

SESSION OF 2012

**CONFERENCE COMMITTEE REPORT BRIEF
SENATE SUBSTITUTE FOR SUBSTITUTE FOR
HOUSE BILL NO. 2318**

As Agreed to April 26, 2012

Brief*

Senate Sub. for Sub. for HB 2318 would amend several statutes concerning the criminal code and drug crimes.

Criminal Code Amendments

The bill would amend various sections of the Kansas Criminal Code to:

- Create the crime of "endangerment," defined as recklessly exposing another person to a danger of great bodily harm or death. Endangerment would be a class A person misdemeanor;
- Amend the statute governing multiple prosecutions for the same act and lesser-included crimes to add language establishing that a defendant may not be convicted of identical offenses based upon the same conduct, the prosecution may choose which such offense to charge, and, upon conviction, the defendant shall be sentenced according to the charged offense;
- Amend the conspiracy statute to allow the unilateral theory of conspiracy, which does not require the other person(s) with whom the

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defendant conspired to have the actual intent to commit the underlying crime, provided the defendant believed the other person(s) to have such intent;

- Add abandonment of a child and aggravated abandonment of a child to the list of inherently dangerous felonies in the statute governing first degree murder;
- Amend the statute governing human trafficking, so current subsection (b)(2) would no longer be a stand-alone means of committing aggravated human trafficking. Instead, the act would have to first meet the definition of human trafficking;
- Increase the severity level for the crime of incest from a severity level 5, person felony to a severity level 3, person felony if the victim is the offender's biological, step, or adoptive child;
- Expand the crime of unlawful use of recordings to include possession of recordings by a person knowing or having reasonable grounds to know the article was produced in violation of law, which would be a class B nonperson misdemeanor;
- Replace "sexual battery" with "sexually motivated crime" in the burglary statute;
- Expand the crime of interference with law enforcement to include falsely reporting to a law enforcement officer or state investigative agency any known false information with intent to influence, impede, or obstruct an officer or agency's duty, or concealing, destroying, or materially altering evidence with intent to prevent or hinder the apprehension or prosecution of any person;

- Clarify the culpability standard for the crime of simulating legal process;
- Amend the crime of escape from custody to include escaping while held under arrest without a written charge;
- Amend the bribery statute to add a *quid pro quo* requirement, include the omission of performance of a public duty, and clarify that a public official may accept some gifts consistent with state ethics laws;
- Amend the statute prohibiting smoking in enclosed areas or at public meetings to make it a "strict liability" infraction. Because the current statute has no explicit culpability standard, the general recodification culpability standard of recklessness would apply;
- Amend other smoking provisions to clarify the culpability requirements for smoking where prohibited (strict liability), allowing smoking where prohibited (recklessness), and taking adverse action for reporting or attempting to prosecute a violation of the smoking prohibition (intent to retaliate);
- Amend the criminal disposal of explosives statute to clarify that the action must be taken without lawful authority and that ignorance of the age of the recipient is irrelevant. The severity level of carrying concealed explosives is increased from a class C to a class A person misdemeanor;
- Amend the cruelty to animals statute to eliminate a requirement that a county or district attorney file charges when a valid complaint is filed;
- Remove the use of living rabbits or chickens, ducklings, or goslings as an advertising device or

promotion display from the definition of unlawful disposition of animals; and

- Amend the statute governing sentencing in multiple conviction cases to allow a judge to consider the need to impose an overall sentence that is proportionate to the harm and culpability in determining whether sentences should be served concurrently or consecutively. It also would give a judge discretion to impose an entire consecutive sentence or a part of such sentence.

Drug Crimes

The bill also would adopt a new drug sentencing grid with five levels, adding a new level 2 with penalties falling between the current first and second levels of the drug grid. The grid also would expand the presumptive imprisonment boxes to include levels 4-C and 4-D (formerly levels 3-C and 3-D), making the presumed sentence for certain offenders convicted of level 4 crimes imprisonment, and expand the border boxes to include levels 5-C and 5-D (formerly levels 4-C and 4-D), allowing courts to impose an optional non-prison sentence for certain offenders convicted of level 5 offenses.

