

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 a.m. on Monday, March 15, 2004, in Room 123-S of the Capitol.

All members were present except:

Senator David Haley - Arrived 10:05  
Senator Derek Schmidt - Arrived 9:44  
Senator Donald Betts (A)  
Senator Lana Oleen - Arrived 9:45

Committee staff present:

Mike Heim, Kansas Legislative Research Department  
Jill Wolters, Office of the Revisor Statutes  
Helen Pedigo, Office of the Revisor Statutes  
Dee Woodson, Committee Secretary

Conferees appearing before the committee:

Kyle Smith, Kansas Bureau of Investigation  
Christi Cain, State Coordinator, Kansas Prevention Project Coordinator  
Chris Schneider, Assistant District Attorney, Wyandotte County  
Tom Stanton, Reno County Deputy Attorney  
Ed Klumpp, Chief of Police, Topeka  
Randall Hodgkinson, Deputy Appellate Defender, Topeka  
Representative Kathe Decker  
Lt. John Eickhorn, Kansas Highway Patrol  
Paul Morrison, District Attorney, Johnson County  
Representative Dean Newton (written testimony)  
Chris Kenney, District Attorney, Douglas County  
Rex Beasley, Deputy Attorney General  
Craig Kabeline, Executive Director, Kansas Area Agencies on Aging Association  
Darrell Donahue, Congressional District Coordinator for AARP Kansas  
Deanne Bacco, Executive Director, Kansas Advocates for Better Care (written testimony)  
Linda Wright, Chairperson, Elder Abuse Committee, Johnson County (written testimony)

Others attending: See attached list.

**HB 2777 - Controlled substances; unlawfully manufacturing, compounding is manufacturing, not a part of selling, in response to State v. McAdam**

Chairman Vratil opened the hearing on **HB 2777**. Kyle Smith, Kansas Bureau of Investigation (KBI), testified in support of **HB 2777**. He explained that the bill was an effort to clear up an ambiguity and to clearly state what was legislative intent when this act was passed a couple of years ago. The Legislature intended to severely penalize manufacturing of meth. Mr. Smith stated the Legislature needed to clarify that KSA 65-4159, the manufacture of controlled substances, and have it be the only statute that criminalizes this particular activity. He said that House **Substitute HB 2777** does this by simply striking the word "compound" from 65-4161 and KSA 65-4163. (Attachment 1)

Cristi Cain, Kansas Methamphetamine Prevention Project, spoke in favor of **HB 2777**. She stated that the Kansas Methamphetamine Prevention Project supports legislative action that would correct the discrepancies between KSA 65-4159 and KSA 65-4161. She said it was very important that those convicted of the manufacture of meth receive long sentences in order to protect communities and deter manufacturers from other states coming to Kansas. (Attachment 2)

Chris Schneider, Assistant Wyandotte County District Attorney, appeared before the Committee in support of **HB 2777**, and to request legislation to remedy the effects of the decision of the Supreme Court in Kansas in the case of McAdam vs. State. He said the passage of **Substitute HB 2777**, which passed the House unanimously, would solve the problem for offenses under KSA 65-4159 in the future, and may well solve the problem of at least some of those convicted in the past being immediately released back

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into the various communities of the state. (Attachment 3)

The Chair inquired relative to the new Section 3, which makes the bill retroactive to affect people convicted of drug offenses prior to the effective date of this act, how such retroactivity can be accomplished under the U.S. Constitution. Mr. Schneider responded that he did not know, and that would be up to the Supreme Court. He said the Supreme Court opened the window for prosecutors in the sexual predators cases, and considering how dangerous manufacturing of drugs is, he felt that the Court would support retroactivity.

Tom Stanton, Deputy Attorney for Reno County, testified in favor of **HB 2777**. He stated that many of the people involved in the manufacture of methamphetamine are multiple repeat offenders, and long sentences do have a deterrent effect. In regard to the retroactivity issue, the Supreme Court's McAdams case states that its facts are limited to that case. (Attachment 4)

Ed Klumpp, Chief of Police for Topeka, submitted written testimony in support of **Sub. HB 2777**. (Attachment 5)

Randall Hodgkinson, Public Defender for the Appellate Defenders' Office, appeared on his own behalf and stated that he was not testifying on behalf of the Deputy Appellate Defenders' Office. He said he was testifying in opposition to **HB 2777** because he had some personal concerns regarding the subject. Mr. Hodgkinson stated that he feels having manufacture, attempt to manufacture, and conspiracy to commit manufacture as Severity Level 1 drug offenses is grossly disproportionate and out of step with actual practice in the courts. He urged the Committee to take the opportunity to deliberately review the drug sentencing scheme. Mr. Hodgkinson attached a possible alternative study for consideration to his written testimony. (Attachment 6)

Fiscal Note on **Sub. HB 2777** was distributed to Committee members. (Attachment 7)

The Chair closed the hearing on **HB 2777**.

**HB 2649 - Unlawful use of a controlled substance**

Chairman Vratil opened the hearing on **HB 2649**. Representative Kathe Decker testified in support stating that the bill was a prevention tool that would help families fight drug addiction, and limit testing to arrest for child abuse, aggravated assault battery and domestic battery. (Attachment 8)

Lt. John Eichkorn, Kansas Highway Patrol, spoke in support of **HB 2649**. The bill would allow an officer to request a drug test from an individual if the officer had probable cause to believe the person used a controlled substance. The Patrol recommended a simple change to Section 2, line 30 that would remove the words "section 1". It would limit officers to requesting drug tests from those arrested for child abuse, aggravated assault, battery, or drug possession. (Attachment 9)

Kyle Smith, Kansas Bureau of Investigation, testified in support of **HB 2649**. He said there was a minimal fiscal note on the bill. (Attachment 10) He explained the different levels of controlled substance or metabolite in a person's system that needs to be tested for, and the importance of same when prosecuting for these crimes. (Attachment 11)

Brief Committee questions and discussion followed.

The Chairman closed the hearing on **HB 2649**.

**HB 2693 - Mistreatment of a dependent adult; increasing penalties if value of financial gain is over \$500**

Chairman Vratil opened the hearing on **HB 2693**. Paul Morrison, Johnson County District Attorney, testified in support of the proposed bill. His office has had several cases in which unscrupulous people have taken advantage of dependant adults, usually elderly, taking property from them. He explained that the Kansas Court of Appeals has not supported the legal concept of such cases being charged and tried as

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violations of the theft statute. The Appeals Court has held violations of this nature are not thefts, but merely violations of the dependant adult statute. The Kansas Supreme Court recently denied Johnson County's petition requesting review of the decision creating a major loophole in the law. Mr. Morrison concluded that the bill simply aligns the taking of financial resources from a dependent adult with the same penalties in the theft statute without impacting the prison population in a significant way. (Attachment 12)

Representative Dean Newton submitted written testimony in favor of **HB 2693**. (Attachment 13)

Chris Kenney, Douglas County District Attorney, testified in support of **HB 2693**. Ms. Kenney stated that the proposed changes to KSA 21-3437 would create a greater deterrent of crimes against the elderly by punishing those who see vulnerable citizens as easy targets whose resources are there for the taking. (Attachment 14)

Rex Beasley, Attorney General's Office, spoke in favor of **HB 2693**. Under current law when a dependent adult becomes the victim of financial abuse, the crime is mistreatment of a dependent adult, and the offender, if found guilty of committing the crime suffers only a Class A person misdemeanor conviction, regardless of the amount of financial abuse or the total loss suffered by the victim. (Attachment 15)

Craig Kaberline, Kansas Area Agencies on Aging Association (K4A), testified in support of **HB 2693**. He stated that K4A believes it is important to strengthen the sentencing of those who are found guilty of mistreating a dependent person provides notice that acts such as taking a dependent person's money or other resources, inflicting physical harm or other mistreatment constitute serious criminal behavior in Kansas. He stated that **HB 2693** would provide dependent adults appropriate and equal status in our state's statutes, and will affirm the value of vulnerable adults in our state. (Attachment 16)

Darrell Donahue, AARP, spoke in support of **HB 2693**, and requested the expansion of protections and enhanced penalties to further protect vulnerable adults from abuse, neglect and exploitation. (Attachment 17)

Deanne Bacco, Advocates for Better Care, submitted written testimony in support of **HB 2693**. (Attachment 18)

Linda Wright, Elder Abuse Committee of the Johnson County Community Violence Action Council, submitted written testimony in favor of **HB 2693**. (Attachment 19)

Fiscal Note for **HB 2693** was distributed to Committee members. (Attachment 20)

Considerable discussion and questions followed.

There being no other conferees to testify, the Chairman closed the hearing on **HB 2693**.

The meeting was adjourned at 10:30 a.m. The next scheduled meeting is Tuesday, March 16, 2004.

# SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon., March 15, 2004

NAME	REPRESENTING
JIM CLARK	KBA
SLOTT SCHNEIDER	GAABA
ERIC COLLINS	Ks Governmental Consulting
Chris Schneider	Asst. Wy Co DA / KCOAA
TOM STANTON	RENO COUNTY DISTRICT ATTY
Mike Jennings	KLDAA
Michael White	KCDAA
Christine Kenney	Dg. Co. DA / KCDAA
Rex Beasley	KS AG.
Loren F. Snell, Jr.	KS AG
Jeff Bottsberg	Kansas Peace Officers Ass'n
Kyle Kessler	SRS
PATRICIA BIGGS	KS Sent Comm
Julia Butler	"
Brenda Harmon	"
John Eichhorn	KHP



## Kansas Bureau of Investigation

Larry Welch  
*Director*

Phil Kline  
*Attorney General*

Before the Senate Judiciary Committee  
In Support of House Substitute for HB 2777  
Kyle G. Smith, Special Agent  
Director of Public and Governmental Affairs  
Kansas Bureau of Investigation  
March 15, 2004

Chairman Vratil and Members of the Committee:

I appreciate the chance to appear on behalf of the KBI in support of what might be the most urgently needed bill this session. This Committee has heard several times the devastating impact of illegal methamphetamine production: The children who have been injured and killed, the lives devastated by the addiction, the explosions and fires, the contaminated motel rooms and rental properties, the extraordinary demand it has made on law enforcement and forensic resources, the soil and water which has been poisoned and of course the officers who risk their lives every day in trying to control this scourge. The number of labs in Kansas has increased from 4 in 1994 to about 700 a year now. Meth is the biggest threat to public safety in this state.

The legislature has responded to the ever-increasing threat with enhanced penalties to try and deter these ultimate producers of this deadly controlled substance and various other legislative initiatives. Now, just when it looked like these efforts might be paying off and the number of meth labs seized was tapering off, a court decision threatens to unleash these drug manufacturers back on the citizens of Kansas.

Senate Judiciary

3-15-04

On January 30, 2004, the Kansas Supreme Court issued an opinion in *State v. McAdams* which basically makes Kansas have the weakest anti-methamphetamine laws in the country. In *State v. McAdams* the Kansas Supreme Court reviewed an issue whether the conduct prohibited under the term "compound" as used in KSA 65-4161 could also be interpreted to mean the same conduct as manufacturing under K.S.A. 65-4159 since the definition of "manufacture" contained in KSA 65-4101(n), also uses the word "compounding".

Unfortunately this issue was raised for the first time on appeal and so no record was made on the scientific issues or the legislative history of the statutes involved. Without the benefit of scientific testimony explaining the difference between compounding and manufacturing (e.g. it is physically impossible to create methamphetamine by compounding) the court viewed the language as ambiguous and held the two statutes prohibited the same conduct. The Supreme court then ordered Mr. McAdam be sentenced under the lower penalty in 65-4161 thus reducing the minimum possible sentence from 12 years and 3 months to 4 years, 7 months. While the court said that the holding was limited to the facts of that case, predictably every meth cook in the state is now claiming his or her facts are the same. While split on retroactivity, the courts are, for the most part, finding that the *McAdam* decision applies giving reduced sentences and early release for hundreds of methamphetamine producers currently in prison or awaiting trial or sentencing. If not corrected and if applied retroactively, the sentencing commission has determined there would be over

400 meth cooks given early release. And if not corrected, Kansas will once again become a Mecca for those who wish to produce this poison at minimal risk.

The longer this ambiguity is left hanging, the more methamphetamine producers will be given reduced sentences or release early.

We can not afford to encourage the deadly production of methamphetamine in Kansas by having the legislative intent misread and our laws eviscerated. The legislative history of our manufacturing statute, K.S.A. 65-4159 clearly shows the intent over the years to penalize these ultimate producers of illegal controlled substances harsher than mere dealers. Manufacturing was made a separate offense in 1990 specifically so it would have higher penalties: The legislation was passed and manufacturing was made a Class B felony under the old sentencing structure, the second highest penalty available. In 1999 the legislature again addressed the growing meth crisis, how our penalties had fallen behind those of surrounding states, and so making Kansas an attractive destination for these criminals. (See my attached testimony from 1999) Again the legislature responded and help protect Kansas by making manufacture a level 1 drug with a special rule doubling the sentence on second and subsequent convictions.

There were good public policy reasons for imposing these severe penalties. The damage inflicted by methamphetamine cooks deserves severe punishment and we need to deter other manufacturers from setting up shop in Kansas. The need and the legislative intent to make Kansas a bad place to cook methamphetamine is still clear.

So how do we fix this problem and reinstate the legislative will? Basically, the Supreme Court said that since the word "compounding" appears in the definition of the

word "manufacture", in KSA 65-4101(n) and the word "compound" also appears in another statute, KSA 65-4161, that the two different statutes, with different penalties, cover the same activity. Since it would not be fair to have one person sentenced more severely than another, it would be an equal protection problem if these two statutes covered the same acts, so only the lower sentence could be imposed.

Clearly the legislature intended to severely penalize manufacture and the historical splitting of the criminal statutes, but not the definition, has created confusion and ambiguity. As such, we need to clarify that K.S.A. 65-4159 covers the manufacture of controlled substances, particularly meth, and have it the only one statute that criminalizes this particular activity. House Substitute for HB 2777 does this by simply striking the word "compound" from 65-4161 and K.S.A. 65-4163.

While methamphetamine is almost exclusively the only drug illegally manufactured in Kansas, there have been two LSD labs and a fentanyl lab in my memory of the last quarter century. The other main controlled substances statute, K.S.A. 65-4163 covers those drugs, which is why it has been included in this bill and the same word struck.

This is an extremely serious problem. We need House Substitute for HB 2777 and we need it through the Legislature as quickly as possible.

If you have any questions I would be happy to answer them.



**Senate Judiciary Committee**  
**March 24, 1999**  
**Testimony of Kyle G. Smith**  
**Assistant Attorney General and Special Agent**  
**Kansas Bureau of Investigation**  
**Proponent House Substitute for HB 2469**

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Carla Stovall and KBI Director Larry Welch, I ask for your support of House Substitute for HB 2469. The safety of the people of Kansas is threatened by an epidemic. The plague is the production of methamphetamine. While manmade, this epidemic is no less deadly than any bacteria known to medical science. Meth labs are multiplying across our state at an incredible rate, spreading death and destruction. Clandestine laboratories producing methamphetamine are causing fires, explosions and hazardous waste contamination. The people and children of Kansas are not only becoming addicts and dying from its use, but also are being poisoned and injured unknowingly when their neighbors operate these laboratories.

Chemicals involved include acids, anhydrous ammonia, red phosphorus, lye and acetone. These deadly chemicals are being handled by offenders with no chemistry background, no respect for pollution controls, no respect for life. In short, these criminals are contaminating our state and killing our citizens.

The 'cooks' at clandestine laboratories are willing to expose their own children to these deadly fumes and explosions in pursuit of satisfying their need for profits and a need to fill their addiction. In one case in Kansas, a neighbor observed the operators of a methamphetamine laboratory risking their lives to repeatedly enter their burning trailerhome to recover their precious equipment and drugs while their children were still trapped in inside.

The drug itself is extremely addictive and has a pharmacological side effect of making a person paranoid. In addition, these individuals operate in an underworld where rip-offs are common, competitors are armed and law enforcement is constantly searching for them. Not surprisingly labs are sometimes booby-trapped and meth dealers are frequently heavily armed. A new dangerous turn is for meth cooks to finish their process on deserted country roads or in public parks to avoid the danger of explosion and fire in their homes. Innocent Kansas citizens traveling those roads, enjoying our parks, are at risk to being shot and killed if they interrupt these operations. After a meth cook has been completed, these hazardous chemicals are dumped on the ground, in street gutters or down waterlines, creating hazardous waste sites and polluting ground water. The cost for the cleanup of these sites runs to the hundreds of thousands of dollars.

