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**Testimony in Support of House Bill 2044
Increasing the Penalty for Drug Distribution Resulting in Death or Great Bodily Harm**

**Presented to the Committee on Corrections and Juvenile Justice
By Assistant Attorney General Christine Ladner**

January 30, 2013

Chairman Rubin and Members of the Committee:

Thank you for the opportunity to speak in support of HB 2044, a bill designed to increase the penalty for drug distribution that results in great bodily harm or death.

“Prescription drug abuse is the fastest growing drug problem in the United States.”¹ In 2007, about 27,000 people died from drug overdoses in the United States, one death every 19 minutes. The increase in overdose death rates has been fueled by an increased use of opioid analgesic prescription drugs, which include fentanyl, morphine, oxycodone, and methadone.²

According to the Centers for Disease Control and Prevention, “[d]eaths from prescription painkillers have reached epidemic levels in the past decade.”³ In 2010, 12 million Americans reported use of prescription painkillers for nonmedical purposes in the previous year.⁴ The number of poisoning deaths exceeded the number of car accident related deaths for the first time since 1980. In 2008, drugs caused 89% of poisoning deaths.⁵

¹ Paulozzi, Leonard, MD, Baldwin, Grant, PhD (2012, January). CDC Grand Rounds: Prescription Drug Overdoses – a U.S. Epidemic. *Centers for Disease Control and Prevention*. Retrieved from: www.cdc.gov

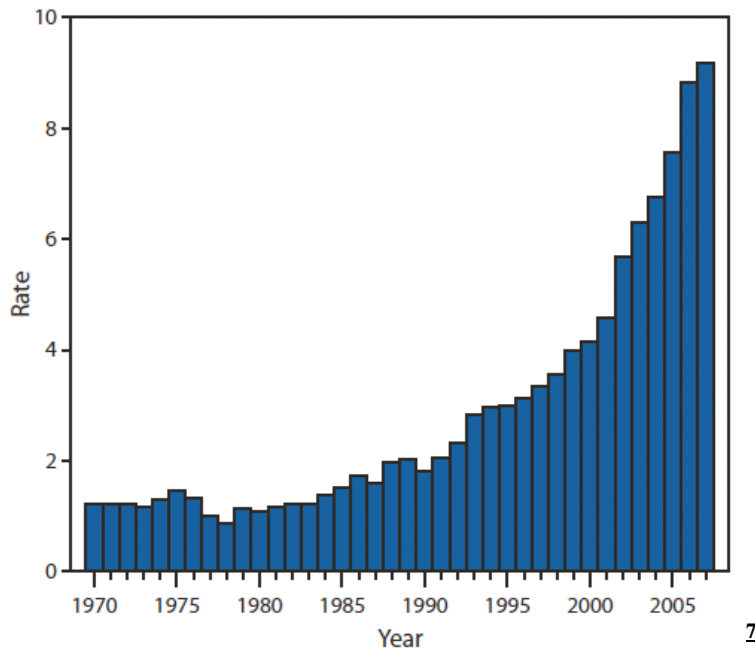
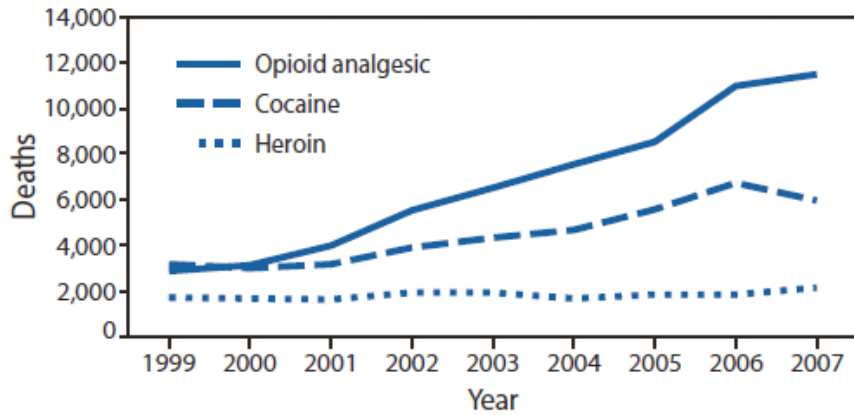
² Paulozzi, Leonard, MD, Baldwin, Grant, PhD (2012, January). CDC Grand Rounds: Prescription Drug Overdoses – a U.S. Epidemic. *Centers for Disease Control and Prevention*. Retrieved from: www.cdc.gov;
(2011, January). Opiate Pain Relievers for Chronic Pain. Pain Management Health Center. Retrieved from www.webmd.com

