admitted travelling with Holder. A KBI lab confirmed two packages taken from the car contained marijuana and weighed more than 600 grams.

Holder was arrested in Arizona and charged in Kansas with possession of at least 450 grams of marijuana with intent to distribute and conspiracy to distribute. See K.S.A. 2020 Supp. 21-5705(a)(4), (d)(2)(C); K.S.A. 2020 Supp. 21-5302(a) (conspiracy). Holler testified for the prosecution. She said she knew Holder from work in Arizona, that he developed the plan to deliver marijuana from Arizona to Indiana in a rental car, and that he gave her money for the car. She said they texted and called each other during the trip. The State supported her testimony with call and text logs. Holder did not testify.

The district court gave a jury instruction based on PIK Crim. 4th 57.022 for a permissive inference that could be drawn from the evidence. It stated:

"If you find the defendant possessed 450 grams or more of marijuana, you may infer that the defendant possessed with the intent to distribute. You may consider this inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. The burden never shifts to the defendant."

The same instruction defined "possession" to mean "having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control."

The district court also instructed the jury that:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified."

And the court instructed:

"The State has the burden to prove Dominic Holder is guilty. Dominic Holder is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

"The test you must use in determining whether Dominic Holder is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find Dominic Holder not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find Dominic Holder guilty."

The jury found Holder guilty of both possession of marijuana with intent to distribute and conspiracy to distribute. The district court sentenced him to 98 months' imprisonment with 36 months' postrelease supervision. He appealed, and the panel affirmed. *Holder*, 2020 WL 6108359, at *1.

Holder petitioned this court for review of the panel's decisions. We granted review on two issues: (1) whether the permissive inference instruction fairly and accurately reflected applicable law; and (2) whether he could facially challenge the rebuttable presumption of intent found in K.S.A. 2020 Supp. 21-5705(e). We declined review of his other five claims, which settled them against Holder as determined by the panel. See Kansas Supreme Court Rule 8.03(g)-(h), (k) (2021 Kan. S. Ct. R. 54).

Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

Presumptions in this context operate when one fact's existence is allowed to follow from proof of another fact. K.S.A. 60-413 provides, "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action."

But our criminal law recognizes an analytical hostility with the Due Process Clause when an adverse presumption in a jury instruction is seen as relieving or reallocating the prosecution's burden to prove all elements of an offense beyond a reasonable doubt. See *Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (evidentiary presumption that a person intends the ordinary consequences of his voluntary acts cannot relieve the State of its burden to prove the essential elements of a crime).

In *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), the United States Supreme Court noted, "Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts." In so doing, the Court clarified:

"The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the

particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. *Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.*" (Emphasis added.) 442 U.S. at 156.

Our first consideration here is deciding whether the permissive inference instruction given to Holder's jury fairly and accurately reflects K.S.A. 2020 Supp. 21-5705(e). See *State v. Owens*, 314 Kan. 210, 235, 496 P.3d 902 (2021) (setting out multi-step standard of review for claims of jury instruction error; at one step, court applies unlimited review to determine if instruction was legally appropriate). We believe it does not.

Consider first the pattern instruction used by the district court to draft Holder's jury instruction. It provides a fill-in-the-blank inference the jury "may accept or reject." The pattern instruction states:

"If you find the defendant possessed (450 grams or more of marijuana) (3.5 grams or more of heroin) (3.5 grams or more of methamphetamine) (100 dosage units or more containing *insert name of controlled substance*) (100 grams or more of *insert name of any other controlled substance*), you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant." PIK Crim. 4th 57.022.

The pattern instruction cites K.S.A. 2020 Supp. 21-5705(e) as its legal authority. That statute sets out various offenses and punishments for unlawful cultivation or distribution of controlled substances dependent on the substance and quantities involved.

Subsection (e)(1), the statutory presumption language applicable to Holder's case, provides in pertinent part: "[T]here *shall be a rebuttable presumption* of an intent to distribute if any person possesses . . . 450 grams or more of marijuana." (Emphasis added.) Other provisions within subsection (e) apply a rebuttable presumption of an intent to distribute for possession of other controlled substances depending on the amount possessed: 3.5 grams or more of heroin or methamphetamine, 100 dosage units or more containing a controlled substance, or 100 grams or more of any other controlled substance. See K.S.A. 2020 Supp. 21-5705(e)(2), (3), and (4).