This committee heard me testify last year on SB 667, a chemical control act, that this was the most serious challenge facing public safety in the 17 years that I've been in law enforcement. You heard Assistant Attorney General Katina Kyridakes of California warn this committee that the problem will worsen if decisive action wasn't taken. SB 667 died on the house side and I have to report we were both right, the problem is worse.

In 1994 there were 4 clandestine laboratories seized in Kansas.

In 1995 that number rose to 7.

In 1996 it skyrocketed to 71, a ten-fold increase.

In 1997 there were 99 clandestine laboratories seized.

Last year, 1998 there were 189.

As of March 20, there had been 116 meth labs seized in Kansas. If that pace continues, our law enforcement officers will be risking their lives in over 500 labs in 1999! In just 5 years we have a hundred times as many meth labs. We can not afford to let this plague continue to run unchecked. Attached are maps showing the numbers and locations of meth labs seized in 1998 and 1997 as well as the labs so far this year. You can see the spread of this epidemic for yourselves.

Kansas, Missouri, Iowa and California are reported by the DEA to be the top producers of methamphetamine in the nation. Last year Missouri took steps in their legislature to reverse this trend. Numerous initiatives were adopted by the Missouri legislature trying to attack this epidemic on every possible front. While we applaud Missouri's efforts, the real effect on Kansans is that it makes our state even more attractive to these purveyors of death, because of the increased difficulties and penalties now found in our neighbor to the east. It is imperative that Kansans take strong, decisive action in meeting the threat to our safety posed by methamphetamine.

The proposed legislation is comprehensive in its efforts to make Kansas the least desirable place in the nation to manufacture methamphetamine. We owe it to our children, ourselves and our land to make every effort to stop this plague.

I have three requested amendments to the substitute bill. They are: (1) give all licensed practitioners the same right to distribute controlled chemicals, (2) remove the exemption for safe harbor products from the requirement that retailers and distributors report suspicious transactions, and (3) reinstate the authority of the secretary of Health and Environment to enter illegal lab sites to carry out their duty to clean them up.

There is attached a comparison between the original bill and the substitute version. As you can see the House Judiciary was not willing to enact a chemical control act that required registration of distributors and retailers or would limit the number of packages of the precursor ephedrine alkaloids that a person could buy at one time. I hope the substitute bill will be effective in addressing the crisis. If not, I'm afraid we'll be back here next year with still worse statistics, to try again.

- If you have other questions please contact me at your convenience.

## IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 88,139

STATE OF KANSAS,

*Appellee,*

v.

BRIAN KEITH McADAM,

*Appellant.*

## SYLLABUS BY THE COURT

1. When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.
2. A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime. No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a coconspirator.
3. Where two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision.
4. Interpretation of a statute is a question of law, and an appellate court's review is unlimited.

Review of the judgment of the Court of Appeals in 31 Kan. App. 2d 436, 66 P.3d 252 (2003). Appeal from Anderson district court; JAMES J. SMITH, judge. Judgment of the Court of Appeals affirming the district court on the limited issues subject to our grant of review is affirmed in part and reversed in part. Judgment of the district court on these issues is affirmed in part, the sentence is vacated, and the case is remanded with directions. Opinion filed January 30, 2004.

*Randall L. Hodgkinson*, deputy appellate defender, argued the cause, and *Kristen L. Chowning*, assistant appellate defender, was with him on the briefs for appellant.

*Frederick B. Campbell*, county attorney, argued the cause, and *Carla J. Stovall*, former attorney general, and *Phill Kline*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

ALLEGRUCCI, J.: Brian Keith McAdam was convicted by a jury of conspiracy to unlawfully manufacture methamphetamine, attempted theft, attempt to unlawfully possess anhydrous ammonia, and

conspiracy to unlawfully possess anhydrous ammonia. He was sentenced to 173 months in prison. The Court of Appeals affirmed the convictions of conspiracy to unlawfully manufacture methamphetamine and attempted theft, reversed the convictions of attempt to unlawfully possess anhydrous ammonia and conspiracy to unlawfully possess anhydrous ammonia, remanded for resentencing in accordance with reversal of those convictions, and affirmed the drug severity level 1 felony penalty for conspiracy to unlawfully manufacture methamphetamine. *State v. McAdam*, 31 Kan. App. 2d 436, 66 P.3d 252 (2003). This court granted McAdam's petition for review and denied the State's cross-petition for review. Therefore, our review is limited to the issues of determining the sufficiency of the evidence to support McAdam's convictions of conspiracy to unlawfully manufacture methamphetamine and attempted theft and whether McAdam was illegally sentenced for conspiracy to unlawfully manufacture methamphetamine.

McAdam was staying at the home of his friend, Marcus Maley, who lived with his girlfriend. Maley and McAdam agreed to manufacture methamphetamine. When they had made methamphetamine before, Maley had helped McAdam by doing tasks like removing ephedrine pills from blister packaging and poking holes in cans of ether.

On this occasion, they had everything they needed to make methamphetamine except anhydrous ammonia. Before Maley and McAdam left Maley's residence to steal anhydrous ammonia from the Kincaid Co-op, they were joined by Casey Carter. Also before leaving Maley's house, they placed the materials that they were going to use for manufacturing methamphetamine into the trunk of Maley's girlfriend's vehicle because Maley would not allow the manufacturing to be done where he lived. They were going to use his girlfriend's vehicle rather than Maley's because his was well known in the area.

At approximately 9:30 or 10 p.m., Maley, McAdam, and Carter drove to the Kincaid Co-op to get anhydrous ammonia. Maley drove his vehicle, Carter sat in the front passenger seat, and McAdam sat in the back. Maley and McAdam brought along two water jugs to carry the anhydrous ammonia and a large cooler. They also had a couple of scanners, some night vision goggles, and walkie-talkies. According to Maley, McAdam had no particular responsibility during the trip, but Maley testified that the three were working together and he went to the Co-op because that was part of the agreed-on plan. When they arrived at the Kincaid Co-op, Carter got out of the vehicle to steal the anhydrous ammonia.

Deputy Max Skelton was at the Kincaid Co-op checking on the anhydrous ammonia tanks when he smelled anhydrous ammonia and saw a man running away from the tanks toward the trees. As Skelton was driving to the road to cut the man off, he saw a vehicle's headlights come on. The vehicle was driven slowly toward the deputy, who turned around and stopped it. Maley was driving the vehicle, and McAdam was in the back seat.

A second officer, Undersheriff Darin Dalsing, got consent from Maley to search the vehicle. In the trunk, there was an ice chest containing a single water jug that smelled of anhydrous ammonia and a margarine container with an orange powder residue. It smelled of ether and later tested positive for methamphetamine. There were scanners, a list of scanner frequencies, a walkie-talkie, and night vision goggles in the passenger compartment.

In an effort to stay out of jail, Maley told Dalsing that he could give him McAdam's methamphetamine lab. Maley gave the officers consent to search his residence and his girlfriend's vehicle. In the trunk of her vehicle, the officers found a shotgun, starting fluid, coffee filters, a face mask, lithium batteries, rock salt, drain opener, a weed sprayer, propane bottles, a heater, a 2-liter bottle full of ether, a digital scale, rubber gloves, and 10 bottles of ephedrine tablets. A few days later, a Kincaid Co-op employee found two water jugs, one of which was half full of anhydrous ammonia, in some trees in the vicinity of the anhydrous ammonia tanks.

We first determine if there was sufficient evidence from which a rational factfinder could find McAdam guilty of conspiracy to commit manufacture of methamphetamine.

K.S.A. 21-3302(a) provides:

"A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime. No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a co-conspirator."

In this case, the jury was instructed that the following claims had to be proved in order to establish the charge of conspiracy to commit unlawful manufacture of methamphetamine: (1) McAdam agreed with another person to manufacture methamphetamine, (2) he did so with the intent to manufacture methamphetamine, and (3) McAdam "or any party to the agreement acted in furtherance of the agreement by attempting to steal anhydrous ammonia."

McAdam contends that it was not shown that McAdam or another party to the agreement committed an overt act in furtherance of the agreement to manufacture methamphetamine. When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Beach*, 275 Kan. 603, Syl. ¶ 2, 67 P.3d 121 (2003).

The Court of Appeals disregarded the cases relied on by McAdam for the proposition that the overt act must extend beyond mere preparation, *State v. Chism*, 243 Kan. 484, 759 P.2d 105 (1988), and *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985), because they involved overt acts for the crime of attempt rather than conspiracy. 31 Kan. App. 2d at 441. The Court of Appeals cited *State v. Hill*, 252 Kan. 637, 642, 847 P.2d 1267 (1993), in which the court quoted the following definition of overt act from Black's Law Dictionary 1104 (6th ed. 1990):

"An open, manifest act from which criminality may be implied. An outward act done in pursuance and manifestation of an intent or design. An open act, which must be manifestly proved.

....

"An overt act which completes crime of conspiracy to violate federal law is something apart from conspiracy and is an act to effect the object of the conspiracy, and need be neither a criminal act, nor crime that is object of conspiracy, but must accompany or follow agreement and must be done in furtherance of object of agreement. [Citation omitted.]"

See 31 Kan. App. 2d at 441. The Court of Appeals' discussion of this issue continued:

"Here, there was sufficient evidence that the act of attempting to steal anhydrous ammonia was done in furtherance of the parties' agreement and plan to commit the unlawful manufacture of methamphetamine. Evidence existed that McAdam and Maley had agreed to manufacture methamphetamine. All they lacked was anhydrous ammonia. Thus, the act to acquire the anhydrous ammonia was in furtherance of their agreement. Because the State did not have to demonstrate that this act extended beyond mere preparation, McAdam's argument fails." 31 Kan. App. 2d at 442.

McAdam also argues that there was insufficient evidence to show that Carter, who stole the anhydrous ammonia, was a party to the agreement to manufacture methamphetamine. In this regard, the Court of

Appeals stated:

"The jury drew a reasonable conclusion that because Carter had joined Maley and McAdam in their quest to obtain anhydrous ammonia, he had agreed to help them manufacture methamphetamine. Because Maley drove Carter to the Kincaid Co-op and because McAdam was checking scanner frequencies in the backseat of Maley's vehicle, it was reasonable for the jury to conclude that Carter was a coconspirator. A conviction of even the gravest offense may be sustained by circumstantial evidence. *State v. Penn*, 271 Kan. 561, 564, 23 P.3d 889 (2001). Thus, there was sufficient evidence to support the inference that Carter had agreed to the conspiracy." 31 Kan. App. 2d at 441.

McAdam has added nothing to his arguments on this issue in this court, and we agree with the Court of Appeals.

We next consider whether there was sufficient evidence from which a rational factfinder could find McAdam guilty of attempted theft.

McAdam contends in his petition for review that there was no overt act to support his conviction of attempted theft of anhydrous ammonia. On this issue the Court of Appeals stated the following:

"McAdam argues that the evidence shows only that he was riding along in Maley's car on the night of the incident. However, Maley's testimony at trial went further than that. McAdam told Maley that anhydrous ammonia was the only ingredient they were lacking to produce methamphetamine. McAdam was part of the discussion regarding who was going to get the anhydrous ammonia and how they would do it. McAdam had one two-way radio in the back seat with him, and Carter had the other. As a result, sufficient evidence existed that McAdam had performed an overt act in furtherance of his attempt to take anhydrous ammonia from the Kincaid Co-op and possess it in an unapproved container." 31 Kan. App. 2d at 442.

It is McAdam's position that Carter was the only one to commit any overt act toward the theft of anhydrous ammonia. He further contends that there is no evidence that he intentionally aided, abetted, advised, or counseled Carter to commit the crime. He cites *State v. Scott*, 250 Kan. 350, 362, 827 P.2d 733 (1992), for the proposition that mere association with persons who commit a crime or mere presence in the vicinity of a crime does not provide a sufficient basis to establish guilt of aiding and abetting. In *Scott*, the court also stated that ""when a person knowingly associates himself with the unlawful venture and participates in a way which indicates he willfully is furthering the success of the venture, such evidence of guilt is sufficient to go to the jury." [Citations omitted.]" 250 Kan. at 362. In this case, the manufacture of methamphetamine was the objective. McAdam had the necessary equipment and ingredients except anhydrous ammonia to make methamphetamine. McAdam was the person who was going to make methamphetamine, he knowingly associated himself with Maley and Carter in order to obtain the anhydrous ammonia that was necessary to make methamphetamine, and he went with Maley and Carter to the Kincaid Co-op for the purpose of stealing anhydrous ammonia.

The Court of Appeals stated that his overt act was having a walkie-talkie in the back seat with him while Carter had the other, the implication being that McAdam could communicate with Carter to further the success of the theft. The evidence supporting the Court of Appeals was Maley's testimony that they took two walkie-talkies with them to the Co-op and that Carter had one of them. When the officers searched Maley's vehicle, one walkie-talkie was found in the back seat, where McAdam had been sitting. From this evidence and evidence of the circumstances, the jury reasonably could find that McAdam knowingly associated himself with the theft of anhydrous ammonia and participated in a way that indicated his intentional furthering of the theft. We find no merit in McAdam's argument and affirm his

convictions.

McAdam also argues that he was illegally sentenced for conspiracy to unlawfully manufacture methamphetamine when he was sentenced for violation of K.S.A. 65-4159(a), a drug severity level 1 felony, rather than for violation of K.S.A. 65-4161(a), a drug severity level 3 felony.

A conspiracy is an agreement with another person to commit a crime. K.S.A. 21-3302(a). The crime that McAdam was charged, convicted, and sentenced of conspiring to commit was the unlawful manufacture of methamphetamine. See K.S.A. 65-4159(a). He argued in the Court of Appeals that he was illegally sentenced under K.S.A. 65-4159(a) and that he should have been sentenced under K.S.A. 65-4161(a). He did not raise the issue of his sentence in the trial court. The Court of Appeals considered the issue pursuant to K.S.A. 22-3504(1), which allows the appellate court to correct an illegal sentence. 31 Kan. App. 2d at 445. This court has said that a sentence that does not conform to the statutory provision is an illegal sentence. *State v. Johnson*, 269 Kan. 594, 600, 7 P.3d 294 (2000). Upon granting McAdam's petition for review, this court reviews the decision of the Court of Appeals. See Rule 8.03(g)(1) (2003 Kan. Ct. R. Annot. 58).

K.S.A. 65-4159(a) provides: "Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture any controlled substance or controlled substance analog." Methamphetamine is a controlled substance. K.S.A. 65-4101(e); K.S.A. 65-4107(d)(3). The penalty for violation of 65-4159(a) is a drug severity level 1 felony. K.S.A. 65-4159(b).

K.S.A. 65-4161(a) provides:

"Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver or distribute; prescribe; administer; deliver; distribute; dispense or compound any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as provided in subsections (b), (c) and (d), any person who violates this subsection shall be guilty of a drug severity level 3 felony."

Methamphetamine is a stimulant designated in 65-4107(d)(3).

The Court of Appeals stated that 65-4159(a) and 65-4161(a) "address the same offense, the compounding of methamphetamine." 31 Kan. App. 2d at 446. The Court of Appeals continued:

"Although K.S.A. 65-4159(a) and K.S.A. 65-4161(a) contain identical elements as applied to this case, K.S.A. 65-4161(g) states: 'The provisions of this section shall be part of *and supplemental to the uniform controlled substances act*.' (Emphasis added.) Thus, it seems that K.S.A. 65-4161 was intended to fill the gaps in the Uniform Controlled Substances Act."

"General and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling. [Citation omitted.]' *In re Estate of Antonopoulos*, 268 Kan. 178, 189, 993 P.2d 637 (1999). Furthermore, although criminal statutes should be interpreted in favor of the accused, 'judicial interpretation must be reasonable and sensible to effect legislative design and intent. [Citation omitted.]' *State v. McGill*, 271 Kan. 150, 154, 22 P.3d 597 (2001). The language in K.S.A. 65-4161(g) indicates it was the legislature's intent to make K.S.A. 65-4151 a general statute, which only applies when no other statute will.