The bill would specify that offenders assigned a high risk status, as determined by a drug abuse assessment, and a moderate or high risk status, as determined by the criminal risk-need assessment would be committed to a drug-abuse treatment program. Offenders so committed would be supervised by community correctional services. Otherwise, based on the result of the criminal risk assessment, they would be supervised either by community correctional services or court services.

Further, it would allow the court to order an offender who does not meet the drug risk assessment level requirements to undergo an additional drug risk assessment while the offender is on probation and to undergo drug abuse treatment

if the offender is determined to meet the risk assessment level requirement. The offender would pay the costs of that assessment.

The bill also would make several changes to the statutes governing drug crimes. Specifically, the bill would delete the packaging or repackaging of a substance or labeling or relabeling its container from the definition of "manufacture," and clarify that it does not include the addition of dilutants or adulterants. It also would amend the definition of "drug paraphernalia" to clarify that it does not include certain drug precursors.

Next, it would amend as follows the severity levels for a violation of KSA 21-5703, manufacture or attempted manufacture of a controlled substance or controlled substance analog:

- Change a violation from a drug severity level 1 felony to a drug severity level 2 felony for a first conviction; a second or subsequent conviction for manufacture would be a drug severity level 1 felony; and
- Specify that manufacture of methamphetamine would remain a drug severity level 1 felony.

In KSA 21-5705, the bill would impose new felony classifications on the drug grid, based on quantity, for the crimes of distribution or possession with the intent to distribute the drugs listed in subsection (a), including lisdexamfetamine, a schedule II substance, as follows:

- Less than 3.5 grams, severity level 4;
- At least 3.5 grams but less than 100 grams, severity level 3;
- At least 100 grams but less than 1 kilogram, severity level 2; and

- 1 kilogram or more, severity level 1.

The bill would create exceptions to these penalties, as follows:

- Violations involving marijuana would have the following felony classifications on the drug grid based on quantity:
 - Less than 25 grams, severity level 4;
 - At least 25 grams but less than 450 grams, severity level 3;
 - At least 450 grams but less than 30 kilograms, severity level 2; and
 - 30 kilograms or more, severity level 1 felony.
- Violations involving heroin or methamphetamine would have the following felony classifications on the drug grid based on quantity:
 - Less than 1 gram, severity level 4;
 - At least 1 gram but less than 3.5 grams, severity level 3;
 - At least 3.5 grams but less than 100 grams, severity level 2; or
 - 100 grams or more, severity level 1.
- Violations involving substances outlined in KSA 65-4105, 65-4107, 65-4109, or 65-4111 (schedules I-IV) would have the following felony classifications on the drug grid based on quantity:
 - Fewer than 10 dosage units, severity level 4;
 - At least 10 dosage units but less than 100 dosage units, severity level 3;
 - At least 100 dosage units but less than 1,000 dosage units, severity level 2; and

- 1,000 dosage units or more, severity level 1.
- Violations occurring within 1,000 feet of any school property would increase the severity level by 1 level.

The crime of distribution or possession with the intent to distribute a controlled substance listed in schedule V would be a class A person misdemeanor, except that if distributed to or possessed with the intent to distribute to a minor, it would be a nondrug severity level 7, person felony.

Cultivation of a controlled substance listed in subsection (a) would have the following felony classifications on the drug grid based on the number of plants cultivated:

- More than 4, but fewer than 50, severity level 3;
- At least 50, but fewer than 100, severity level 2; or
- 100 or more, severity level 1.

A rebuttable presumption of intent to distribute would be created for possession of the following amounts of controlled substances:

- 450 grams or more of marijuana;
- 3.5 grams or more of heroin or methamphetamine;
- 100 dosage units or more containing a controlled substance listed by statute in the Uniform Controlled Substances Act; or
- 100 grams or more of any other controlled substance listed under the Act.

The bill also would amend KSA 21-5705 to bar the use of certain defenses and define some key terms.

In KSA 21-5706, sale of lisdexamfetamine, a schedule II substance, would be criminalized.

In KSA 21-5710, the subsections with enhanced penalties for distribution or causing paraphernalia to be distributed to a minor on or within 1,000 feet of any school property would be amended to strike the requirement that the offender be 18 or older.