To consider whether the statute's rebuttable presumption of intent to distribute is fairly and accurately reflected by PIK Crim. 4th 57.022's permissive inference that the jury "may accept or reject" requires some brief background. The *Allen* Court suggested the various presumptions stated in the law can be understood as a continuum. At one end, there is an "entirely permissive inference or presumption" that allows, but does not require, a jury "to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant." 442 U.S. at 157. At the other end, there is a "mandatory presumption" that "may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden." 442 U.S. at 157.

The Court refined the markers along this continuum in *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). The *Francis* Court defined a "mandatory presumption" as one that "instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." 471 U.S. at 314. Then, it sought to separate mandatory presumptions into two camps, either conclusive or rebuttable, explaining:

"A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption

does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element *unless the defendant persuades the jury that such a finding is unwarranted.*" (Emphasis added.) 471 U.S. at 314 n.2.

The Court defined a "permissive inference" as one suggesting to the jury "a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." 471 U.S. at 314. Our court adopted these definitions in *State v. Harkness*, 252 Kan. 510, Syl. ¶¶ 12-14, 847 P.2d 1191 (1993), altering the terminology slightly. We limited use of the term "mandatory presumption" to those described by the United States Supreme Court as "conclusive presumptions." Rebuttable presumptions were given their own category. In other words, in Kansas we differentiate the terms as follows:

"A presumption may be either mandatory or rebuttable. A mandatory presumption removes the presumed element from the case because the State has proven the predicate facts giving rise to the presumption. That is, once the State proves certain facts, a jury must infer [the element] from such facts and the accused cannot rebut the inferences.

"A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the accused persuades the jury otherwise. That is, once the State proves certain facts, the jury must infer [the element] from those facts, unless the accused proves otherwise. . . .

"An instruction containing a permissive inference does not relieve the State of its burden because it still requires the State to convince the jury that an element, such as intent, should be inferred based on the facts proven." *Harkness*, 252 Kan. 510, Syl. ¶¶ 12-14.

These definitions tell us Holder has a point when he complains about the apparent discrepancy between the permissive inference instruction given in his case and K.S.A.

2020 Supp. 21-5705(e)(1)'s rebuttable presumption of an intent to distribute if any person possesses 450 grams or more of marijuana. Applying the definitions adopted in *Harkness*, the statutory rebuttable presumption means that once the State proved possession of 450 grams or more of marijuana, the jury must infer Holder's intent to distribute unless he proved otherwise. This suggests some burden shifting, although the operative impact in a given case would depend on the jury instructions as a whole. See *State v. Wimbley*, 313 Kan. 1029, 1039, 493 P.3d 951 (2021) (when addressing a challenged instruction's legal appropriateness, an appellate court does not view the instruction's language in isolation but considers all the jury instructions as a whole).

The panel correctly noted the instruction given to the jury "conforms to the instruction required under PIK Crim. 4th 57.020" *Holder*, 2020 WL 6108359, at *6. But that misses the point because it ignores what K.S.A. 2020 Supp. 21-5705(e) specifies. And our law is clear that "an instruction must always fairly and accurately state the applicable law, and an instruction that does not do so would be legally infirm." *Plummer*, 295 Kan. at 161.

A rebuttable presumption has a different legal effect than a permissive inference. *Harkness*, 252 Kan. 510, Syl. ¶¶ 13-14. This means that even if we consider the jury instructions as a whole, we cannot hold they fairly and accurately reflect the applicable law specified by K.S.A. 2020 Supp. 21-5705(e), when measured narrowly against that statute.

But aside from that, we also should consider more broadly whether the instruction—framed as it was as a permissive inference—was nevertheless legally appropriate. To do this, we view the instructions as a whole to determine "whether it is reasonable to conclude that they could have misled the jury." *Wimbley*, 313 Kan. at 1035 (quoting *State v. Liles*, 313 Kan. 772, 780, 490 P.3d 1206 [2021]). Instructions fail their

purpose if they omit words that may be considered essential to providing the jury with a clear statement of the law. *State v. Andrew*, 301 Kan. 36, 42-43, 340 P.3d 476 (2014).