"K.S.A. 65-4159 clearly applies to the unlawful manufacture of methamphetamine. Because there is no conflict between K.S.A. 65-4159(a) and K.S.A. 65-4161(a), the trial court appropriately sentenced McAdam under the special statute, K.S.A. 65-4159. See *State v. Luttig*, 30 Kan. App. 2d 1125, 54 P.3d 974, *rev. denied* 275 Kan. \_\_\_\_ (2002) (holding defendant was properly sentenced under special statute that conflicted with general statute). Thus, McAdam's argument fails." 31 Kan. App. 2d at 446-47.

The State contends that the Court of Appeals reached the right decision for the wrong reason. According to the State, 65-4161(a) and 65-4159(a) are not identical and K.S.A. 65-4161(a) does not apply to McAdam's conduct. The State's position is that methamphetamine is not made by compounding, which is the conduct prohibited by K.S.A. 65-4161(a), but rather is made by a chemical synthesis called reduction. The State seems to expect the court to take it on faith that methamphetamine is not made by compounding and, because not made by compounding, it is made by manufacturing within the meaning of K.S.A. 65-4159(a). The State provides molecular diagrams and descriptions but nothing that would assist a layperson in distinguishing between compounding and manufacturing.

The State has not provided the court with enough information to evaluate the merits of the scientific argument on distinguishing compounding from manufacturing, and the State's common-sense and legal arguments are less than convincing. Moreover, the State fails even to mention the intent of the legislature, which is the critical issue, in wording 65-4159(a) and 65-4161(a) as it did. The interpretation of a statute is a question of law, and this court's review is unlimited. *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003). At oral argument the State conceded that if compounding is synonymous with manufacturing then the State loses the argument. The statutory definition of "manufacture" is:

"'Manufacture' means the production, preparation, propagation, *compounding*, conversion or processing of a controlled substance either directly or indirectly or by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container . . . ." (Emphasis added.) K.S.A. 65-4101(n).

Based on compounding's being included in the definition of manufacture, the State would have the court conclude that compounding is a type of manufacturing, as apple is a type of fruit, and that compounding is a more specific term than manufacturing. If the statutory definition is to be interpreted so that compounding is a particular subdivision of manufacturing rather than a synonym of manufacturing, then it seems that production, preparation, propagation, conversion, and processing also ought to be particular types of manufacturing rather than synonyms. It is not apparent that they are, and, in fact, "production" is defined as including the manufacture of a controlled substance. K.S.A. 65-4101(w). By definition compounding is manufacturing, and the State loses this argument.

The State also condemns the Court of Appeals' decision in *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied* 274 Kan. \_\_\_\_ (2002), as a misapplication of *State v. Nunn*, 244 Kan. 207, 229, 768 P.2d 268 (1989), which held that "[w]here two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision." In *Frazier*, the Court of Appeals concluded that possession of ephedrine or pseudoephedrine under K.S.A. 2001 Supp. 65-7006(a) and possession of drug paraphernalia under K.S.A. 2001 Supp. 65-4152(a)(3) are identical offenses so that only the lesser penalty could be imposed on Frazier. 30 Kan. App. 2d at 405-06. In the present case, the Court of Appeals distinguished *Frazier* as not involving a statute that was part of and supplemental to the Uniform Controlled Substances Act. 31 Kan. App. 2d at 446. Based on its perception that 65-4161 was a gap filler, the conclusion drawn by the Court of Appeals was that the statute was a general statute, "which only applies when no other statute will." 31 Kan. App. 2d at 447. The Court of Appeals further reasoned that K.S.A. 65-4159(a) "clearly applies to the unlawful manufacture of methamphetamine" and

therefore concluded that McAdam was appropriately sentenced "under the special statute, K.S.A. 65-4159." 31 Kan. App. 2d at 447.

Under the particular facts of this case, we agree with McAdam's contention that 65-4161(a) and 65-4159(a) are identical and thus he can be sentenced only under the lesser penalty provision of 65-4161(a). See *Nunn*, 244 Kan. at 229.

The key difference between McAdam's position and the reasoning of the Court of Appeals is that the Court of Appeals treated the analysis applicable to identical statutes as if it could be combined with the analysis applicable to g

eneral and specific statutes. McAdam, on the other hand, treats the two concepts as separate and separately analyzed. The Court of Appeals characterized K.S.A. 65-4159(a) and K.S.A. 65-4161(a) as identical and then applied the general and specific analysis to them. By doing so, the Court of Appeals created a hierarchy with the general and specific analysis trumping the analysis for identical provisions.

In *Nunn*, the court considered two criminal offenses with identical essential elements but different penalties. The defendant contended that the trial court erred in not instructing the jury on the offense with the lesser penalty as a lesser included offense. The court rejected defendant's contention and quoted from *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), where the same argument already had been turned down:

"Where identical offenses are involved, the question is not truly a matter of one being a lesser included offense of the other. Each has identical elements and the decision as to which penalty to seek cannot be a matter of prosecutorial whimsy in charging. As to identical offenses, a defendant can only be sentenced under the lesser penalty. Here, it would have been the better practice to have instructed on indecent liberties with a child, but the error could have been remedied by sentencing defendant as having been convicted of a class C felony rather than a class B felony. Accordingly, the sentence imposed herein must be vacated.' 241 Kan. at 83." 244 Kan. at 229.

The governing principle, as stated by the court in *Nunn*, is: "Where two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision." 244 Kan. at 229.

In *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), the court considered two criminal offenses that, although dealing with the same subject, did not have identical essential elements. Williams was charged with one count of indecent liberties with a child, K.S.A. 1991 Supp. 21-3503, for the alleged sexual molestation of his step-granddaughter. The court concluded that he should have been charged with the more specific offense of aggravated incest, K.S.A. 21-3603, which had the additional essential element of kinship. The governing principle, as stated by the court in *Williams*, is: "When there is a conflict between a statute dealing generally with a subject and another statute dealing specifically with a certain phase of it, the specific statute controls unless it appears that the legislature intended to make the general act controlling." 250 Kan. 730, Syl. ¶ 3.

The statutory provisions either have identical elements or they do not, and the analysis for statutes with identical elements differs from the analysis applicable where statutes do not have identical elements. Thus, if K.S.A. 65-4159(a) and K.S.A. 65-4161(a) have identical elements, the proper analysis is that set out in *Nunn*. As we have seen, the elements of K.S.A. 65-4159(a) and K.S.A. 65-4161(a) are identical, as the Court of Appeals noted, "as applied to this case." 31 Kan. App. 2d at 446. For example, in other circumstances, the essential elements of a violation of K.S.A. 65-4161(a) could be that the defendant

sold opium. For this reason, a decision that McAdam's conduct was prohibited by K.S.A. 65-4161(a) as well as by K.S.A. 65-4159(a) so that he may be sentenced only under the lesser penalty provision of K.S.A. 65-4161(a) is limited to the facts of this case. We, therefore, vacate McAdam's sentence for violation of K.S.A. 65-4159(a) and remand to the district court for resentencing McAdam to a drug severity level 3 felony as provided for a violation of K.S.A. 65-4161(a).

Judgment of the Court of Appeals affirming the district court on the limited issues subject to our grant of review is affirmed in part and reversed in part. Judgment of the district court on these issues is affirmed in part, the sentence is vacated, and the case is remanded with directions.


BEIER, J., not participating.

LARSON, S.J., assigned.<sup>1</sup>

<sup>1</sup>**REPORTER'S NOTE:** Judge Judge Edward Larson was appointed to hear case No. 88,139 vice Justice Beier pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616.

END

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 [KSC](#) | [Keyword](#) | [Name](#) » [SupCt](#) - [CtApp](#) | [Docket](#) | [Date](#) |

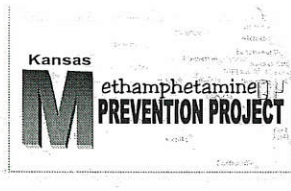
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Comments to: [WebMaster, kscases@kscourts.org](mailto:kscases@kscourts.org).

Updated: January 30, 2004; revised: February 3, 2004.

URL: <http://www.kscourts.org/kscases/supct/2004/20040130/88139.htm>.

Sub. HB 277



**TESTIMONY**  
**Submitted to the Kansas Senate Judiciary Committee**  
**March 15, 2004**

**Cristi Cain**  
**State Coordinator**  
**Kansas Methamphetamine Prevention Project**

The Kansas Methamphetamine Prevention Project provides support, current information, strategies and tools for addressing the methamphetamine problem at the local level. We have provided training and technical assistance designed to reduce the supply of and demand for meth in communities throughout Kansas.

**Kansas Methamphetamine Prevention Project Partner Agencies**

Kansas Bureau of Investigation  
 Kansas Department of Health and Environment  
 Midwest HIDTA  
 Kansas State University Research and Extension  
 Kansas Regional Prevention Centers  
 Kansas National Guard  
 Social and Rehabilitation Services-Addiction and Prevention Services/Children and Family  
 Policy Division  
 Kansas Family Partnership  
 U.S. Attorney's Office  
 Sedgwick County DA's Office  
 Kansas Farm Bureau  
 University of Kansas  
 Prevention & Recovery Services  
 Community Systems Group  
 Treatment Providers  
 Local Law Enforcement Agencies

The Kansas Supreme Court ruling in State v. McAdam, which jeopardizes the sentences of hundreds of criminals convicted of meth manufacture and poses future sentencing problems is very disturbing for communities throughout the state, especially in a year when agencies that deal with methamphetamine are already facing budget crises. For example, the Kansas Methamphetamine Prevention Project, which has provided training and technical assistance to approximately 10,000 Kansans lost federal funding to continue these efforts. Additionally, numerous law enforcement agencies have faced major budget cuts, which will have a significant impact on their ability to address more manufacturing occurring in Kansas communities.

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 Attachment 2

The success rate of treatment for meth addiction based on national research is 3-7%. When combined with the fact that the state prison system has limited substance abuse treatment available, it is logical to conclude that when those convicted of meth manufacture are released, they are highly likely to return to manufacturing of meth in order to supply their addiction.

Quotes from community members:

"That McAdam case is a huge setback. I currently have two cases in front of the Supreme Court which they've ordered me to show cause why my cases should not be re-sentenced under the lesser penalties. In my opinion this is an egregious example of the courts invading the role of the legislature."

Chris Oakley, Rice County Attorney

"As you may know, the potential for recovery of a meth addict is poor. For those sincerely desiring recovery it will easily be 18 months before they can regain a semblance of normal in their lives. Incarcerated persons are rarely internally motivated to recover and with as short a sentence as 2.5 years it is easy to see they will breach the system again and a vicious cycle repeats. Longer sentencing creates a time for the family to be helped through their problems of malnutrition, neglect, physical, psychological and/or sexual abuse and if they themselves are addicted through recovery. Longer sentencing also allows time for the meth manufacturer to be off of the meth and his/her neurotransmitting chemicals to regain proper function, increasing likelihood of remaining meth free. Additionally, the simple concept of harm to others and society should bring the more stringent sentence into use."

Margaret (Maggie) A. Myers M.S.N., R.N.  
Education Coordinator  
Hospital District #1 of Rice County

The State v. McAdam ruling will have serious impact on communities throughout the state. Repercussions of the ruling will include:

- Increased availability of methamphetamine in communities throughout the state. With increased availability, more Kansans would use methamphetamine, a highly addictive drug. Kansas has had an 82% increase in residents who have sought treatment for meth addiction over the past 5 years. Additionally, the average age of admission for meth addiction treatment has decreased significantly. In FY 2003, 37% of residents seeking treatment for meth addiction were 24 or under. Of additional concern is the research demonstrating teens can become addicted after just two uses of meth. With increased availability, more teens will experiment with meth.
- Many communities have fewer law enforcement officers because of budget constraints. The release of convicted meth manufacturers would be a significant strain on enforcement resources.
- Clean-up resources would be insufficient to handle the increased number of manufacturers released. Looking at just the 375 manufacturers who will possibly receive drastically reduced sentences due to the Supreme Court ruling, if it is assumed that 90% of them would return to manufacturing, the clean-up costs to

handle just these labs would be approximately \$365,000, which is Kansas Department of Health and Environment's entire annual budget for meth lab clean-ups.

- The following are risks Kansas communities already face due to meth use and manufacture in our communities: domestic violence, increased crime including theft, auto accidents, fires and explosions, child abuse and neglect, sexually transmitted diseases, hazardous waste, murders, suicides, dangers to law enforcement and other first responders, and effects on children including birth defects and diseases related to chemical exposure. These risks would increase with more meth manufacturers in our communities due to reduced sentences.

The Kansas Methamphetamine Prevention Project supports legislative action that would correct the discrepancies between K.S.A. 65-4159 and K.S.A. 65-4161. Methamphetamine is a very serious problem in Kansas. It is very important that those convicted of the manufacture of meth receive long sentences in order to protect communities and deter manufacturers from other states, such as Missouri, from coming to Kansas.

#### ***Why the Meth Epidemic in Kansas Must Be Addressed***

- Kansas ranks in the top 10 in the nation in lab seizures.
- Kansas has experienced an 82% increase in methamphetamine addiction treatment admissions.
- Meth costs the state over \$23 million dollars per year in enforcement, incarceration and treatment.
- Rural communities are experiencing high levels of youth usage in addition to safety issues.
- Rural youth are 104% more likely to use meth than kids in urban areas (Kansas is 91% rural).
- Teenagers can become addicted to meth after just two uses.
- 37% of Kansas residents seeking treatment for meth addiction in FY2003 were 24 or under (57% were 29 or under).
- Over 120 children were exposed to chemicals involved in meth manufacturing in Kansas in 2002 and an increased number of children are being born exposed to methamphetamine.
- In the time period from January through September 2003, there were nearly 1,300 articles about methamphetamine in Kansas newspapers, demonstrating the dramatic impact this drug is having on the state.

#### ***Why Should You Support Methamphetamine Efforts in Kansas?***

- Because of the implications to communities, this issue has a lot of interest around the state. Thousands of constituents are dedicated to working on this issue and need your assistance to continue addressing the problem effectively.
- Communities have had tremendous success! Reported results include increased arrests, improved control of anhydrous ammonia, decreased usage of meth by youth, and increased community safety.
- The meth problem has significant implications for agricultural communities. The Project has been very successful in assisting rural constituencies. 74,000 tamper tags were distributed throughout the state to address the theft of anhydrous ammonia, a main ingredient in meth manufacture. Farmers, employees of co-ops and other agricultural organizations also received education that led to increased safety for rural communities. Efforts to expand rural efforts will not occur without further funding.

- An infrastructure composed of key state agencies and other organizations is in place. The infrastructure has been very successful in providing support, strategies, training and tools to almost 10,000 Kansans.
- The Kansas Methamphetamine Prevention Project is being considered as a national model by many organizations and has already provided technical assistance to 15 states.
- Changes in retail policies and farm and co-op policies were implemented locally by hundreds of businesses and farmers. Without continued support, the benefits will be lost.
- Drug Endangered Children (DEC) programs to address children found in meth labs, affected by their parents' meth usage, or born meth-exposed, have been formed in numerous communities throughout the state. Catalysts for forming DEC teams have included deaths of infants who were born exposed to meth and injuries to children in labs in Kansas communities. Support is needed to continue these efforts.
- In one year, Project staff and partner agencies had over 300 requests for technical assistance and materials related to efforts to address the meth problem. This need will not be met without further funding.
- Training for child protective service workers, home visitors and other service professionals has been developed which has led to increased safety for these professionals in Kansas. Without funding for these trainings, they will not be continued.
- Without your support, Kansas communities will lose momentum in addressing this problem. Long-term costs will be staggering.