³ (2011, November). Prescription Painkiller Overdoses in the US. *Centers for Disease Control and Prevention*. Retrieved from www.dcd.gov

⁴ (2011, November). Prescription Painkiller Overdoses in the US. *Centers for Disease Control and Prevention*. Retrieved from www.dcd.gov

⁵ Warner, Margaret, PhD, Chen, Li Hui, PhD (2011, December). Drug Poisoning Deaths in the United States. *NCHS Data Brief*. Retrieved from www.cdc.gov

The following two charts from National Vital Statistics System demonstrate: 1) unintentional drug overdose deaths involving opioid analgesics, cocaine, and heroin, and, 2) the rate (per 100,000 population) of unintentional drug overdose deaths in the United States.



Kansas is not immune from the increase in prescription drug overdose deaths and injury. Southeast Kansas, in particular, has seen an increase in prescription drug-related overdose deaths. From the 206 total autopsies performed in a three-county area in Southeast Kansas, approximately 18% of the deaths were over-dose deaths. Seventy percent of these deaths were

⁶ Paulozzi, Leonard, MD, Baldwin, Grant, PhD (2012, January). CDC Grand Rounds: Prescription Drug Overdoses – a U.S. Epidemic. *Centers for Disease Control and Prevention*. Retrieved from: www.cdc.gov

⁷ Paulozzi, Leonard, MD, Baldwin, Grant, PhD (2012, January). CDC Grand Rounds: Prescription Drug Overdoses – a U.S. Epidemic. *Centers for Disease Control and Prevention*. Retrieved from: www.cdc.gov

caused by prescription drugs.⁸ The median age for these overdose deaths is slightly over 43 years of age. While this bill does not target only prescription drugs, prescription drugs clearly are a growing problem, and are causing an increasing number of deaths.

In addition to prescription drug-related deaths, synthetic marijuana use is increasing among teens, and is sending more kids and teens to the emergency room than ever before.⁹ Synthetic marijuana was linked to over 11,000 emergency room visits in 2010, according to the Substance Abuse and Mental Health Services Administration.¹⁰

Statutes from other Jurisdictions

Other states have addressed the issue of distribution of a controlled substance resulting in death by criminalizing the action under first or second degree murder statutes. Florida, Wisconsin, and New Jersey have all criminalized the act as first degree murder. Louisiana, Tennessee, and North Carolina have criminalized the act as second degree murder. Still other states consider the crime felony murder.

Federal law prohibits distribution of a Schedule I or II controlled substance resulting in death, penalizing the seller of the controlled substance with a 20-year sentence. Distribution of a Schedule III controlled substance resulting in death penalizes the seller with a sentence no longer than 15 years. 21 U.S.C. 841.

Fact pattern for Impetus of the Proposal

In July 2012, a 22-year-old man purchased a fentanyl patch from a drug dealer. The young man had a prescription addiction that stemmed from a high school baseball injury. He had never taken fentanyl before, and in the past had always used oxycodone and hydrocodone. The drug dealer could not obtain the oxycodone, and instead offered to sell the young man a fentanyl patch. The young man, not knowing what fentanyl was, and not understanding its potency, placed the fentanyl patch on himself and went to sleep. He did not wake up.