The bill would amend KSA 21-5714 to clarify that a person prosecuted for the distribution or possession with the intent to distribute a noncontrolled substance as a controlled substance also could be prosecuted for, convicted of, and punished for theft.

In KSA 21-5716, concerning crimes involving proceeds derived from the commission of any drug crime, the severity level of crimes involving proceeds of \$100,000-\$500,000, would be amended to raise the severity level for proceeds of \$100,000-\$250,000, from a level 2 to a level 3, due to the adoption of the five-level grid. For proceeds of \$250,000-\$500,000, the severity level would remain a level 2.

Conference Committee Action

The Conference Committee agreed to remove the provisions of SB 327, which were added by the Senate Committee of the Whole and acceded to the Senate's other amendments to the bill. Additionally, the Conference Committee agreed to clarify the definition of "drug paraphernalia"; criminalize distribution, possession with the intent to distribute, and possession of lisdexamfetamine, a schedule II substance; remove the section amending interference with the judicial process due to amendments made to the crime by other bills during the 2012 Legislative Session; amend the drug sentencing grid to make 5-C and 5-D border boxes and 4-C and 4-D presumptive imprisonment; and make other technical changes. It also agreed to amend the bill to allow the court to order an offender who does not

meet the drug risk assessment level requirements to undergo an additional drug risk assessment while the offender is on probation and to undergo drug abuse treatment if the offender is determined to meet the risk assessment level requirement. The offender would pay the costs of that assessment.

Background

HB 2318, as introduced, was based on the recommendations of the Kansas Judicial Council's Criminal Advisory Committee. In the House Committee on Corrections and Juvenile Justice, representatives of the Kansas County and District Attorneys Association and the Kansas Judicial Council's Criminal Advisory Committee appeared in support of the bill.

The House Committee on Corrections and Juvenile Justice adopted a substitute bill incorporating changes required due to the adoption of a five level drug grid, which was recommended by the Kansas County and District Attorneys Association.

In the Senate Committee on Judiciary, representatives of the Kansas Judicial Council, the Kansas County and District Attorneys Association, and the Attorney General appeared in support of the bill. The Committee amended the bill by adopting another substitute bill, which is substantially similar to the House substitute, but reverted to current law in KSA 21-5709, concerning drug paraphernalia, and added the provisions of SB 368, concerning presumptive probation and border boxes on the drug sentencing grid.

The Senate Committee of the Whole amended the bill to include the contents of SB 327 concerning electronic prescriptions and amending the Prescription Monitoring Program Act. The majority of SB 308, which represents the policy recommendations of the Criminal Recodification Commission, was also added to the bill.

The fiscal note for HB 2318, as introduced, indicates it has the potential to increase litigation, but the fiscal effect would likely be accommodated within existing resources. The Kansas Sentencing Commission's (KSC) revised estimate indicates no additional convictions in FY 2013 and an increase of 23 convictions in FY 2022.

The fiscal note for SB 368 indicates passage would require \$101,985 for two new court services officers. The KSC indicates passage would increase the number of offenders eligible for drug treatment by 202 in FY 2012, which would require \$930,640 in additional funding. Further, the Commission estimates a decrease of 67 adult prison beds in FY 2013 and 146 by FY 2022.

The KSC indicated passage of SB 308, as introduced, would result in 193 additional prison admissions by the end of FY 2013 and 231 additional prison admissions by the end of FY 2022, requiring 193 additional prison beds by the end of FY 2013 and 231 additional prison beds by the end of FY 2022. However, this impact was attributed to the section creating the crime of armed criminal action, which was removed by the Senate Judiciary Committee.

The fiscal note further indicates additional charges may be filed in district courts as a result of the new crimes and expanded violations of current crimes, which would create a fiscal effect due to additional time required for court cases. However, it is not possible to predict how complex and time-consuming these issues would be, and a precise fiscal effect cannot be determined. Any fiscal effect would most likely be accommodated within the existing schedule of court cases and would not required additional resources.

Drug Crimes; Drug Sentencing and Treatment; Kansas Criminal Code Amendments

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