STATE OF KANSAS

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March 24, 1977

ATTORNEY GENERAL OPINION NO. 77-102

Honorable Ross O. Doyen
President, Kansas State Senate
State Capitol Building
Topeka, Kansas 66612

RE: Criminal Law - Uniform Controlled Substances Act - Marihuana

SYNOPSIS: 1977 House Bill 2313 contains no classification which on its face is manifestly and parently unrelated to a permissible legislative objective. The procedures prescribed in section 5 of said bill conform to those outlined in the Kansas code of criminal procedure, including K.S.A. 1976 Supp. 22-2408. Under section 6, any vehicle which is found to be used or intended to be used for transporting an ounce of marihuana for sale or receipt is subject to forfeiture, unless such material is located in a locked rear truck, or rear compartment or in any locked outside compartment which is inaccessible to the driver or any passenger in said vehicle while it is in motion. The bill contains no provision which is so vague and indefinite as to render it unconstitutional and all language in the bill appears reasonably designed and drafted to afford reasonable persons fair and adequate notice of that conduct which is prohibited by the bill, as required by the due process provisions of the Kansas and United States Constitutions.

The present penalty for marihuana offenses was established by the legislature, and it is within the power of the legislature to alter those penalties for all or any subclass of such offenses.

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Dear Senator Doyen:

You inquire concerning 1977 House Bill 2313, as amended by the House committee and by the House Committee of the Whole.

Section 1 amends K.S.A. 1976 Supp. 65-4101 of the Uniform Controlled Substances Act to include a definition of hashish and an amended definition of marihuana. Section 2 amends K.S.A. 65-4105, also of the Uniform Controlled Substances Act, to include hashish and synthetic tetrahydrocannabinols as Schedule I substances. Section 3 amends K.S.A. 1976 Supp. 65-4127b to accommodate new section 4, of the bill, which provides that any person who shall "have under his or her control, prescribe, administer, deliver, distribute, dispense or compound" any marijuana" shall be guilty of a class A misdemeanor upon conviction of a first offense, and a class D felony upon a second or subsequent conviction, when the amount involved is over one ounce. If the amount of marihuana involved is one ounce or less, the first offense is an unclassified misdemeanor punishable by a fine of not more than $100, and third or subsequent offenses are punishable as a class A misdemeanor. Irrespective of the amount of marihuana involved, any violation by a defendant 18 years of age or older involving delivery of marihuana to a minor is punishable as a class D felony. Section 5 provides for issuance of a summons or notice to appear in instances of violations of section 4(a)(2) of the bill, i.e., offenses involving possession or delivery of one ounce of marihuana or less and not involving minors. Section 6 amends K.S.A. 65-4135 to add the following new language:

> "(E) No conveyance is subject to forfeiture under this section by reason of its use in transporting, delivering, importing or exporting marihuana, if the amount of marihuana found in such conveyance is one ounce or less and is in the locked rear truck or rear compartment, or in any locked outside compartment, which is not accessible to the driver or any other person in such conveyance while it is in motion."

Section 7, which is new, provides for deposit of all fines, penalties and forfeitures arising from violations of the Uniform Controlled Substances Act to be paid into a drug abuse fund, which is created by the bill, the proceeds to be expended therefrom for the use or establishment of licensed treatment facilities for drug users.

You inquire whether the bill makes "any classification which is so unjustifiably related to an appropriate legislative objective that the bill is unconstitutional." Under existing law, it is unlawful to possess or deliver marihuana, regardless of the amount involved, and conviction of a first offense constitutes a class A misdemeanor, and sale or possession with intent to sell, marihuana is punishable as a class D felony. The offense of sale or possession with intent to sell remains unchanged by the bill. The

penalty for possession or delivery when the amount involved exceeds one ounce remains punishable as a class A misdemeanor, and upon conviction of a second or subsequent offense, as a class D felony. The bill enhances the offense of transfer when the transferor is an adult and the recipient is a minor, from a class A misdemeanor to a class D felony. The offense of possession or other transfers, except those involving minors as recipients, is reduced from a class A misdemeanor, punishable by confinement in the county jail for not to exceed one year and a fine of not to exceed $2,500, to an unclassified misdemeanor punishable by a fine not exceeding $100, when the amount involved is one ounce of marihuana or less. The apparent legislative objective is to reduce the penal consequences for minor marihuana offenses, which are those involving possession or delivery of one ounce or less and not involving a minor as a transferee. This is, obviously, a permissible legislative objective, and the new classification created by the bill is manifestly related to that clearly permissible legislative purpose. Obviously, it is impossible to anticipate all the arguments which might be raised against application of the bill involving particular offenses. However, certainly, I find no classification in the bill which is on its face manifestly and patently unrelated to a permissible legislative objective.

Secondly, you inquire whether the procedures set forth in section 5 constitute a "departure from the code of criminal procedure in any inoperable or unconstitutional manner." The procedures outlined in this section conform to those permitted by K.S.A. 1976 Supp. 22-2408, and I see no departure whatever from that prescribed procedure.

Third, you ask whether section 6 subjects any person having marihuana found in his or her vehicle in a location accessible to the driver or passenger to forfeiture of the vehicle, and if so, whether this provision contains any constitutional infirmity. The existing K.S.A. 65-4135 subjects to forfeiture "all conveyances, including aircraft, vehicles or vessels, which are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale or receipt" of controlled substances which have been manufactured, distributed, dispensed or acquired in violation of the act. Thus, to be subject to forfeiture, a vehicle must be found to be "used or intended for use to transport or . . . facilitate the transportation of controlled substances for the purpose of sale or receipt." [Emphasis supplied.] It will surely be the exceedingly rare circumstance where possession of one ounce or less of marijuana in a vehicle supports an inference that it is being transported for the purpose of sale. If, however, a vehicle is found to be used or intended to be used for transporting one ounce of marihuana or less for purposes of sale or receipt, that vehicle will be exempt from forfeiture if the

contraband is located in the locked rear truck, rear compartment or in any locked outside compartment which is inaccessible to the driver or other passenger while the vehicle is in motion. The instances in which this exemption would be invoked are surely infrequent, indeed. The fact that it is probably largely unnecessary, however, does not render it unconstitutional, and I find no constitutional infirmity therein.

Lastly, you ask whether the bill contains "any provisions which are so vague and indefinite as to cause the bill to be unconstitutional." Much of the bill, of course, merely incorporates existing statutory language. I have reviewed the entire bill, with particular attention to the new language approved by the House committee and the House Committee of the Whole, and I find no language which is vague or indefinite in such a fashion as to draw into question the constitutionality of the bill. All the language in the present bill is reasonably calculated and drafted to afford a reasonable person fair and adequate notice of what conduct is permitted and that which is prohibited, as required by the due process clause of the state and federal constitutions. In short, I find no constitutional defects in this bill.

The present penalty for marijuana offenses was established by the legislature, and it is obviously within the power of the legislature to alter those penalties for all or any subclass of marijuana offenses.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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