In general, a jury may infer intent from "acts, circumstances, and inferences reasonably deducible therefrom." *State v. Ross*, 310 Kan. 216, 224, 445 P.3d 726 (2019) (quoting *State v. Barnes*, 293 Kan. 240, 264, 262 P.3d 297 [2011]). In this context, a defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic. See 1 Jones on Evidence § 5:42 (7th ed.). But here the instructed permissive inference was not only unmoored from any statutory basis, its 450-gram threshold had no connection to the evidence. Said differently, the jury was simply told out of left field that Holder's possession of "more than 450 grams" of marijuana could support an intent-to-distribute inference—even though the evidence showed a much larger quantity and no other evidence explained why a 450-gram threshold to trigger this permissive inference was important to anything about the case.

We apply a clear error standard to the question of harm because this instructional error claim was not properly preserved in the district court. See K.S.A. 2020 Supp. 22-3414(3) (unpreserved instructional error is reviewed for clear error); *State v. Gentry*, 310 Kan. 715, 721, 449 P.3d 429 (2019) (Under clear error standard, appellate court must decide whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred, and the burden to establish clear error is on defendant.). So even if the statute providing for a rebuttable presumption would have imposed on Holder some burden of production, the permissive instruction given at his trial did not. And the permissive inference instruction given did not relieve the State of its burden of proof.

Holder argues the jury would not have convicted him of the charged crimes had the instructional error not occurred. We disagree. In his brief to the panel, he claimed:

"Holder was caught with nothing while Holler was caught with everything. Holler was scared of prison, so she told her story about Holder. No one but Holler and the erroneous presumption of intent instruction provided any support for the intent element of distribution. And [by] removing this instruction, all that is left is Holler."

This contention fails to consider the entire trial record. Holler's credibility was a jury question. She testified Holder hatched the plan, that he fronted the money for the car, and that the two of them worked together to deliver the marijuana from Arizona to Indiana. She said they texted and called each other throughout their trip, and the State provided corroborating text and phone logs. And when officers searched Holler's car, they discovered 44 pounds of marijuana but no paraphernalia that might suggest at least some personal use. We hold the jury would not have reached a different verdict had the instructional error not occurred.

As to Holder's second claim that the rebuttable presumption in K.S.A. 2020 Supp. 21-5705(e) is unconstitutional on its face, the panel determined Holder lacked standing and therefore declined to address the issue's merits. *Holder*, 2020 WL 6108359, at *5. But we need not address the standing or merits questions—or even the fact Holder raised this claim for the first time on appeal—because in Holder's prosecution any constitutional defect in that subsection of the statute was harmless.

This is because the statutory presumption was not applied to him at trial. So even if we concluded Holder has standing to raise this claim, and also decided K.S.A. 2020 Supp. 21-5705(e)'s rebuttable presumption could not be constitutionally applied in a criminal trial, Holder still could claim no prejudice—for much the same reason it could

be said he lacks standing. Plus, even assuming subsection (e) were stricken as unconstitutional, the crime itself is defined in subsection (a)(4), so his conviction would remain intact.

We hold any statutory defect was harmless in Holder's case beyond a reasonable doubt. See *State v. Kleypas*, 305 Kan. 224, 257, 382 P.3d 373 (2016) (stating the constitutional harmless error standard is defined in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967], under which standard, appellate courts "must be convinced beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record—that is, that there is no reasonable possibility the error affected the jury's verdict of guilt"); see, e.g., *Carella v. California*, 491 U.S. 263, 266-67, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (holding jury instructions on statutory, mandatory presumptions violated due process; remanding to lower court to determine whether error instructing on the presumption was nevertheless harmless).

Affirmed.

HOUSE BILL No. 2705

By Committee on Federal and State Affairs

2-14

1 AN ACT concerning crimes, punishment and criminal procedure; relating
2 to crimes involving controlled substances; distribution of a controlled
3 substance; replacing the rebuttable presumption of intent to distribute
4 with a permissive inference; amending K.S.A. 2021 Supp. 21-5705 and
5 repealing the existing section.