***Nearly 50% of Kansas Counties Have Implemented Meth Prevention Efforts and/or Drug Endangered Children Programs Using KMPP Funding, Training and Technical Assistance:***

Atchison	Clay	Cheyenne	Cowley	Cherokee	Crawford
Decatur	Ellis	Finney	Franklin	Gove	Graham
Grant	Greenwood	Harper	Harvey	Haskell	Jefferson
Johnson	Kingman	Leavenworth	Logan	Lyon	Marshall
McPherson	Miami	Mitchell	Morris	Neosho	Osage
Osborne	Pottawatomie	Rawlins	Reno	Rice	Riley
Rooks	Russell	Scott	Sedgwick	Seward	Shawnee
Sheridan	Sherman	Stevens	Sumner	Thomas	Wallace
Washington	Wilson	Wyandotte			

**Demonstrated Outcomes in Kansas Communities as a result of the Kansas Methamphetamine Prevention Project:**

- Reduction in lifetime and 30 day usage of meth by youth
  - Increased public awareness
  - Decrease in lab seizures
    - Increase in arrests

- Decrease in theft of anhydrous ammonia
- Decrease in theft of precursor products from retail stores
  - Increased community safety
  - Increased perception of harm
- Decrease in perceived availability
- Increased reporting by retailers
  - Improved collaboration

**For more information, contact:**

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**[www.ksmethpreventionproject.org](http://www.ksmethpreventionproject.org)**



Remarks of Christopher L. Schneider, Assistant Wyandotte  
County District Attorney, Concerning Substitute for H.B. 2777

Before the Committee on the Judiciary of the  
Kansas Senate  
March 15, 2004

Mr. Chairman and members of the committee:

I appear before the committee to request legislation to remedy the effects of the decision of the Supreme Court of Kansas in the case of *McAdam vs. State*, which the court handed down January 30, 2004. In that decision, the court ruled that the crime of Manufacture of a Controlled Substance, in violation of K.S.A. 65-4159, which is a Level I felony on the drug sentencing grid, could only be sentenced as a Level III felony on the drug sentencing grid. The rationale for the decision is that the definition of manufacture, as set forth in K.S.A. 65-4101(n), includes "compounding". K.S.A. 65-4161(a), which is a level III drug grid felony, also proscribes "compounding". The Supreme Court has thus held that a person convicted of manufacturing a controlled substance can only be sentenced as if they were convicted of the less serious crime.

The effects of the *McAdam* decision are already being felt. The mandate in that case was handed down on February 18, 2004, and almost everyone convicted of Manufacture or Attempted Manufacture of Methamphetamine in the last five years is filing a motion to correct an illegal sentence. I have at least three such hearings set next week in Wyandotte County District Court. The result of the decision is that almost everyone convicted of Manufacture or Attempted Manufacture is going to be set free.

Manufacturing methamphetamine is a dangerous act. Depending on the method used, fire, explosion, or the production of carcinogenic gasses can result from such activities. Furthermore, use of the end product is a scourge upon many communities in this state.

The substitute for H.B. 2777, which passed the other body unanimously, will solve the problem for offenses under K.S.A. 65-4159 in the future, and may well solve the problem of at least some of those convicted in the past being immediately released back into the various communities of the State. By simply striking the word "compounding" from K.S.A. 65-4161(a), the argument that two separate and distinct statute proscribe the same conduct is removed.

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Attachment 3

DISTRICT ATTORNEY

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DEPUTY DISTRICT ATTORNEY

Thomas R. Stanton

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March 15, 2004

To: Kansas Senate Judiciary Committee

**TESTIMONY REGARDING H.B. 2777**

Thank you for the opportunity to address you regarding the provisions of H.B. 2777. I believe that this is one of the most important pieces of law enforcement legislation before the Legislature this term. The bill would simply remove the word "compound" from K.S.A. 65-4161 and K.S.A. 65-4163, but the effect of this change will protect many Kansas citizens from injury or death resulting from the manufacture of methamphetamine.

This legislation is needed because the Kansas Supreme Court has delivered an opinion that overrides this body's intent to make the manufacture of methamphetamine a level one drug felony. In State v. McAdam, \_\_\_ Kan. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 88,139 1/30/04) the Supreme Court ruled that, because the term "compound" appeared in K.S.A. 65-4161 and the term "compounding" was used as one of the acts that could constitute manufacturing as that term was defined in K.S.A. 65-4101(n), the act of manufacturing a controlled substance constituted the same conduct prohibited by K.S.A. 65-4161. Therefore, instead of the crime being sentenced as a level one drug felony, the Court has ruled that the crime must be sentenced as a level three drug felony, which is the level of crime for a first time conviction for possession of methamphetamine with intent to sell.

K.S.A. 65-4159 was enacted in 1990, while the original form of K.S.A. 65-4161, K.S.A. 65-4127a, was enacted in 1973. The enactment of K.S.A. 65-4127a was under the umbrella of the uniform controlled substances act and was designed to generally control both the lawful and unlawful distribution of controlled substances. This legislation was generally considered to be sufficient for the management of the distribution of controlled substances and the attempted management of the use of legal and illegal drugs. However, in the late 1980's Kansas and other states began to suffer from the scourge of the illegal manufacture of controlled substances, primarily methamphetamine. The processes used to manufacture the drug are extremely dangerous to those manufacturing the drug, as well as to any innocent citizen who might accidentally be near such a manufacturing operation. The ease of the manufacture of methamphetamine resulted in a plethora of such criminal activity, and in an increase in the amount of methamphetamine available in Kansas. This body was forced to act in an attempt to deal with this threat to the safety and welfare of Kansas citizens. It did so by promulgating K.S.A. 65-4159. The sole purpose of the statute was to deal with the specific

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Attachment 4

act of the manufacture of a controlled substance. The legislature clearly believed that the statutes previously enacted in this arena, including those statutes under the umbrella of the uniform controlled substances act, did not adequately address the act of manufacturing a controlled substance.

The original penalty ascribed to the act of manufacture of a controlled substance was a sentence under severity level two of the drug grid. This legislature later determined that, based on the nature of the crime and the threat to the public safety inherent in the commission of this crime, the crime should be punished as a severity level one drug offense. The legislature then modified K.S.A. 65-4159 to reflect this penalty in 1999. The legislature has thus considered this issue on multiple occasions and determined that the penalty for the commission of this crime should be severe.

The manufacture of methamphetamine is extremely dangerous. The process creates hazardous wastes which threaten the health of anyone who might come into contact with them. The ease of manufacture allows the labs to be set up anywhere. Motel rooms are common lab sites, and anyone staying in a motel room after a cook has been conducted in that room may unwittingly fall victim to the waste products left behind. Meth labs are mobile, and it is common for law enforcement officers to stop cars or trucks filled with lab items with cooks in process. I know of at least one head-on collision which was caused directly by the driver being affected by the fumes from a meth lab in the car he was driving. The victim driver never imagined that he would be involved in a collision with a rolling methamphetamine lab. Additionally, many meth cooks are conducted in the country in an attempt to conceal the activity from law enforcement. The remnants of these labs are left in farmers' fields where livestock can be poisoned and the hazardous wastes can make their way into the water table.

Last Friday night there was a fire in a duplex in Hutchinson. Law enforcement officers suspect that the cause of the fire was a methamphetamine lab. How do we explain to a family on the other side of the duplex that we know how dangerous these labs are but we have allowed a single word in a statute to be interpreted by the Courts to reduce the sentence from twelve years to fifteen months? This body has listened to the terrible facts regarding meth labs in the past and has taken action to severely punish those who would create such a threat to Kansas citizens. The citizens of this state deserve a fast response by the legislature to reinstate the penalties which fit the crime of manufacture of methamphetamine.

Many persons involved in the manufacture of methamphetamine are multiple repeat offenders. In my fourteen years of experience as a prosecutor I have never known of any crime other than the manufacture of methamphetamine that nearly every offender will continue to commit even while on bond for the commission of the offense. I am currently prosecuting several offenders who have been arrested for the manufacture of methamphetamine three or more times. Long sentences do have a deterrent effect once the community sees that the sentences are being imposed. More importantly, long sentences keep those who insist upon manufacturing methamphetamine from returning to our communities to manufacture more meth. Since McAdam I have already sensed an attitude from defendants that they are willing to continue to manufacture methamphetamine if the sentence will be only a short time in prison. Defendants have been clamoring to enter pleas believing a level three

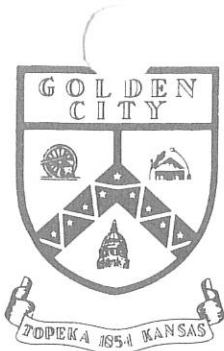
sentence is all they will receive. This body should act quickly to remove the word "compound" from K.S.A. 65-4261 and K.S.A. 65-4163. This body should also make this action retroactive and should require that the legislation go into effect when published in the Kansas Register. The sooner this legislation is effective the sooner the courts will enforce the law as it was intended to be enforced.

I ask you to pass H.B 2777 as soon as possible to require the courts to implement your original legislative intent regarding the punishment for the crime of manufacture of a controlled substance. Thank you for your attention to this matter and for your willingness to hear my testimony on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stanton', with a long horizontal flourish extending to the right.

Thomas R. Stanton  
Deputy Reno County District Attorney



# CITY OF TOPEKA

An Accredited  
Law Enforcement Agency

DEPARTMENT OF POLICE  
320 S. Kansas Ave., Suite 100  
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Fax 785-368-9458



Before the Senate Judiciary Committee  
In Support of House Substitute for HB 2777

Ed Klumpp  
Chief of Police  
Topeka Police Department  
March 15, 2004

Chairman Vratil and Members of the Committee:

Methamphetamine remains as one of the most common drugs available in Topeka. This Bill corrects a the current law as cited by the Kansas Supreme Court decision in *State v. McAdams*. In that case, one word in the statute, "compounding" has created a situation where persons manufacturing methamphetamine will receive lighter sentencing than intended by the legislature.

The manufacturing of methamphetamine is a clear danger to innocent people in our society. First, our children are at risk not only from the availability of methamphetamine but also the children often found in the place where methamphetamine is being manufactured. Second, the hazards from exposure to the fumes and chemicals exist in the neighborhoods where methamphetamine is manufactured. As these methamphetamine producers dispose of their hazardous chemicals in haphazard ways. Third, persons using motels are at risk. We are finding more frequently persons manufacturing these drugs are using motel rooms to produce the methamphetamine then leave the chemicals and hazardous residue behind. The exposes children and others who later use those rooms to the hazards of the chemicals.

I support the passage of this Bill. The need to fix this flaw is great. We must maintain our serious approach to the methamphetamine manufacturing in Kansas if we are to avoid inviting others to come to Kansas where the laws are weaker than in other states.

Senate Judiciary

3-15-04  
Attachment 5

700 Jackson, Suite 900  
Topeka, KS 66603

Testimony of

Randall L. Hodgkinson, Deputy Appellate Defender<sup>1</sup>

Before the Senate Committee on Judiciary

**RE: HB 2777**

March 15, 2004

Chairman Vratil and Members of the Committee:

I am testifying regarding my concerns about House Bill 2777 ("HB 2777"). My name is Randall Hodgkinson and I am a Deputy Appellate Defender here in Topeka. I am not testifying in my capacity as Deputy Appellate Defender and I have no authority to speak on behalf of any organization or agency; but my experience in the criminal justice system has caused me to have some personal concerns regarding this subject.

Specifically, HB 2777 aims to counter a Supreme Court case interpreting statutes prohibiting manufacture of a controlled substance. I have no qualms about clarifying the laws to resolve the conflicts in response to a court case—that is the Legislature's role.

But I would suggest that this is an appropriate time to step back and look at the results of the drug sentencing provisions and their practical impact. In my opinion, having manufacture, attempt to manufacture, and conspiracy to commit manufacture as severity level 1 drug offenses is grossly disproportionate and out of step with actual practice in the courts.

*Severity level 1 drug classification is out of step with practice in district court*

I believe that actual experience with classification of manufacture as a drug severity level 1 offense teaches volumes. The general trend with regard to departures in severity level 1 drug offenses is illustrative. I have attached copies of a table from the Sentence Commission report for fiscal year 1998, 1999, 2000, 2001, and 2002. As would be expected, before 1999, there were actually very few severity level 1 drug sentences, three in FY 1998 and six in FY 1999. But beginning in 2000, the number began growing and reached 84 in FY 2001 and 193 in FY 2002.

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<sup>1</sup>This testimony is not necessarily the position of the Kansas Appellate Defender Office or of the Kansas Board of Indigent Defense Services. This testimony constitutes the personal opinions and conclusions of the witness.

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In FY 2001, for all offenses 15.5% of sentences were downward departures and 27.6% of drug offenses were downward departures. But, for severity level 1 drug offenses, 81.7% (or more than 4 in 5) of offenders sentenced for severity level 1 drug offenses received downward durational departures, while only 3.7% received upward departures and only 14.6% received standard sentences. In FY 2002, this disparity remained steady. In FY 2002, for all offenses, while the downward departure rate for nondrug offenses remained relatively steady, 40.7% of drug offenders received downward departures, including 80.3% of those persons sentenced for drug severity level 1 offenses. This is compared with other nondrug felony classifications where the percentage of upward and downward departures is either relatively equal or upward departures are granted more often than downward departures. The conformity to the Guidelines, or lack thereof, for severity level 1 drug offenses is clear from this evidence. The expressed intent of the Legislature in passing the Guidelines was to have the vast majority of cases sentenced within presumptive ranges. But experience under the previous sentencing scheme shows that standard sentences for severity level 1 drug offenses are disproportionate and trial judges recognize that fact (as do prosecutors when they enter into plea agreements for downward departures).

*Which is worse: making meth for personal use or selling it at a school?*

The *McAdam* case held that, by definition, manufacture is identical to compounding a controlled substance, which is prohibited by the same statute as that which prohibits *selling* or *distributing* drugs; this offense is a severity level 3 drug offense, resulting in a presumptive sentence of between 14 and 51 months depending on criminal history. K.S.A. 21-4705; 65-4161(a). If a person sells or distributes drugs *to children at a school*, the offense is classified as a severity level 2 drug offense, resulting in a presumptive sentence of between 46 and 83 months, depending on criminal history. K.S.A. 21-4705; 65-4161(b).

But, under the classification urged by the proponents of HB 2777, a person who manufactures some methamphetamine for personal use or even agrees to help someone get the materials necessary to make methamphetamine for personal use would be guilty of a severity level 1 drug offense and would be subject to a sentence of no less than *138 months in prison*—more if the person had any criminal history. My question is simple: which is worse, selling drugs to children at school or making methamphetamine in a field for personal use? To me the answer is simple: distributing and selling drugs is worse. But the classification that would result from HB 2777 reflects exactly the opposite.

*Which Is Worse: Making Meth for Personal Use or Voluntary Manslaughter?*

Additionally, these sentences are disproportionate with nondrug offenses. For comparison sake, a severity level 1 drug offense mandates a greater presumptive sentence than a severity level 3 nondrug offense for all except the two highest criminal history categories. Severity level 3 nondrug offenses include aggravated robbery, kidnapping, aggravated indecent liberties with a child, voluntary manslaughter, and attempted second-degree murder. Again the question is: which is more serious? Again, to me the answer is apparent, but the laws as recommended by the proponents of HB 2777 would reflect exactly the opposite.

*A real alternative*

I understand the price that the scourge of methamphetamine exacts upon persons and upon the State of Kansas as a whole. I have a front-row seat to witness the effects of methamphetamine and I understand that methamphetamine production is destructive to the environment and costly to the government that is often left holding the bill for cleaning up. I am not suggesting that manufacture and its related offenses should not be crimes or even that they should not be serious felonies. But I am suggesting that, by itself, in relation to other drug and nondrug offenses, first-time manufacture and related offenses should not be classified as a severity level 1 drug offense. Essentially, the law, as proposed by the proponents of HB 2777 lumps real "big-time" players right in with the addicts who are basically feeding their own habits. Both should receive criminal sanctions, but, as a policy matter, locking up addicts for decades is probably not fiscally sound.

I urge the Committee to take this opportunity to deliberately review the drug sentencing scheme and its practical effects as illustrated by courtroom experience since 1999.

I have attached a possible alternative for study. This is based loosely on the Colorado drug laws, which make distinctions in punishment severity based on amounts. This allows greater punishment for persons who are manufacturing amounts that make it likely that the drug is being pushed into the community, not just used personally.

I know that this Committee and the Legislature are continuing to study and consider drug enforcement policy and appropriate sanctions, especially in light of budgetary restrictions. I hope that this Committee will really consider whether throwing people in prison on first time personal use manufacture charges for ten, twenty or more years at a cost of hundreds of thousands of dollars to the state is the best use of limited resources.

Thank you for this opportunity to provide some input in this process. If any of the Committee members would like to follow up on this information, please feel free to contact me.