Current Kansas Law

Although distribution of drugs is an inherently dangerous felony listed in the murder in the first degree statute, under the facts of the case set out above, there are intervening events leading to the victim's death. The intervening acts do not satisfy the causation requirement for first degree felony murder. In *State v. Mauldin*, 215 Kan. 956, § 2, 529 P.2d 124 (1974), the only appellate case on point, the appellate court found: "The sole act of selling heroin to a purchaser who, voluntarily, out of the presence and without the assistance of the seller,

⁸ If the death certificate stated only "polydrug overdose" or "multiple drug toxicity," these were NOT included in the seventy percent.

⁹ Jaslow, Ryan (2012). Synthetic marijuana sending more teens to hospital, study finds. CBS News. Retrieved from www.cbsnews.com

¹⁰ (2012, December). First-of-its-kind report finds that street forms of "synthetic marijuana" products linked to thousands of hospital emergency departments visits each year. SAMHSA New Release. Retrieved from www.samhsa.gov

subsequently injects a quantity of heroin into his body and dies as a result thereof does not invoke the application of the felony murder rule so as to constitute first degree murder within the contemplation of K.S.A. 1973 Supp. 21-3401.” Therefore, felony murder is not an appropriate charge.

Involuntary manslaughter, under Kansas law, is the most appropriate charge. Involuntary manslaughter is “the killing of a human being committed: (1) recklessly.” Under the new culpable mental states, “A person acts ‘recklessly’ or is ‘reckless,’ when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” Involuntary manslaughter is a severity level 5 person felony. For defendants that have 2 misdemeanors or fewer in their criminal history, they fall into the “border box” on the sentencing guidelines gridbox. All other defendants are presumptive imprisonment, with a sentencing range from 38 – 136 months, depending on their criminal history. When this crime is prosecuted federally, the defendant receives a 20-year to a life sentence. In other states, the drug dealer would face a first or second degree murder charge.

Due to the increase in deaths as a result of prescription drug abuse, it is imperative to establish a specific appropriate crime, as other jurisdictions have done.

Features of HB 2044 and Penalties

The intent of HB 2044 is to increase the penalty for drug distribution resulting in great bodily harm or death. HB 2044 brings the penalty more in line with the penalty for felony murder, which does include distribution of a controlled substance as an inherently dangerous felony. K.S.A. 21-5402(c)(1)(N). However, instead of making the crime an off-grid person felony, HB 2044 makes distribution resulting in death a level 1 person felony.

“Distribution” does not apply to prescriptions that are lawfully provided. The definition of “distribute,” followed in HB 2044, “does not include acts of administering, dispensing or prescribing a controlled substance as authorized by the pharmacy act of the state of Kansas, the uniform controlled substances act or otherwise authorized by law.” K.S.A. 2011 Supp. 21-5701(d).

The following table sets out penalties in current Kansas criminal statutes, the federal law of distribution resulting in death, and the proposed law.

Crime	Severity Level / Punishment
Aggravated Battery – knowingly causing great bodily harm	4 person felony (38 – 172 months)
Aggravated Battery – recklessly causing great bodily harm	5 person felony (31 – 136 months)
Involuntary Manslaughter	5 person felony (31 – 136 months)
Felony Murder	Off-grid person felony
Federal law – serious bodily injury	Schedule I or II drug – 20 years to life Schedule III drug – not more than 15 years
Federal law – death	Schedule I or II drug – 20 years to life Schedule III drug – not more than 15 years
<i>Proposal – drug distribution resulting in great bodily harm</i>	<i>5 person felony (31 – 136 months)</i>
<i>Proposal – drug distribution resulting in death</i>	<i>1 person felony (147 – 653 months)</i>

The bill also makes clear that an affirmative defense of the user of the controlled substance contributing to his or her own death is not a possibility. Drug dealers are obtaining these prescriptions, or other illegal controlled substances, and distributing them to individuals, killing these individuals.

Conclusion

This legislative bill targets drug dealers who illegally sell prescription and other illegal controlled substances to individuals, who then die as a result of taking this controlled substance provided to them illegally by the drug dealer. Additionally, it targets drug dealers who illegally sell controlled substances to individuals who take the controlled substance and are harmed. Due to the epidemic of prescription drug overdoses, Kansas must act to protect its citizens.