

SESSION OF 2013

**CONFERENCE COMMITTEE REPORT BRIEF
SENATE SUBSTITUTE FOR HOUSE BILL NO. 2093**

As Agreed to April 4, 2013

Brief*

Senate Sub. for HB 2093 would amend the law concerning crimes and criminal procedure, including DNA testing, felony murder, computer crimes, and identity theft and identity fraud.

DNA Testing

The bill would amend the statute allowing a person convicted of first-degree murder or rape to petition the court for forensic DNA testing of certain biological material. Specifically, in the provision addressing the duties of the court when the results of such testing “are favorable to the petitioner,” the bill would add that the results “are of such materiality that a reasonable probability exists the new evidence would result in a different outcome at trial or sentencing.”

Felony Murder

The bill would amend the law concerning felony murder to specify:

- Felony murder would be an alternative method of proving first degree murder;
- Current provisions allowing for prosecution of more than one crime and governing lesser included crimes would not apply to felony murder;

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- Felony murder would not be a separate crime or a lesser included offense of first degree murder or capital murder; and
- Consistent with current law, felony murder would have no lesser included offenses.

The bill also would state these amendments establish a procedural rule for the conduct of criminal prosecutions and would be construed and applied retroactively to all cases currently pending.

Computer Crimes, Identity Theft, and Identity Fraud

The bill would amend statutes concerning computer crimes and would amend the definitions of the crimes of identity theft and identity fraud. Pursuant to the bill, it would be unlawful for any person to knowingly and without authorization disclose a number, code, password, or other means of access to a social networking website or personal electronic content. It also would be unlawful for any person to knowingly and without authorization access or attempt to access any social networking website. Commission of these acts would be class A nonperson misdemeanor. Further, the bill would increase the severity level from a level 8, nonperson felony to a level 5, nonperson felony for certain computer crimes where the monetary loss to the victim is more than \$100,000.

The bill would amend the definition of the crime of identity theft to include obtaining, possessing, transferring, using, selling, or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person with intent to misrepresent that person in order to subject that person to economic or bodily harm. Commission of such acts would be a severity level 8, nonperson felony, except where monetary loss to the victim is more than \$100,000, in which case it would be a severity level 5, nonperson felony.

Additionally, the bill would amend the definition of “personal identifying information,” which appears in the definitions of identity theft and identity fraud, to include passwords, usernames, or other log-in information that can be used to access a person’s personal electronic content, including, but not limited to, content stored on a social networking website. The bill would include definitions for “personal electronic content” and “social networking website.”

Conference Committee Action

The Conference Committee agreed to the House version of HB 2093, without the provisions concerning the Kansas Consumer Protection Act (KCPA), which the House and Senate Judiciary Conference Committee added to the contents of HB 2081. The Conference Committee also agreed to add the revised contents of SB 40, as amended by the Senate Committee, concerning DNA testing, and the contents of HB 2387, as amended by the House Committee, concerning felony murder.

Background

In the House Corrections and Juvenile Justice Committee, Representative Gail Finney and representatives of the Kansas Bureau of Investigation (KBI) and Kansas Oath Keepers appeared in support of the bill. No others offered testimony.

The House Committee amended the bill to add a new section applying remedies and penalties under the KCPA to the crimes of identity theft and identity fraud. The House Committee of the Whole amended the bill to name the new section added to the KCPA the “Wayne Owen Law.”

In the Senate Judiciary Committee, representatives of the KBI, Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs’ Association appeared in support of the bill.

The Senate Committee expressed concerns that the House's addition of the KCPA language would violate the single-subject rule and agreed to strike the criminal provisions and recommend the KCPA section as a substitute bill.

The fiscal note prepared by the Division of the Budget for the bill, as introduced, indicates passage would result in an increase of two or three prison beds in FY 2014 and two, three, or four additional prison beds by FY 2023. Additionally, the Office of Judicial Administration indicates passage could increase the number of cases filed; however, the fiscal effect likely would be accommodated within existing resources.

SB 40. In the Senate Judiciary Committee, a representative of the Kansas County and District Attorneys Association (KCDAA) testified in support of the bill, explaining KCDAA members believe the bill will clarify the statute in light of issues raised in *Haddock v. State*, 295 Kan. ____, 286 P.3d 837 (2012). No opponents appeared at the hearing.

The Senate Committee adopted a technical amendment updating statutory citations in the bill and recommended the bill be passed as amended.

The fiscal note prepared by the Division of the Budget indicates the bill would have no fiscal effect on the Judicial Branch or the KBI.

HB 2387. Pursuant to statute, first degree murder can be committed either intentionally and with premeditation or in the commission of, attempt to commit, or flight from any inherently dangerous felony (felony murder). This bill would codify case law that states the two crimes are not separate and distinct, but rather different theories of proving first degree murder. Additionally, the bill would amend the law concerning first degree murder in response to a recent Kansas Supreme Court case, *State v. Cheever*, 295 Kan. 229 (2012), which held that felony murder is a lesser included crime of capital murder and, where facts support it, should be included in jury instructions on lesser included crimes in

capital murder cases. The new language in the bill would specify felony murder is not a lesser included offense of first degree murder or felony murder. A lesser included crime is:

1. A lesser degree of the same crime, except that there are no lesser degrees of felony murder;
2. A crime where all elements of the lesser crime are identical to some of the elements of the crime charged;
3. An attempt to commit the crime charged; or
4. An attempt to commit a crime defined under paragraph 1 or 2.

In the House Corrections and Juvenile Justice Committee, a representative of the Attorney General's Office appeared, stating the Office opinion that the *Cheever* opinion misinterprets the law such that these amendments are necessary. A public defender in the Capital Appeals and Conflicts Office appeared to oppose the bill, referring to the U.S. Supreme Court case *Beck v. Alabama*, 447 U.S. 627 (1980), which held the death penalty may not be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense when the evidence would have supported such a verdict.

The fiscal note prepared by the Division of the Budget for the bill indicates passage would have no impact on the Judicial Branch or the Board of Indigents Defense Services.

Crimes and criminal procedure; DNA testing; felony murder; computer crimes; identity theft; Wayne Owen

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