6
7 *Be it enacted by the Legislature of the State of Kansas:*

8 Section 1. K.S.A. 2021 Supp. 21-5705 is hereby amended to read as
9 follows: 21-5705. (a) It shall be unlawful for any person to distribute or
10 possess with the intent to distribute any of the following controlled
11 substances or controlled substance analogs thereof:

12 (1) Opiates, opium or narcotic drugs, or any stimulant designated in
13 ~~subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107(d)(1), (d)(3) or (f)(1),~~
14 and amendments thereto;

15 (2) any depressant designated in ~~subsection (e) of K.S.A. 65-4105(e),~~
16 ~~subsection (e) of K.S.A. 65-4107(e), subsection (b) or (e) of K.S.A. 65-~~
17 ~~4109(b) or (c) or subsection (b) of K.S.A. 65-4111(b),~~ and amendments
18 thereto;

19 (3) any stimulant designated in ~~subsection (f) of K.S.A. 65-4105(f),~~
20 ~~subsection (d)(2), (d)(4), (d)(5) or (f)(2) of K.S.A. 65-4107(d)(2), (d)(4),~~
21 ~~(d)(5) or (f)(2) or subsection (e) of K.S.A. 65-4109(e),~~ and amendments
22 thereto;

23 (4) any hallucinogenic drug designated in ~~subsection (d) of K.S.A.~~
24 ~~65-4105(d), subsection (g) of K.S.A. 65-4107(g) or subsection (g) of~~
25 ~~K.S.A. 65-4109(g),~~ and amendments thereto;

26 (5) any substance designated in ~~subsection (g) of K.S.A. 65-4105 and~~
27 ~~subsection (e), (d), (e), (f) or (g) of K.S.A. (g) or 65-4111(c), (d), (e), (f) or~~
28 ~~(g),~~ and amendments thereto;

29 (6) any anabolic steroids as defined in ~~subsection (f) of K.S.A. 65-~~
30 ~~4109(f),~~ and amendments thereto; or

31 (7) any substance designated in ~~subsection (h) of K.S.A. 65-4105(h),~~
32 and amendments thereto.

33 (b) It shall be unlawful for any person to distribute or possess with
34 the intent to distribute a controlled substance or a controlled substance
35 analog designated in K.S.A. 65-4113, and amendments thereto.

36 (c) It shall be unlawful for any person to cultivate any controlled

1 substance or controlled substance analog listed in subsection (a).

2 (d) (1) Except as provided further, violation of subsection (a) is a:

3 (A) Drug severity level 4 felony if the quantity of the material was
4 less than 3.5 grams;

5 (B) drug severity level 3 felony if the quantity of the material was at
6 least 3.5 grams but less than 100 grams;

7 (C) drug severity level 2 felony if the quantity of the material was at
8 least 100 grams but less than 1 kilogram; and

9 (D) drug severity level 1 felony if the quantity of the material was 1
10 kilogram or more.

11 (2) Violation of subsection (a) with respect to material containing any
12 quantity of marijuana, or an analog thereof, is a:

13 (A) Drug severity level 4 felony if the quantity of the material was
14 less than 25 grams;

15 (B) drug severity level 3 felony if the quantity of the material was at
16 least 25 grams but less than 450 grams;

17 (C) drug severity level 2 felony if the quantity of the material was at
18 least 450 grams but less than 30 kilograms; and

19 (D) drug severity level 1 felony if the quantity of the material was 30
20 kilograms or more.

21 (3) Violation of subsection (a) with respect to material containing any
22 quantity of heroin, as defined by ~~subsection (e)(1) of K.S.A. 65-4105(c)~~
23 ~~(1)~~, and amendments thereto, or methamphetamine, as defined by
24 ~~subsection (d)(3) or (f)(1) of K.S.A. 65-4107(d)(3) or (f)(1)~~, and
25 amendments thereto, or an analog thereof, is a:

26 (A) Drug severity level 4 felony if the quantity of the material was
27 less than 1 gram;

28 (B) drug severity level 3 felony if the quantity of the material was at
29 least 1 gram but less than 3.5 grams;

30 (C) drug severity level 2 felony if the quantity of the material was at
31 least 3.5 grams but less than 100 grams; and

32 (D) drug severity level 1 felony if the quantity of the material was
33 100 grams or more.