**Table 24: Conformity Rates by Severity Level - Incarceration Sentences**

Severity Level	N	Within Guidelines (%)				Departures (%)		
		Agg	Stand	Miti	Box	Durational		Dispositional
						Upward	Downward	Upward
D1	193	1.0	5.7	7.8		5.2	80.3	
D2	89	6.7	25.8	18.0		11.2	38.2	
D3	149	1.3	13.4	5.4	64.4	4.0	11.4	
D4	161	1.2	23.6	10.6	24.2	6.2	21.7	12.4
<b>Subtotal</b>	<b>592</b>	<b>2.0</b>	<b>15.5</b>	<b>9.5</b>	<b>22.8</b>	<b>6.1</b>	<b>40.7</b>	<b>3.4</b>
N1	56	12.5	21.4	8.9		26.8	30.4	
N2	37	10.8	21.6	10.8		29.7	27.0	
N3	209	6.7	24.4	20.6		25.8	22.5	
N4	64	10.9	31.3	21.9		21.9	14.1	
N5	198	6.1	15.7	11.1	40.9	8.6	17.7	
N6	40	5.0	30.0		7.5	32.5	7.5	17.5
N7	153	2.0	17.6	7.2		10.5	9.2	53.6
N8	75	6.7	22.7	4.0		4.0	5.3	57.3
N9	152	3.9	32.2	7.9		3.9	9.2	42.8
N10	42	2.4	21.4	11.9			2.4	61.9
<b>Subtotal</b>	<b>1,026</b>	<b>5.9</b>	<b>23.0</b>	<b>11.6</b>	<b>8.2</b>	<b>14.5</b>	<b>15.0</b>	<b>21.7</b>
<b>TOTAL</b>	<b>1,618</b>	<b>4.5</b>	<b>20.3</b>	<b>10.8</b>	<b>13.5</b>	<b>11.4</b>	<b>24.4</b>	<b>15.0</b>

Table 25 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated 14.4% downward dispositional departures for sentences, which should have been presumptive incarceration, while only 6% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders

did when their severity levels and criminal history categories fell within the border boxes (33.3% versus 4.7%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences: the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past seven years.

Table 26: Conformity Rates by Severity Level - Incarceration Sentences

Severity Level	N	Within Guidelines (%)				Departures (%)			
		Agg	Stand	Miti	Box	Durational		Dispositional	
						Upward	Downward	Upward	
D1	82	1.2	4.9	8.5		3.7	81.7		
D2	54	5.6	16.7	20.4		25.9	31.5		
D3	143	1.4	4.2	1.4	77.6	7.7	7.7		
D4	145	2.1	19.3	10.3	28.3	6.9	15.2	17.9	
<b>Subtotal</b>	<b>424</b>	<b>2.1</b>	<b>11.1</b>	<b>8.3</b>	<b>35.8</b>	<b>9.0</b>	<b>27.6</b>	<b>6.1</b>	
N1	70	11.4	11.4	14.3		42.9	20.0		
N2	34	5.9	26.5	14.7		26.5	26.5		
N3	182	12.6	17.6	23.1		31.9	14.8		
N4	45	17.8	26.7	17.8		22.2	15.6		
N5	195	6.7	19.0	6.7	38.5	14.4	14.9		
N6	24	4.2	25.0	8.3	8.3	20.8		33.3	
N7	178	3.9	11.8	3.9		8.4	3.4	68.5	
N8	64	1.6	9.4	6.3		3.1	1.6	78.1	
N9	130	0.8	16.2	6.9		5.4	4.6	66.2	
N10	53	1.9	18.9	5.7			1.9	71.7	
<b>Subtotal</b>	<b>975</b>	<b>6.7</b>	<b>16.6</b>	<b>10.6</b>	<b>7.9</b>	<b>16.8</b>	<b>10.3</b>	<b>31.2</b>	
<b>TOTAL</b>	<b>1,399</b>	<b>5.3</b>	<b>14.9</b>	<b>9.9</b>	<b>16.4</b>	<b>14.4</b>	<b>15.5</b>	<b>23.6</b>	

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated 12% downward dispositional departures for sentences, which should have been presumptive incarceration, while only 6.3% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than

nondrug offenders did when their severity levels and criminal history categories fell within the border boxes (35.5% versus 4%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences: the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past six years.

Table 26: Conformity Rates by Severity Level - Incarceration Sentences

Severity Level	N	Within Guidelines(%)				Departures(%)			
		Agg	Stand	Miti	Box	Durational		Dispositional	
						Upward	Downward	Upward	
D1	24			16.7		4.2	79.2		
D2	76	5.3	19.7	15.8		11.8	47.4		
D3	143	1.4	6.3	2.8	77.6	7.0	4.9		
D4	106	0.9	14.2	9.4	33.0	3.8	15.1	23.6	
<b>Subtotal</b>	<b>349</b>	<b>2.0</b>	<b>11.2</b>	<b>8.6</b>	<b>41.8</b>	<b>6.9</b>	<b>22.3</b>	<b>7.2</b>	
N1	46	15.2	13.0	8.7		30.4	32.6		
N2	46	6.5	17.4	8.7		32.6	34.8		
N3	166	6.6	27.7	17.5		31.3	16.9		
N4	42	7.1	35.7	7.1		28.6	21.4		
N5	160	6.3	16.9	8.1	40.6	11.3	16.9		
N6	33	9.1	24.2	24.2	9.1	15.2	9.1	9.1	
N7	123	0.8	17.1	4.9		8.1	3.3	65.9	
N8	69		10.1	8.7		7.2	5.8	68.1	
N9	122	3.3	16.4	1.6		0.8	1.6	76.2	
N10	39	5.1	15.4	12.8				66.7	
<b>Subtotal</b>	<b>846</b>	<b>5.2</b>	<b>19.4</b>	<b>9.5</b>	<b>8.0</b>	<b>15.6</b>	<b>12.8</b>	<b>29.6</b>	
<b>TOTAL</b>	<b>1,195</b>	<b>4.3</b>	<b>17.0</b>	<b>9.2</b>	<b>17.9</b>	<b>13.1</b>	<b>15.6</b>	<b>23.0</b>	

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated 9.2% downward dispositional departures for sentences which should have been presumptive incarceration, while only 6% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders

did when their severity levels and criminal history categories fell within the border boxes (32.9% versus 3.6%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences; the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past five years.

**Table 26: Conformity Rates by Severity Level - Incarceration Sentences**

Severity Level	N	Within Guidelines(%)				Departures(%)			
		Agg	Stand	Miti	Box	Durational		Dispositional	
						Upward	Downward	Upward	
D1	6	16.7	16.7				66.7		
D2	59	5.1	25.4	15.3		8.5	45.8		
D3	165	1.2	4.8	4.2	80.0	1.8	7.9		
D4	106		17.0	11.3	28.3	7.5	20.8	15.1	
<b>Subtotal</b>	<b>336</b>	<b>1.8</b>	<b>12.5</b>	<b>8.3</b>	<b>48.2</b>	<b>4.8</b>	<b>19.6</b>	<b>4.8</b>	
N1	44	11.4	27.3	11.4		34.1	15.9		
N2	40	7.5	17.5	17.5		20.0	37.5		
N3	157	11.5	33.1	16.6		24.2	14.6		
N4	48	27.1	31.3	8.3		20.8	12.5		
N5	173	1.7	15.6	11.0	49.1	8.7	13.9		
N6	45	8.9	28.9	4.4	6.7	15.6	13.3	22.2	
N7	129	3.9	10.9	7.8		10.9	3.9	62.8	
N8	65	1.5	13.8	9.2		3.1	6.2	66.2	
N9	125	5.6	17.6	7.2		5.6	3.2	60.8	
N10	31	3.2	6.5	9.7		19.4	3.2	58.1	
<b>Subtotal</b>	<b>857</b>	<b>7.0</b>	<b>20.2</b>	<b>10.6</b>	<b>10.3</b>	<b>14.2</b>	<b>11.1</b>	<b>26.6</b>	
<b>TOTAL</b>	<b>1,193</b>	<b>5.5</b>	<b>18.0</b>	<b>10.0</b>	<b>21.0</b>	<b>11.6</b>	<b>13.5</b>	<b>20.5</b>	

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated a 11.3% downward dispositional departures for sentences which should have been presumptive incarceration, while only 4.6% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than

nondrug offenders did when their severity levels and criminal history categories fell within the border boxes (32.7% versus 3.1%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences; the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past four years.

**Table 26: Conformity Rates by Severity Level - Incarceration Sentences**

Severity Level	N	Departures(%)							
		Within Guidelines(%)				Durational			Dispositional
		Agg	Stand	Miti	Box	Upward	Downward	Upward	
D1	3					33.3	66.7		
D2	43	2.3	18.6	20.9		16.3	41.9		
D3	155	1.9	5.8	3.2	75.5	3.2	10.3		
D4	79	0.0	17.7	10.1	31.6	7.6	17.7	15.2	
<b>Subtotal</b>	<b>280</b>	<b>1.4</b>	<b>11.1</b>	<b>7.9</b>	<b>50.7</b>	<b>6.8</b>	<b>17.9</b>	<b>4.3</b>	
N1	16	6.3	18.8	0.0		25.0	50.0		
N2	60	15.0	8.3	6.7		36.7	33.3		
N3	163	11.7	32.5	17.2		25.8	12.9		
N4	59	13.6	23.7	15.3		28.8	18.6		
N5	164	5.5	25.0	12.8	34.8	8.5	13.4		
N6	39	5.1	25.6	7.7	23.1	12.8	12.8	12.8	
N7	120	3.3	13.3	6.7		4.2	2.5	70.0	
N8	60	6.7	18.3	5.0		6.7	10.0	53.2	
N9	111	5.4	13.5	9.0		2.7	4.5	64.9	
N10	37	0.0	18.9	5.4		0.0	13.5	62.2	
<b>Subtotal</b>	<b>829</b>	<b>7.5</b>	<b>21.1</b>	<b>10.6</b>	<b>8.0</b>	<b>14.0</b>	<b>12.8</b>	<b>26.1</b>	
<b>TOTAL</b>	<b>1,109</b>	<b>6.0</b>	<b>18.6</b>	<b>9.9</b>	<b>18.8</b>	<b>12.2</b>	<b>14.1</b>	<b>20.6</b>	

Table 27 displays conformity rates for probation sentences by severity levels. Probation drug sentences indicated a 8.3% downward dispositional departures for sentences which should have been presumptive incarceration, while only 4.7% of nondrug sentences experienced downward dispositional departures. The significant differences also occurred within the border box grids. Drug offenders received more probation sentences than nondrug offenders when their severity levels and criminal history categories fell within the border boxes (36.5% versus 2.7%). Comparison of probation drug and nondrug sentences revealed the same trend as indicated with incarceration sentences; the tendency is to impose more non-prison sentences for drug offenders than for nondrug offenders. This trend has been consistent for the past three years.

6-8

Proposed Reform regarding manufacture of methamphetamine

AN ACT concerning controlled substances, relating to manufacture of methamphetamine.

Section 1. K.S.A. 65-4159 is repealed.

Section 2. K.S.A. 65-4161 is hereby amended to read as follows:

(a) Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver or distribute; prescribe; administer; deliver; distribute, dispense, or ~~compound~~, **manufacture** any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as provided in subsections (b), (c), ~~and~~ (d), **and (e)**, any person who violates this subsection shall be guilty of a drug severity level 3 felony.

....

(d) ~~Notwithstanding any other provision of law, upon~~ **Upon** conviction of any person for a first offense pursuant to subsection (a), such person shall be guilty of a drug severity level 2 felony if such person is 18 or more years of age and the substances involved were possessed with intent to sell, deliver or distribute; sold or offered for sale; **or manufactured** in or on, or within 1,000 feet of any school property . . .

(e) Upon conviction of any person for a first offense pursuant to subsection (a), such person shall be guilty of a drug severity level 2 felony and shall not be subject to statutory provisions for suspended sentence, community work service, or probation, if the offense involved a stimulant designated in subsection (d)(1) or (d)(3) of K.S.A. 65-4107 and amendments thereto in an amount equal to or greater than 25 grams but less than 450 grams. Upon conviction of any person for a first or second offense pursuant to subsection (a), such person shall be guilty of a drug severity level 1 felony and shall not be subject to statutory provisions for suspended sentence, community work service, or probation if the offense involved a stimulant designated in subsection (d)(1) or (d)(3) of K.S.A. 65-4107 and amendments thereto in an amount equal to or greater than 450 grams.

[reletter previous sections (e), (f), and (g).]

Section 3. [add in manufacture to and remove compounding from K.S.A. 65-4163]

Section 4. [add in manufacture to and remove compounding from K.S.A. 65-4164]

Section 5. [Repeal or amend other provisions citing 65-4159].



# KANSAS

**KANSAS SENTENCING COMMISSION**

Honorable Ernest L. Johnson, Chairman  
District Attorney Paul Morrison, Vice Chairman  
Patricia Ann Biggs, Executive Director

KATHLEEN SEBELIUS, GOVERNOR

**MEMORANDUM**

**To:** Duane A. Goossen, Director of the Budget  
**ATTN:** Jeff Aprin  
**From:** Patricia Biggs, Executive Director  
**Date:** March 12, 2004  
**RE:** Fiscal Note on Sub. HB 2777

**SUMMARY OF BILL:**

AN ACT concerning controlled substances; relating to manufacturing; amending K.S.A. 65-4161 and 65-4163 and repealing the existing sections.

**This bill would not have an impact upon the Kansas Sentencing Guidelines Act (KSGA).** This bill would:

- remove the word "compound" from K.S.A. 65-4161 (Unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants; penalties; acts within 1,000 feet of school property) and K.S.A. 65-4163 (Unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances; penalties; acts within 1,000 feet of school property).
- In addition, all offenders convicted of a violation of K.S.A. 65-4159 (Unlawful manufacturing or attempting such of any controlled substance; penalty) on or before this act are guilty of a severity level 1 felony and their sentences would not be reduced to a violation of K.S.A. 65-4161 (Unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants; penalties; acts within 1,000 feet of school property) or 65-4163 (Unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances; penalties; acts within 1,000 feet of school property).

**Section 1** (a) removes the word "compound" from the definition of K.S.A. 65-4161.

**Section 2** (a) removes the word "compound" from the definition of K.S.A. 65-4163.

**Section 3** any person convicted of violating K.S.A. 65-4159 on or before the effective date of this act is guilty of a severity level 1 felony and their sentence will not be reduced to violating provisions of K.S.A. 65-4161 or 65-4163.

**Section 4** if this act or application of this act is held invalid, the invalidity shall not affect other provisions or applications of the act. The provisions of this act are severable.

**Section 5** repeals K.S.A. 65-4161 and K.S.A. 65-4163.

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Senate Judiciary

3-15-04  
Attachment 7

Prison Population Impact of 2004 Sub HB 2777  
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**Section 6** sets the effective date as publication in the Kansas register.

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**IMPACT ON KANSAS SENTENCING COMMISSION:**

Based on the current duties of the Kansas Sentencing Commission, the change proposed in this bill will have no effect the following:

1. The current operation or responsibilities of the Commission
2. The current budget of the Commission.
3. The current staffing and operating expenditure levels of the Commission.
4. The long-range fiscal estimates of the Commission.

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**IMPACT ON PRISON ADMISSIONS:**

- Increase by an estimated: \_\_\_\_\_
- Potential to increase but cannot quantify
- Decrease by an estimated: \_\_\_\_\_
- Potential to decrease but cannot quantify
- Remain the same

Note: This substitute bill responds to the State v. McAdam Kansas Supreme Court Decision.

Summary of State v. McAdam Kansas Supreme Court Decision:

The offender was convicted of conspiracy to unlawfully manufacture methamphetamine, attempted theft, attempt to unlawfully possess anhydrous ammonia and conspiracy to unlawfully possess anhydrous ammonia. The Court of Appeals affirmed the convictions of conspiracy to unlawfully manufacture methamphetamine and attempted theft, reversed the convictions of attempt to unlawfully possess anhydrous ammonia and conspiracy to unlawfully possess anhydrous ammonia, remanded for resentencing in accordance with reversal of those convictions, and affirmed the drug severity level 1 felony penalty for conspiracy to unlawfully manufacture methamphetamine.

The Kansas Supreme Court granted the offender's petition for review to determine if he was illegally sentenced for conspiracy to manufacture methamphetamine. The offender claimed that he was illegally sentenced for conspiracy to unlawfully manufacture methamphetamine when he was sentenced for violation of K.S.A. 65-4159(a) a drug severity level 1 felony, rather than for a violation of K.S.A. 65-4161(a), a drug severity level 3 felony.

