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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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