34 (4) Violation of subsection (a) with respect to material containing any
35 quantity of a controlled substance designated in K.S.A. 65-4105, 65-4107,
36 65-4109 or 65-4111, and amendments thereto, or an analog thereof,
37 distributed by dosage unit, is a:

38 (A) Drug severity level 4 felony if the number of dosage units was
39 fewer than 10;

40 (B) drug severity level 3 felony if the number of dosage units was at
41 least 10 but ~~less~~ fewer than 100;

42 (C) drug severity level 2 felony if the number of dosage units was at
43 least 100 but ~~less~~ fewer than 1,000; and

1 (D) drug severity level 1 felony if the number of dosage units was
2 1,000 or more.

3 (5) For any violation of subsection (a), the severity level of the
4 offense shall be increased one level if the controlled substance or
5 controlled substance analog was distributed or possessed with the intent to
6 distribute on or within 1,000 feet of any school property.

7 (6) Violation of subsection (b) is a:

8 (A) Class A person misdemeanor, except as provided in subsection
9 (d)(6)(B); and

10 (B) nondrug severity level 7, person felony if the substance was
11 distributed to or possessed with the intent to distribute to a minor.

12 (7) Violation of subsection (c) is a:

13 (A) Drug severity level 3 felony if the number of plants cultivated
14 was more than 4 but fewer than 50;

15 (B) drug severity level 2 felony if the number of plants cultivated was
16 at least 50 but fewer than 100; and

17 (C) drug severity level 1 felony if the number of plants cultivated was
18 100 or more.

19 (e) In any prosecution under this section, there shall be a ~~rebuttable~~
20 ~~presumption~~ *permissive inference* of an intent to distribute if any person
21 possesses the following quantities of controlled substances or analogs
22 thereof *and there are facts to support such inference*:

23 (1) 450 grams or more of marijuana;

24 (2) 3.5 grams or more of heroin or methamphetamine;

25 (3) 100 dosage units or more containing a controlled substance; or

26 (4) 100 grams or more of any other controlled substance.

27 (f) It shall not be a defense to charges arising under this section that
28 the defendant:

29 (1) Was acting in an agency relationship on behalf of any other party
30 in a transaction involving a controlled substance or controlled substance
31 analog;

32 (2) did not know the quantity of the controlled substance or
33 controlled substance analog; or

34 (3) did not know the specific controlled substance or controlled
35 substance analog contained in the material that was distributed or
36 possessed with the intent to distribute.

37 (g) As used in this section:

38 (1) "Material" means the total amount of any substance, including a
39 compound or a mixture, which contains any quantity of a controlled
40 substance or controlled substance analog.

41 (2) "Dosage unit" means a controlled substance or controlled
42 substance analog distributed or possessed with the intent to distribute as a
43 discrete unit, including but not limited to, one pill, one capsule or one

1 microdot, and not distributed by weight.

2 (A) For steroids, or controlled substances in liquid solution legally
3 manufactured for prescription use, or an analog thereof, "dosage unit"
4 means the smallest medically approved dosage unit, as determined by the
5 label, materials provided by the manufacturer, a prescribing authority,
6 licensed health care professional or other qualified health authority.

7 (B) For illegally manufactured controlled substances in liquid
8 solution, or controlled substances in liquid products not intended for
9 ingestion by human beings, or an analog thereof, "dosage unit" means 10
10 milligrams, including the liquid carrier medium, except as provided in
11 subsection (g)(2)(C).

12 (C) For lysergic acid diethylamide (LSD) in liquid form, or an analog
13 thereof, a dosage unit is defined as 0.4 milligrams, including the liquid
14 medium.

15 Sec. 2. K.S.A. 2021 Supp. 21-5705 is hereby repealed.

16 Sec. 3. This act shall take effect and be in force from and after its
17 publication in the statute book.

**OFFICE OF THE
RENO COUNTY
DISTRICT ATTORNEY**

The 27th Judicial District of Kansas
206 West First Avenue, Fifth Floor
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Thomas R. Stanton
District Attorney

TO: The Honorable Representatives of the Committee on Corrections and Juvenile Justice

FROM: Thomas R. Stanton
Reno County District Attorney

RE: House Bill 2705

DATE: March 3, 2022

Chairman Owens and Members of the Committee:

Thank you for allowing me to submit testimony regarding House Bill 2705.

The purpose of this bill is to replace the term “rebuttable presumption” in K.S.A. 21-5705(e) with the term “permissive inference,” and add language to make it clear that the evidence presented by the State at a jury trial supports the jury’s consideration of the permissible inference.