K.S.A. 65-4159(a) provides:

"Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to *manufacture* any controlled substance or controlled substance analog."  
Methamphetamine is a controlled substance. K.S.A. 65-4101(e); K.S.A. 65-4107(d)(3).  
The penalty for violation of 65-4159(a) is a drug severity level 1 felony. K.S.A. 65-4159(b).

K.S.A. 65-4161(a) provides:

"Except as authorized by the uniform controlled substances act, it shall be unlawful for

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*Prison Population Impact of 2004 Sub HB 2777*  
*March 12, 2004* *Page 3 of 3*

any person to sell, offer for sale or have in such person's possession with intent to sell, deliver or distribute; prescribe; administer; deliver; distribute; dispense or *compound* any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as provided in subsections (b), (c) and (d), any person who violates this subsection shall be guilty of a drug severity level 3 felony."

Methamphetamine is a stimulant designated in 65-4107(d)(3).

Compound means to put together, combine or construct. (Black's law dictionary, 7<sup>th</sup> Edition 1999)

The statutory definition of manufacture is: "Manufacture means the production, preparation, propagation, *compounding*, conversion or processing of a controlled substance either directly or indirectly or by extraction from substances of natural origin or independently by means of chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container..." K.S.A. 2003 Supp. 65-4101(n).

The Kansas Supreme Court noted that by definition compounding is manufacturing. The Court agreed with the offender that 65-4161(a) and 65-4159(a) are identical and therefore he can only be sentenced under the lesser penalty provision of 65-4161(a). The Court's analysis included a review of *State v. Nunn*, 244 Kan. 207, 786 P.2d 268 (1989), which held that "[w]here two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision." The Court vacated the offender's sentence and remanded the case to the district court for resentencing to a drug severity level 3 felony.

The McAdam decision was handed down after the Sentencing Commission produced its prison population projections in September 2003 and the revision produced in November 2003. Therefore, the impact of the McAdam decision is not included in the projections.

Sub. HB 2777 negates the impact of the McAdam decision, and, as such, returns the prison population projections to their original levels. There is no impact on prison admissions or prison bed space needs.

**IMPACT ON OFFENDER POPULATION LEVELS:**

- have impact on offender population as noted below  
 have the potential to impact offender population as noted below.  
 have minimal or no impact on offender population.  
 have impact but cannot be quantified with data available.

**SUMMARY OF Sub. HB 2777 IMPACT:**

- Admissions: The impact of this bill will result in no change in prison admissions.
- Prison Beds: The impact of this bill will result in no change in prison bed space needs.

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COMMITTEE ASSIGNMENTS  
CHAIR: EDUCATION  
MEMBER: EDUCATION BUDGET

**HB2649**  
**Testimony**

Thank you Chairman and committee members for allowing me to appear before you today in regards to HB 2649.

This legislation has certainly been a work in progress and will continue to be a work in progress with you, the committee, weighing into the mix.

HB2649 is a prevention tool to help families fight drug addiction. Too many times crimes are committed under the influence of an illegal substance and law enforcement has no way of charging for the use of the drugs involved.

HB 2649 limits testing to arrest for child abuse K.S.A. 21-3609, aggravated assault K.S.A. 21-3410, battery K.S.A. 21-3412 and K.S.A. 21-3412 a, which is domestic battery.

The U.S. military now can and does test for drug use among their personnel. The military have drug levels established which determine if charges are pursued and are detected with urine test. The KBI has levels set that their labs can detect which differ from the military. I do believe it would be a good idea to have levels set in statute to let our court system have guidelines on when to pursue charges.

There are attorneys as well as law enforcement officers here to testify today and I would request the more technical questions be asked of them.

Thank you for your time.

*Kathe Decker*  
*District 64*

Senate Judiciary  
3-15-04  
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# KANSAS

WILLIAM R. SECK, SUPERINTENDENT

KANSAS HIGHWAY PATROL

KATHLEEN SEBELIUS, GOVERNOR

**Testimony on HB 2649  
to  
Senate Judiciary Committee**

**Presented by  
Lieutenant John Eichkorn  
Kansas Highway Patrol**

**March 15, 2004**

Good morning, Mr. Chairman and members of the committee. My name is Lieutenant John Eichkorn, and I appear before you on behalf of Colonel William Seck and the Kansas Highway Patrol to comment on HB 2649.

HB 2649 proposes to bar any person from using any controlled substances prohibited under K.S.A. 65-4160 or 65-4162. "Use" is defined as knowingly injecting, ingesting, inhaling, or otherwise introducing the substance into the human body. Under current law, it is illegal for a person to "possess or have under such person's control" controlled substances, but once a drug is inside a person's body, we enter a legal gray area.

This bill would allow an officer to request a drug test from an individual arrested for child abuse (K.S.A. 21-3609), aggravated assault (K.S.A. 21-3410), battery (K.S.A. 21-3412), or drug possession (K.S.A. 65-4160, 65-4162) if the officer had probable cause to believe the person used a controlled substance. The testing would comply with provisions of the state's DUI law (K.S.A. 8-1001).

In reviewing HB 2649, the Patrol would recommend a simple change to Section 2, line 30 that would remove the words "section 1". In the circular way it is stated, it could allow officers to stop virtually anyone and request a drug test. By removing "section 1," officers would be limited to requesting drug tests from those arrested for child abuse, aggravated assault, battery, or drug possession.

Once limited in this way, the Kansas Highway Patrol would support HB 2649 and would appreciate the role it would play in the war on drugs. The Patrol is committed to the war on drugs. We have an active Criminal Interdiction Program, specially trained police service dogs, certified Drug Recognition Experts, and award-winning troopers who are dedicated to removing drugs from the state's roadways. However, we know that we do not stop all contraband traveling through our state. Unfortunately, controlled substances do reach individuals who commit further crimes, sometimes violent crimes.

This bill would clarify the state's drug laws and help the nation fight the war on drugs. Once amended, it would also help the law enforcement community further protect the victims of child abuse, aggravated assault, and battery. Thank you for the opportunity to address you today, and on behalf of the Patrol, I urge this committee to give HB 2649, with the proposed change, a favorable report. I will be happy to stand for any questions you might have.

###

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Senate Judiciary

3-15-04

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MEMORANDUM

To: Chairman Vratil, Senate Judiciary Committee  
From: Patricia Biggs, Executive Director  
Date: March 17, 2004  
RE: **Fiscal Note on HB 2649** - as amended by House - with proposed change to Section 2.

**SUMMARY OF BILL:**

**This bill will likely have an effect upon the Kansas Sentencing Guidelines Act (KSGA).** This bill would make use of a controlled substance prohibited in K.S.A. 65-4160 or K.S.A. 65-4162 a class A nonperson misdemeanor. A prior conviction under this section or a similar offense from another jurisdiction would result in a drug severity level 4 felony. ***In addition, this bill would require an officer following an arrest for abuse of a child, aggravated assault or battery or domestic battery request that a person submit to a test or tests to determine if the person has used a controlled substance if the officer has probable cause to believe that a person used a controlled substance.***

**Section 1** (a) of this bill prohibits use of any controlled substances prohibited in K.S.A. 65-4160 or K.S.A. 65-4162.

(b) of this bill states the first violation will be a class A nonperson misdemeanor and a prior conviction under this section or a similar offense from another jurisdiction would result in a severity level 4 felony.

(c) of this bill defines "use" and that knowledge of the presence of the controlled substance is a required component. Knowledge of the presence of the controlled can be inferred from the presence of the controlled substance in a person's body or from other circumstantial evidence.

**Section 2** of this bill ***requires the law enforcement officers following an arrest for K.S.A. 21-3609 (Abuse of a child), K.S.A. 21-3410 (Aggravated Assault) or K.S.A. 21-3412 (Battery) or K.S.A. 21-3412a (Domestic Battery)*** request that a person submit to a test or tests if the officer has probable cause to believe that a person used a controlled substance. The tests shall comply with the provisions of K.S.A. 8-1001 and amendments thereto. Refusal of the test or tests is admissible evidence against the person at trial on a charge of violation of section 1 and amendments thereto.

**Section 3** of this bill sets the effective date as publication in the statute book.

**IMPACT ON KANSAS SENTENCING COMMISSION:**

Based on the current duties of the Kansas Sentencing Commission, the change proposed in this bill will affect the following:

**1. The current operation or responsibilities of the Commission** - under the provisions of this bill, the number of journal entries is anticipated to expand substantially.

**2. The current staffing and operating expenditure levels of the Commission** - due to the large anticipated increase in the number of journal entries, an additional staff person will be required to maintain the databases which deal with probation sentences and probation revocation sentences.

**3. The current budget of the Commission** - Associated with the additional staff person needed

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to accommodate the anticipated increase in the number of journal entries, the budget of the Commission would have to increase to accommodate that increase in staffing. Beyond salary, fringes, and training costs, this person would require a personal computer, associated software, and a license for the statistical software we use to analyze the journal entry information ("SPSS").

Commission budget would also need to be increased for purchase of a computer server. Presently, all research staff maintain individual databases on their individual PC's. The level of redundant work this generates is at a maximum tolerable level presently (the work referred to here includes downloading individual machines, scrubbing data, and reloading the cleansed data, for example). Should the staff increase by one more person, this process could not continue and a computer server would be necessitated to facilitate the work of the research group. This would allow us to more efficiently maintain consistency and accuracy of the journal entry records via a centralized database system.

Costs associated with these items are estimated to be in the range of \$54,646.50 - \$62,616.50. Below are the expenditure details.

NOTES: Some of these costs (e.g., training and travel associated with training) can be spread over two years. Training and travel are one-time only expenses. Purchase of SPSS (statistical software) components is a one-time purchase with upgrades occurring on approximately a biennial cycle. Upgrades cost a fraction of the initial purchase.

**IMPACT ON PRISON ADMISSIONS:**

- Increase by an estimated: \_\_\_\_\_
- Potential to increase but cannot quantify**
- Decrease by an estimated: \_\_\_\_\_
- Potential to decrease but cannot quantify
- Remain the same

**IMPACT ON OFFENDER POPULATION LEVELS:**

- have impact on offender population as noted below
- have the potential to impact offender population as noted below.
- have minimal or no impact on offender population.
- have impact but cannot be quantified with data available.**

Notes:

**Limitations and Unknowns:**

- The Commission has conviction data but has **no arrest data** for any of the included offenses.
- **Battery (K.S.A. 21-3412)** - No arrest and no conviction data is available for the crime of battery since battery is a class B, person misdemeanor.
  - No inference can be made regarding the number of convictions for battery.
- **Domestic battery (K.S.A. 21-3412a)-1<sup>st</sup> and 2<sup>nd</sup>:** No arrest and no conviction data is available for the crime of domestic battery under K.S.A. 21-3412a for the first and second conviction as these are misdemeanor offenses.
  - Domestic battery, first time, is class B, person misdemeanor.
  - Domestic battery, second time, is class A, person misdemeanor.
- The rate at which law enforcement officers may attribute **probable cause to believe that a person used controlled substance** is unknown and there exists no data to make inference as to the probability that law enforcement will/will not require the individual to submit to a drug usage test.
- **The rate of drug usage** for the target group of arrestees - and the likelihood of conviction within the parameters of the bill - is unknown.
- **Lag time** for a second drug use is unknown (i.e., A "delay factor" must be programmed into the projection model to move a person with a second positive test for drug usage to drug severity level 4. This parameter is unknown and there exists no data upon which to base an assumption.)

**Knowns:**

Aggravated Assault (K.S.A. 21-3410)

Convictions: During FY 2003, 161 offenders were convicted of the crime of aggravated assault under K.S.A. 21-3410, Of this number,

- 30 (19%) were sentenced to prison,
- 131 (81%) received probation sentences.

Concurrent or Consecutive Sentences: Of the 161 offenders, 28 had multiple offenses for

which they received concurrent or consecutive sentences. Of these 28,

- o 6 (21%) were concurrent sentences,
- o 22 (79%) were consecutive sentences.

Length of Sentence: The average length of the prison sentences was 23 months.

Severity Level: Aggravated assault is a nondrug severity level 7, person felony.

Domestic Battery (K.S.A. 21-3412a) 3<sup>rd</sup> or subsequent:

Convictions: During FY 2003, 28 offenders were convicted of a third or subsequent domestic battery within last 5 years under K.S.A 21-3412a. Of this number,

- o 9 (32%) were sentenced to jail
- o 19 (68%) were sentenced to probation.

Concurrent or Consecutive Sentences: Of the 28 offenders, 15 had multiple offenses for which they received concurrent or consecutive sentences. Of these 15,

- o 6 (40%) were concurrent sentences,
- o 9 (60%) were consecutive sentences.

Severity Level and Length of Sentence: Domestic Battery 3<sup>rd</sup> or subsequent conviction within 5 years is a nongrid offense; sentence is to be served in county jail (not prison) and term of incarceration is up to one year.

Abuse of a Child (K.S.A. 21-3609):

Convictions: During FY 2003, 29 offenders were convicted of the crime of abuse of child under K.S.A.21-3609. Of this number,

- o 8 (28%) were sentenced to prison,
- o 21 (72%) received probation sentences.

Concurrent or Consecutive Sentences: Of the 29 offenders, 2 had multiple offenses for which they received concurrent or consecutive sentences. Of these 2,

- o 2 (100%) were consecutive sentences.

Severity Level: Abuse of a child is a nondrug severity level 5, person felony.

Length of Sentence: The average length of the prison sentences for these offenders was 48 months.

Battery (K.S.A. 21-3412)

- o No data is available regarding arresets, convictions, concurrent or consecutive sentences. This offense is a misdemeanor. We have no information regarding length of sentence.

**Key Assumptions:**

- The target inmates as defined in this bill include any persons who are arrested for the violation of K.S.A. 21-3609 (Abuse of a child), K.S.A. 21-3410 (Aggravated Assault), and K.S.A. 21-3412 (Battery) or K.S.A. 21-3412a (Domestic Battery) and tested positive if the officer has probable cause to believe that a person used a controlled substance.
- Second or subsequent use of drugs is drug severity level 4, felony.
- It is assumed that the average length of sentence for drug level 4 is 20 months.
- Percentage of target inmate sentences served in prison is assumed to be 85 percent, which is in consistent with the projections released in September and revised in November 2003.
- Use of drug does not qualify for SB 123 drug treatment.
- Probation revocation rate is assumed to be 31%, which is the actual rate of probation violators during FY 2003.
- Lag time for a probationer to violate his/her probation conditions is assumed to be within 12 months.

**Impact of the Bill**

- This amended bill might have:
  1. a large impact on probation populations,
  2. a small to a medium impact on prison admissions,

~~10-4~~ 10-4

3. a medium to a large impact on prison population and beds and
  4. a large impact on the workload of the journal entries of the Commission.
- However, the number of impact cannot be quantified due to the large number of limitations and unknowns.

**SUMMARY OF HB 2649 IMPACT:**

- Admissions: The impact of this bill will result in an increase in prison admissions; the magnitude of such an increase cannot be quantified with available data.
- Prison Beds: The impact of this bill will result in an increase need for prison beds; the magnitude of such an increase cannot be quantified with available data.





## Kansas Bureau of Investigation

Larry Welch  
Director

Phill Kline  
Attorney General

Before the Senate Judiciary Committee  
In Support of HB 2649  
Kyle G. Smith, Special Agent  
Director of Public and Governmental Affairs  
Kansas Bureau of Investigation  
March 15, 2004

Chairman Vratil and Members of the Committee:

I appear today on behalf of the Kansas Bureau of Investigation, in support of the concept behind HB 2649. It seems self-evident that if it's illegal to possess a controlled substance that it should also be illegal to use a controlled substance. However, there are some practical issues that I thought should be addressed.

First, there is a fiscal impact. Prosecution of this crime contemplates testimony concerning the presence of controlled substances inside a person's system, either through blood or urine testing. As can reasonably be anticipated, the defense will occasionally be that the defendant did not intentionally ingest the drugs or received only second-hand smoke in the case of marijuana. That defense will bring into issue the **quantity** of the controlled substance or the metabolite found in their system. Scientific methodology is involved in testing for the quantity of a drug is in addition to qualitative act of identifying the drug.

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Currently the KBI has two forensic scientists working full time testing for controlled substances in blood and urine. Normally these are only qualitative tests, looking for and identifying the drug, not the amount of the drug. Unfortunately qualitative and quantitative tests cannot be run at the same time. If we were also to do quantitative testing, it would essentially be doubling the number of tests to be done per case.

Therefore, we would need two additional people and additional equipment, and as you have probably heard in the past, additional space. Without the additional fiscal resources, these additional tests will swamp our toxicology lab and result in large backlogs and cases being dismissed. Of course, people sometimes use several drugs and so the testing could get even more complicated and expensive.

Second, the levels of some drugs are so small that current equipment utilized by the KBI, as well as other forensic labs in the state, would not be able to detect those amounts. Newer and more expensive equipment would be needed.

Third, there has been some confusion as to these levels and what they actually indicate. As a prosecutor, I would love to be able to bring in evidence of the amount of metabolites or drugs in a person's system will show that they were under the influence while driving. However, these levels, or any levels, probably can't scientifically reflect intoxication – there are just too many variable in our current level of scientific knowledge. For instance, the number of nanograms per milliliter will depend on how much water I've consumed. These numbers are

used to indicate a quantity more than could be accidentally absorbed through incidental contact, not an intoxication level.

If you don't get too technical, I'll be happy to try and answer any questions.

## Testimony Regarding House Bill 2693

Paul J. Morrison, District Attorney - Tenth Judicial District  
March 15, 2004

To members of the Senate Judiciary Committee, I'm here today to offer my full support for this bill. As you might or might not know, our office has had several cases in the last few years wherein unscrupulous people have taken advantage of dependant adults, usually elderly, and taken property from them. While the amount of victimization has varied greatly, we had one case where over half a million dollars in assets were taken from a mentally ill elderly widow. These situations have occurred many times over in both Johnson County and across this State.

In the past many of these cases were charged and tried as violations of the Theft statute, the theory being that the victims were deceived and or taken unfair advantage of. While the appellate courts of several other states have supported that legal concept, Kansas Court of Appeals has not. In the recent case of State v. Maxon, the Kansas Court of Appeals held that violations of this nature are not thefts, but merely violations of the dependent adult statute, a misdemeanor. Unfortunately, the Kansas Supreme Court recently denied our petition requesting review of this decision. This has created a major loophole in the law that allows paltry penalties for what can be massive thefts.

This bill simply aligns the taking of financial resources from a dependent adult with the same penalties in the Theft statute. It will close this loophole without impacting the prison population in any significant way. I strongly suggest that you pass this bill.

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MEMBER: APPROPRIATIONS  
 EDUCATION AND LEGISLATIVE  
 BUDGET  
 JUDICIARY

TOPEKA

HOUSE OF  
 REPRESENTATIVES

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The Honorable John Vratil  
 Chair, Senate Judiciary Committee  
 State Capitol, Room 123-S  
 Topeka, KS 66612

Senator Vratil and Members of the Senate Judiciary Committee:

Thank you for the opportunity to appear before you as a proponent of HB 2693. The legislation you have in front of you passed the House unanimously and is an attempt to broaden the protections of dependent adults, including the elderly and those with physical and mental illness disabilities.

There are numerous cases where elderly victims are taken advantage of by various individuals, including family members, home health care workers, trustees and those with power of attorney. Most of the abuse is financial and is done through intimidation, manipulation and deception. Examples of recent abuse this legislation is addressing include:

1. A case where five people worked together to steal over \$600,000 in a ten month period from an elderly victim. The victim was recently widowed and was diagnosed with a mental illness. Prior to her husband's death, the victim knew the five perpetrators as business clients of her late husband. Shortly after her husband's death, these individuals worked hard to gain her trust. They used this relationship to steal hundreds of thousands of dollars from the victim.
2. An attorney who was assigned as trustee to liquidate the estate of one of his own family members stole over \$100,000 from the rest of his family.
3. A home health care nurse who took advantage of a young victim with severe physical disabilities. The nurse placed numerous charges on the victim's credit card without her permission.
4. Home health care workers in a number of instances have stolen from elderly individuals that have major health problems at the time of the thefts. The thefts were accomplished a variety of ways including fraudulent use of a power of attorney and unauthorized use of the victim's credit cards and checks.

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There is a glaring inconsistency in the criminal code with respect to these situations that this legislation attempts to remedy. The loophole allows criminals who commit major crimes to simply receive a slap on the wrist under the law. Basically, under the current criminal code a person who steals \$500 or \$10 million from a dependent adult are subject to the same penalty under the law. The practical effect of this fact is that both individuals receive a slap on the wrist under the law.

My legislation changes the law to make it a severity level 7, person felony if a person steals more than \$25,000. The theft of property of at least \$500 but less than \$25,000 is a severity level 9, person felony offense and it is a Class A misdemeanor if the theft is less than \$500.

The change in the law makes it much more likely that these major criminals will receive significant punishment rather than a slap on the wrist. Most importantly, the loophole is eliminated with very little impact on prison beds.

The punishment simply does not fit the crime in these instances and I urge your support for this bill. Criminals who commit these major felonies belong in prison and not on the streets.

  
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March 15, 2004

Senate Judiciary Committee  
Hearing on HB 2693, Amendments to K.S.A. 21-3437  
Testimony of Christine E. Kenney, Douglas County District Attorney

Dear Chairperson Vratil and Committee Members:

Protection of our elderly and dependent adult citizens has become priority in this nation. As the percentage of our population becomes more dependent, the need for legislation to protect them increases. Protection should take many forms, including severe penalties for anyone who takes unfair advantage of their vulnerability. This group has increasingly become an easy target for criminals.

In 1992 this legislature enacted K.S.A. 21-3437, Mistreatment of a dependent adult. This legislation is an acknowledgment that our elderly and dependent adults need special protection. We recognized that this is a group of people specially situated, and against whom thefts and financial abuse are more devastating. This is not a group who can take on a second job to try to replace stolen savings, investments, or even collectibles. This is a group that is affected more drastically by these crimes, not only financially, but also emotionally. This is a group of people for whom the need to rely on others for assistance is difficult to accept, yet often necessary for survival. These crimes are generally committed by someone who has gained the victim's trust, then violated that trust for selfish gains.

The language of HB 2693 addresses specifically the financial abuse section of K.S.A. 21-3437. Thus, the language of HB 2693 mirrors the penalties for the crime of theft under K.S.A. 21-3101 with the exception that at all levels, violation of K.S.A. 21-3437 be classified as a person crime for the reasons stated above.

An example of a case in my jurisdiction where the shortcomings of the penalties of K.S.A. 21-3437 was highlighted is *State v. McKenzie*, 03CR0659. The incidents in this case occurred between 5-1-01 and 6-1-02 and involved an in-home care nursing service. The victims were an 80 year old and 93 year old

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couple. The defendant was the care provider. Conservators were appointed in May and June 2002. The financial abuse was discovered after the appointment of the conservator.

The conservator discovered that between April 2001 and May 2002, over \$300,000 was paid to the defendant. One example was a check for \$35,000 for yard work. The owner of a landscape service estimated his charge for the same work would be \$1100. Another incident that came to the attention of the conservator was that the victims were charged \$47,000 for in-home care, during a time the victims had been moved to a full-time nursing care facility. One victim died in August 2002. The other died in July 2003.

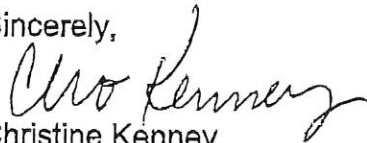
The defendant was convicted of four counts of Mistreatment of a dependant adult, all A person misdemeanors under the current statute.

K.S.A. 21-3437 is designed to protect people who need assistance, but for whom asking for help is difficult. Many are extremely independent and find it hard to accept the fact that they have to rely on someone else. For the person providing the help to violate that trust is a crime more serious than simply the amount of the financial abuse.

The proposed changes to K.S.A. 21-3437 in HB 2693 would create a greater deterrent of crimes against these victims by punishing those who see our vulnerable citizens as easy targets and whose resources are there for the taking. The changes proposed in HB 2693 would make the penalty fit the crime. If \$70,000 were stolen from any one else in this room, the crime would be a level 7 non-person felony. Because the law requires that the more specific crime be charged, this same act committed against a dependant adult would only be an A person misdemeanor. Clearly, when enacting this statute, the legislature recognized that the harm to our dependant adults is greater, thus making it a person, rather than non-person crime.

I thank this committee for taking the time to consider this request. If you have any questions, please do not hesitate to contact me.

Sincerely,



Christine Kenney  
Douglas County District Attorney





STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE  
ATTORNEY GENERAL

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March 15, 2004

Senate Judiciary Committee  
Hearing on HB2693, Amendments to K.S.A. 21-3437  
Testimony of Rex G. Beasley, Deputy Attorney General

Dear Chairperson Vratil, and Committee Members:

On behalf of Attorney General Phill Kline, I wish to convey his interest in protecting the interests of vulnerable adults in the State of Kansas and his support for HB2693 as passed by the House.

The Attorney General has made no secret of the fact that the most vulnerable members of society, including elderly and dependent adults, are a priority to his administration. In reviewing the laws currently in place that are designed specifically to protect the elderly and the dependent adults it was felt that the laws, as they are currently written, fall short of the protection that our senior citizens, as well as those adults that depend on us for their care and support, deserve.

In particular, K.S.A. 21-3437, in its current form, while recognizing that there exists a need to protect our most vulnerable citizens, fails to provide a significant deterrent to the criminals who prey on these individuals. These are criminals who portray themselves as being the victim's friend, as being trustworthy, and then take advantage of that "trust" often causing financial hardship and devastation to the victim. Victims who are forced due to circumstances outside of their control to set aside their pride and depend on others for their care and well-being. Unlike the citizens who can look out for themselves, and overtime, erase most if not all of the effects of such victimization, our dependent adults typically do not have that luxury. The effects are devastating and long-lasting, impacting the very resources they depend on for their survival.

Under the current law in K.S.A. 21-3437, when a dependent adult becomes the victim of financial abuse, the crime is mistreatment of a dependent adult, and the offender, if found guilty of committing the crime suffers only a class A person misdemeanor conviction, regardless of the amount of financial abuse or the total loss suffered by the victim. However, if the victim had not been a dependent adult, and suffered a loss in excess of \$500, the crime charged is theft, and, if found guilty, the offender will likely be convicted of a felony.

There has been an unsuccessful attempt to address this matter through the courts. In *State*

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*v Maxon*,<sup>1</sup> decided by the Kansas Court of Appeals on November 21, 2003, the Court reversed two felony theft convictions of Christopher and Jodi Maxon, and affirmed misdemeanor convictions for mistreatment of a dependent adult. The Maxons had been charged with and convicted of two counts of felony theft and one count of mistreatment of a dependent adult, for their respective roles in what the Court described as "the approximately 8-month long feeding frenzy" in which the defendants took over \$600,000 from an elderly, recently-widowed woman by taking advantage of her vulnerability and inability to protect her own interest. The Court of Appeals, in reversing the Maxons' felony convictions, held that "In Kansas, a defendant who takes unfair advantage of the financial resources of an adult who is unable to protect his or her interest for another individual's personal or financial advantage by the use of undue influence has committed the specific crime of mistreatment of a dependent adult, in violation of K.S.A. 21-3437. The State cannot elect to prosecute the defendant for the general crime of theft when the defendant's acts constitute the specific crime of mistreatment of a dependent adult." (*Maxon* syllabus #5) The State asked the Kansas Supreme Court to review the Appellate Court's decision in *Maxon*, but on February 10, 2004 the Kansas Supreme Court denied the State's Petition for Review

Our elderly and dependent adults depend on us for their care and well-being, despite their unwillingness to be so dependent. We are responsible for enacting laws that will serve to protect them from the effects of crime. It is obvious that the legislature has already realized the importance of protecting our vulnerable citizens. However, the Kansas Court of Appeals and the Kansas Supreme court have now told us that, under the current law, our dependant adults are not given the same protections from financial crimes that are given to the rest of the population. Attorney General Kline does not believe that it was the intent of the Legislature that the law be more lenient to those who commit financial crimes against dependant adults than it is with those of us who are not yet dependant adults as defined by K.S.A. 21-3437. A law that makes taking unfair advantage of the financial resources of an adult who is unable to protect his or her interest by the use of undue influence a misdemeanor **regardless** of the amount taken unjustly discriminates against our senior citizens. We owe it to them to correct that. We must recognize that those who illegally take the financial resources of dependent adults commit heinous violations of trust and deserve more than merely a misdemeanor conviction. The proposed changes in HB 2693 make the penalties for committing financial abuse of a dependent adult more consistent with the penalties for committing theft. In short it, the bill would make the punishment fit the crime.

Thank you for the opportunity to testify on this very important issue, and for your consideration. Please do not hesitate to contact our office if you should have any questions.

Sincerely,

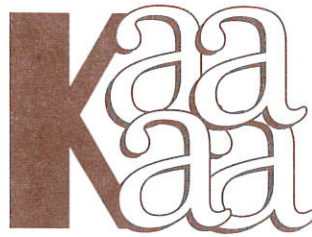
OFFICE OF THE ATTORNEY GENERAL  
PHILL KLINE

  
Rex Beasley,  
Deputy Attorney General  
Medicaid Fraud and Abuse Division

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<sup>1</sup><http://www.kscourts.org/kscases/ctapp/2003/20031121/20031121.htm>

THE  
KANSAS  
AREA AGENCIES  
ON AGING  
ASSOCIATION



*Meeting the Needs of Older Kansans*

1720 SW TOPEKA BOULEVARD • TOPEKA, KS 66612 • 785-235-8734 • FAX - 785-235-8747

To: Senate Judiciary Committee  
From: Craig Kaberline, Executive Director, Kansas Area Agencies on Aging Association  
Date: March 15, 2004

### **Testimony in Support of Senate Bill 2693**

Senator Vratil and members of the committee, thank you for this opportunity to provide testimony regarding HB 2693. I am the executive director of the Kansas Area Agencies on Aging Association (K4A). K4A's mission is to work to improve services and supports for all older Kansans and their caregivers. K4A represents all eleven Area Agencies on Aging (AAA) who coordinate services for seniors in all 105 counties of Kansas.

I am writing this letter in support of House Bill 2693, as amended by House Corrections and Juvenile Justice Committee, a bill sponsored by Representatives Newton and Davis. K4A believes it is important to strengthen the sentencing of those who are found guilty of mistreating a dependent person provides notice that acts such as taking a dependent person's money or other resources, inflicting physical harm or other mistreatment constitute serious criminal behavior in Kansas. This bill would provide dependent adults appropriate and equal status in our state's sentencing statutes and will affirm the value of vulnerable adults in our state.

The Kansas Area Agencies on Aging Association asks that you support this very important piece of legislation.

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AREA AGENCIES ON AGING:

CENTRAL PLAINS • EAST CENTRAL KANSAS • JAYHAWK • JOHNSON COUNTY • NORTH CENTRAL - FLINT HILLS • NORTHEAST KANSAS  
NORTHWEST KANSAS • SOUTH CENTRAL KANSAS • SOUTHEAST KANSAS • SOUTHWEST KANSAS • WYANDOTTE - LEAVENWORTH

e-mail: k4aed@hotmail.com



March 15<sup>th</sup>, 2004

Senator Vratil, Chair  
Senate Judiciary Committee

Good morning Chairman Vratil and Members of the Senate Judiciary Committee. My name is Darrell Donahue and I am a Congressional District Coordinator for AARP Kansas. AARP Kansas represents the views of our more than 350,000 members in the state of Kansas. Thank you for this opportunity to express our support and comments on House Bill 2693.

The American Psychological Association (APA) estimates that every year approximately 2.1 million older Americans are victims of physical, psychological, or other forms of abuse and neglect. For every case of elder abuse, neglect or exploitation that is reported to authorities, experts estimate that there may be as many as five cases that have not been reported.

All 50 states and the District of Columbia have laws addressing elder abuse in domestic and institutional settings. Typically, adult protective services laws do not provide for criminal or civil prosecution. In fact, fewer than half of the states have provisions in their laws for penalties against perpetrators of abuse, neglect or exploitation.