In 2012, the legislature enacted legislation which created an inference that possession of a certain quantity of controlled substances suggested the drugs were possessed for sale rather than personal use. In doing so, the term “rebuttable presumption” was used to establish the inference as an applied to those specific quantities of controlled substances. The quantities established by the legislature depended on the specific controlled substance, how that controlled substance was used, and the detrimental effect resulting from use of specified substances. For example, the presumptive quantity for sale for methamphetamine was 3.5 grams based on its instantly addictive properties and the amounts normally used by the individual user. The presumption for cocaine was set at 100 grams, and the presumption for marijuana was set at 450 grams. As a prosecutor who has spent the majority of my 30-year career prosecuting drug cases, I believe those inferences remain indicative of clear intent to distribute the various drugs.

The statute has recently come under a constitutional attack from appellate defense counsel

because of the use of the term “rebuttable presumption” in the statute. I recently argued a case before the Kansas Supreme Court (*State v. Dominic Holder*, No. 120,464) in which this constitutional issue was raised. The argument presented by defense is that the term “rebuttable presumption” carries with it an implication that the defendant must present evidence to rebut the presumption. Justices of the Kansas Supreme Court expressed concern that the use of that term creates a shifting of the burden in a criminal case, resulting in an unconstitutional application of law. Another aspect of this issue is that the pattern jury instruction for the presumption was written in a manner that is more consistent with a permissive inference than with a rebuttable presumption. So, while the instruction read to the jury would not suggest shifting the burden, the statute itself may very well carry that implication.

The Supreme Court in my case did not reverse the defendant’s conviction for possession of marijuana with intent to distribute because the amount he possessed for distribution (approximately 40 pounds) was really not affected by statute or the jury instruction at trial. The defendant failed to preserve the issue for review, and the Supreme Court found that there was no real possibility the jury would not have convicted based on the evidence presented at trial. However, it became clear to me during arguments before the Supreme Court that the language in the statute needed to be modified from “rebuttable presumption” to “permissive inference” because the Court is likely to find the statute unconstitutional if the issue is properly preserved for appeal, and the evidence could support either possession for sale or possession for personal use.

In consultation with other prosecutors, we also determined that it would be best to add a phrase to make it clear that the inference had to be supported by evidence presented at trial. This bill would also add the language we thought appropriate to accomplish that goal.

It is my belief, and the belief of the prosecutors with whom I have discussed this issue, that this change in language is required to preserve the constitutionality of the statute previously promulgated by this body. I urge the passage of this legislation.

Respectfully submitted,

/s/ Thomas R. Stanton
Thomas R. Stanton
Reno County District Attorney



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**Testimony in Support of House Bill 2705
Modifying the rebuttable presumption of intent to distribute**

**Presented to the Corrections and Juvenile Justice Committee
By Assistant Solicitor General Natalie Chalmers**

March 4, 2022

Chairman Owens and Members of the Committee:

Reno County District Attorney Tom Stanton has indicated that there is an interest in our office's position on this bill. Recent arguments before the Kansas Supreme Court have indicated that there may be constitutional issues with K.S.A. 21-5705(e) as it is currently written. House Bill 2705 fixes those issues.

Essentially, mandatory presumptions in criminal cases are unlawful if "they relieve the State of the burden of persuasion on an element of an offense." *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 1971, 85 L. Ed. 2d 344 (1985), *holding modified on other grounds by Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). Defense counsel has been arguing that the word "shall" and "rebuttable presumption" in K.S.A. 21-5705(e) amount to such an unlawful mandatory presumption. Based on oral arguments in cases such as *Holder*, No. 18-120464-AS, it appears that defense counsel's arguments may have some merit.

This bill fixes the issue by making the evidentiary rule a permissive inference while requiring the inference to be supported by facts. This would fix the possible constitutional flaws being argued in the appellate courts.

Currently, any error is likely to be harmless due to current version of the PIK instruction. But the Kansas Supreme Court's decision in *State v. Holder*, __ Kan. __ 502 P.3d 1039 (2022), will require rewriting the PIK to follow the possibly constitutionally flawed statute. At that point, giving the instruction may well result in the reversal of convictions. Thus, the fix is important to avoid the unnecessary reversal of drug convictions involving substantial amounts of drugs.

For the above reasons, the Office of the Attorney General supports this committee adopting this bill. Thank you for your time.

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