Some states have adopted enhanced criminal penalties in order to deter abuse, neglect or exploitation of vulnerable adults. The premise of these penalties is that society should punish more severely behaviors that are particularly repugnant. The enhanced penalties should apply where the vulnerable individuals are unable by reason of mental or physical incapacity to protect themselves from abuse, neglect or exploitation or to provide for their own health, safety or welfare.

Civil actions against abusers may also deter the victimization of vulnerable individuals. Furthermore, these penalties may provide the only real remedies that an elderly victim has available. For example, victims of financial exploitation who can recover their assets may preserve independence and autonomy.

AARP believes that states should enact laws that:

- Provide strong legal protections against all forms of abuse or exploitation of incapacitated and vulnerable adults.
- Make it a criminal offense, with potential for enhanced penalties, to abuse, neglect or exploit a vulnerable adult.
- Provide victims and their legal representatives adequate civil procedures and remedies (including a shift in the burden of proof).

- Award attorney's fees and costs, expedited hearings and posthumous recoveries for pain and suffering against perpetrators of abuse, neglect or exploitation.

Therefore, we respectfully urge you to give favorable consideration to House Bill 2693 and expand protections and enhanced penalties in order to further protect vulnerable adults from abuse, neglect and exploitation.

Thank you for your consideration in this matter.

Darrell Donahue  
AARP Kansas



**Kansas Advocates  
for  
Better Care**

913 Tennessee, Suite 2  
Lawrence, KS 66044-6904  
phone: (785) 842-3088  
toll-free: (800) 525-1782  
fax: (785) 749-0029  
e-mail: info@kabc.org  
website: www.kabc.org

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Deanne Bacco

Promoting Quality Long-term Care since 1975

**HB 2693**

**concerning crimes and punishment;  
relating to mistreatment of a dependent adult  
March 15, 2004**

**Honorable Chairman Vratil and  
Senate Judiciary Committee Members:**

Kansas Advocates for Better Care (KABC) strongly supports HB 2693.

KABC is the statewide non-profit organization that promotes quality long-term care for residents of licensed adult care homes. By their nature, residents of long-term care homes are dependent adults who are easily susceptible to abuse, neglect and exploitation (ANE). They are susceptible in a similar manner that children are susceptible to ANE.

Dependent adults need legal protection which properly punishes ANE crimes against them. KABC is pleased and thankful that HB 2693 redefines the severity level to that of "felony" for most types of mistreatment of a dependent adult. As well, KABC is pleased that an amendment to the original bill stiffens the penalty for repeat offenders. The passage of this bill will demonstrate that Kansans are indeed concerned about ANE crimes against dependent adults, just as they are concerned about ANE crimes against children.

KABC requests the Committee to favorably pass HB 2693.

Thank you for this opportunity to speak up for dependent adults.

Deanne Bacco, Executive Director

Senate Judiciary

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*A multidisciplinary community approach to breaking the cycle of violence*

**Advisory Board:**

Frank Devocelle, CEO  
Olathe Medical Center

Mayor Ed Eilert  
City of Overland Park

Barbara Friedman  
Coalition for Community Collaboration

Marjorie Kaplan, Superintendent  
Shawnee Mission School District

Most Reverend James P. Keleher  
Archbishop of Kansas City, Kansas

Joan Kort  
Jewish Women's International

Steve Rose, Publisher  
Sun Publications

Zita Surprenant  
M.D., M.P.H. University of Kansas

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Johnson County Court Services

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Johnson County District Attorneys' Office

Captain Mike Marshall  
Johnson County Sheriff's Office

Harriet Duff  
Health Partnership Clinic

Karen Wulfschlegel, Executive Director  
United Community Services of JoCo

Sharon Katz, Executive Director  
SAFEHOME

**Committees:**

**Faith Community**

Susan Lebovitz, SAFEHOME  
Donna Bacic, LSCSW

**Children's Issues**

Cindy Riddel, Social and Rehabilitation Services

**Education**

Brian Porch, Johnson County District Attorney's  
Office

Megan Emmerson, SAFEHOME

**Medical**

Harriet Duff, Health Partnership Clinic

**Justice**

Patrick Carney, Johnson County District Attorney's  
Office

**Elder Abuse**

Linda Wright, Area Agency on Aging

**Members**

Chief John Douglass, Overland Park Police Dept.  
Mary Cole, Social and Rehabilitation Services

Brenda Sharpe, Sunflower House  
Korry Norris, Olathe District Schools

Timothy Mulcahy, Justice Information Management  
Alice Snider, City of Olathe

Erin Dugan, Olathe District Schools  
Melissa Hillman, Attorney

Karen Wulfschlegel, United Community Services  
Juanita Bartel, St Luke's-SMMC

Lynn Allen, Honeywell

March 15, 2004

The Honorable Senator John L. Vratil  
Chairperson, Judiciary Committee  
Kansas Senate

The Honorable Senator Edward W. Pugh  
Vice-Chairperson, Judiciary Committee  
Kansas Senate

Members of the Kansas Senate Judiciary Committee

Dear Chairperson Vratil, Vice Chairperson Pugh and Members  
of the Committee:

I am writing this letter in support of **House Bill 2693, as amended by House Committee**, sponsored by Representatives Newton and Davis. I currently serve as chairperson of the Elder Abuse Committee—a standing committee of the Johnson County Community Violence Action Council (COMVAC). The Elder Abuse Committee advocates on behalf of older, dependent adults and serves at the community level to prevent and protect dependent older adults from abuse, neglect and exploitation.

Strengthening the sentencing of those who are found guilty of willfully mistreating a dependent person gives notice that acts such as taking a dependent person's money or other resources, inflicting physical harm or other mistreatment constitute serious criminal behavior in Kansas. Further, this bill will give dependent adults appropriate and equal status in our state's sentencing statutes and will affirm the value of vulnerable people in our state—people who deserve respect and protection.

The Elder Abuse Committee respectfully asks that you support this important bill. Thank you for the opportunity to comment.

Yours truly,

Linda Wright  
Chairperson, Elder Abuse Committee of COMVAC

c: Representative Dean Newton

Senate Judiciary  
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# KANSAS

## KANSAS SENTENCING COMMISSION

Honorable Ernest L. Johnson, Chairman  
 District Attorney Paul Morrison, Vice Chairman  
 Patricia Ann Biggs, Executive Director

KATHLEEN SEBELIUS, GOVERNOR

### MEMORANDUM

**To:** Rep. Loyd, Rep. Newton, Paul Morrison  
**From:** Patricia Biggs, Executive Director  
**Date:** February 18, 2004  
**RE:** Fiscal Note on Balloon version of HB 2693

#### SUMMARY OF BILL:

AN ACT concerning crimes and punishment; relating to mistreatment of a dependent adult; amending K.S.A. 21-3437 and repealing the existing section.

**This bill may have impact upon the Kansas Sentencing Guidelines Act (KSGA).** Mistreatment of a dependent adult by inflicting physical injury, unreasonable confinement or cruel punishment remains a severity level 6, person felony. This bill creates **three** new person felonies and one new misdemeanor offense for any individual who mistreats a dependent adult for financial gain.

- a new severity level 7, person felony **if the total amount of the value of the resources** is \$25,000 or more
- a new severity level 9, person felony **if the total amount of the value of the resources** is at least \$500 but less than \$25,000
- a new class A person misdemeanor **total amount of the value of services** is less than \$500
- **a new severity level 9, person felony if the total amount of the value of the resources is less than \$500 and is committed by a person who as been convicted of mistreatment of a dependent adult tow or more times within five years of the commission of the crime.**

#### **Section 1** (a) Mistreatment of a dependent adult is knowingly and intentionally:

- (1) inflicting physical injury, unreasonable confinement or cruel punishment upon a dependent adult;
  - (2) taking advantage of a dependent adult's physical or financial resources for another persons financial or personal advantage by the use of undue influence, coercion, harassment, duress, deception, false representation or false pretense by a care taker or another person;
  - (3) not providing goods or services that are necessary to maintain physical or mental health of a dependent adult.
- (b) this does not apply to dependent adults who are receiving treatment by spiritual means through prayer instead of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination that the dependent adult is a member or believes in.
- (c) Dependent adult means an individual 18 years or older who is not able to protect their own interests.  
 Dependent adult includes:
- (1) any resident of an adult care home including but not limited to facilities defined by K.S.A. 39-923 and amendments thereto;
  - (2) any adult cared for in a private residence.
  - (3) any person in a medical facility;

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*Prison Population Impact of 2004 HB 2477*  
*January 12, 2004* *Page 2 of 5*

- (4) any person with mental retardation or a developmental disability receiving services through a facility licensed under K.S.A. 75-3307b and amendments thereto.
- (5) any person with a developmental disability receiving services through a community services provider as provided in the developmental disability reform act.
- (6) any person in a state psychiatric hospital or state institution for the mentally retarded.
- (d) (1) Violation of subsection (a) (1) is a severity level 6, person felony.
- (2) Violation of subsection (a) (2) is a severity level 7, person felony if the **total amount of the value of the resources** is \$25,000 or more.
- (3) Violation of subsection (a) (2) is a severity level 9, person felony if the **total amount of the value of the resources** is at least \$500 but less than \$25,000.
- (4) Violation of subsection (a) (2) is a class A misdemeanor if the **total amount of the value of the resources** is less than \$500.
- (5) Violation of subsection (a) (3) is a class A person misdemeanor.
- (6) **Violation of subsection (a) (2) is a severity level 9, person felony if the total total amount of the value of the resources is less than \$500 and the person has been convicted of mistreatment of a dependent adult two or more times within five years of the commission of the crime.**

**Section 2** of this bill repeals K.S.A. 21-3437.

**Section 3** of this bill sets the effective date as publication in the statute book.

---

**IMPACT ON KANSAS SENTENCING COMMISSION:**

Based on the current duties of the Kansas Sentencing Commission, the change proposed in this bill will affect the following:

1. **The current operation or responsibilities of the Commission : Immediately increase journal entry workload by 11 to 22 journal entries per year. This can be absorbed with in-house resources.**
2. The current budget of the Commission.
3. The current staffing and operating expenditure levels of the Commission.
4. The long-range fiscal estimates of the Commission.

---

**IMPACT ON PRISON ADMISSIONS:**

- Increase by an estimated: 0 in 2005; 0 to 8 additional admissions in FY 2014**  
 Potential to increase but cannot quantify  
 Decrease by an estimated:  
 Potential to decrease but cannot quantify  
 Remain the same

Notes:

**Scenario One:** It is assumed that 5% of current property theft offenders will be converted to the crime as defined in subsection (a) (2) of this bill with the same financial gain/resource value and severity levels applying.

*Prison Admissions*

- By 2005, there would be no additional admissions
- By 2014, there would be 0 additional admissions.

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*Prison Bed Space.*

- By 2005, there would be no change in prison bed space needs.
- By 2014, there would be no change in prison bed space needs.

**Scenario Two:** It is assumed that:

- a) 3 additional offenders will be convicted of the crime as defined in subsection (a)(2) with a value of \$25,000 or more
- b) 5 additional offenders will be convicted of the crime as defined in the bill subsection (a)(2) with a value between \$500 and \$25,000
- c) **3 additional offenders will be convicted of the crime as defined in subsection (a)(2) with a value of less than \$500 but the person has been convicted of mistreatment of a dependent adult two or more times within five years of the commission of the crime.**

All of these are sentenced to probation. The rate of probation revocation is 31% in a 12 month timeframe.

*Prison Admissions*

- By 2005, there would be no additional admissions
- By 2014, there would be 4 additional admissions.

*Prison Bed Space.*

- By 2005, there would be no change in prison bed space needs.
- By 2014, there would be 4 additional prison beds needed.

**Scenario Three:** It is assumed that:

- a) 5 additional offenders will be convicted of the crime as defined in subsection (a)(2) with a value of \$25,000 or more
- b) 10 additional offenders will be convicted of the crime as defined in the bill subsection (a)(2) with a value between \$500 and \$25,000
- c) **5 additional offenders will be convicted of the crime as defined in subsection (a)(2) with a value of less than \$500 but the person has been convicted of mistreatment of a dependent adult two or more times within five years of the commission of the crime.**

All of these are sentenced to probation. The rate of probation revocation is 31% in a 12 month timeframe.

*Prison Admissions*

- By 2005, there would be no additional admissions
- By 2014, there would be 8 additional admissions.

*Prison Bed Space.*

- By 2005, there would be no change in prison bed space needs.
- By 2014, there would be 10 additional prison beds needed.

Presented below is the projected increase in admissions and prison bed space.

Prison Population Impact of 2004 HB 2477  
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**Prison Admission Impact Assessment**

June of Each Year	Scenario #1 5% or 38 Offenders of Property Theft Converted to the Proposed Crime as Defined Above Additional Admission	Scenario #2 3, 5 & 3 probation offenders with 31% revocation rate to prison Additional Admission	Scenario #3 5, 10 & 5 probation offenders with 31% revocation rate to prison Additional Admission
2005	0	0	0
2006	0	3	4
2007	0	4	7
2008	0	4	7
2009	0	4	7
2010	0	4	7
2011	0	4	8
2012	0	4	8
2013	0	4	8
2014	0	4	8

**IMPACT ON OFFENDER POPULATION LEVELS:**

have impact on offender population as noted below: **no change in beds needed in 2005; 0 to 10 additional beds needed in 2014.**

have the potential to impact offender population as noted below.

have minimal or no impact on offender population.

have impact but cannot be quantified with data available.

Presented below are the assumptions, data findings, and prison bed impact for the changes proposed in this bill.

**Key Assumptions:**

- The target inmates as defined in this bill include any offenders convicted of the crimes of mistreatment of a dependent adult under K.S.A 21-3437.
- Projected admission to prison is assumed to increase by an annual average of one point five percent. Bed space impacts are in relation to the baseline forecast produced in September 2003 and revised in November 2003 by the Kansas Sentencing Commission.
- Percentage of the target inmate sentences served in prison is assumed to be 85 percent, which is in consistent with the projections released in September and revised in November 2003.
- Mistreatment of a dependent adult as defined in subsection (a)(1) is a severity level 6, person felony. This punishment remains unchanged.
- Mistreatment of a dependent adult as defined in subsection (a)(2) is a severity level 7, person felony if the value of the financial gain is \$25,000 or more. The average length of underlying prison sentence is assumed to be 21 months.
- Mistreatment of a dependent adult as defined in subsection (a)(2) is a severity level 9, person felony if the value of the financial gain is at least \$500 but less than \$25,000. The average length of underlying prison sentence is assumed to be 10 months.
- Mistreatment of a dependent adult as defined in subsection (a)(2) is a class A misdemeanor if the value of the financial gain is less than \$500.

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- Mistreatment of a dependent adult as defined in subsection (a)(3) is a class A misdemeanor.
- ***Mistreatment of a dependent adult as defined in subsection (a)(2) is severity level 9, person felony if the total value of the financial gain is less than \$500 and the person has been convicted of mistreatment of a dependent adult two or more time within five years of the commission of the crime.***

**Findings:**

- During FY 2003, only one offender was convicted of the crime of mistreatment of a dependent adult as defined in subsection (a)(1) and received probation sentence. The Commission maintains no misdemeanor sentencing information.
- During FY 2003, 36 offenders were convicted of the crime of property theft with a loss of \$25,000 or more and 715 offenders were convicted of the crime of property theft with a loss of at least \$500 but less than \$25,000.
- The impact of this bill would result in no additional prison admissions by the year 2005 but 4 to 8 additional prison admissions by the year 2014 under scenario #2 and scenario #3.
- The impact of this bill would result in no additional prison beds by the year 2005. It would result in additional 4 to 10 prison beds by the year 2014 under scenario #2 and scenario #3.
- The impact of this bill would immediately increase the workload of the Commission staff by 11 to 20 felony sentencing journal entries each year.

**Prison Bed Space Impact Assessment**

June of Each Year	Scenario #1 5% or 38 Offenders of Property Theft Converted to the Proposed Crime as Defined Above Additional Beds Needed	Scenario #2 3, 5 & 3 probation offenders with 31% revocation rate to prison Additional Beds Needed	Scenario #3 5, 10 & 5 probation offenders with 31% revocation rate to prison Additional Beds Needed
2005	0	0	0
2006	0	3	4
2007	0	3	5
2008	0	3	7
2009	0	4	8
2010	0	4	5
2011	0	5	7
2012	0	3	8
2013	0	3	8
2014	0	4	10

**SUMMARY OF HB 2693 with Balloon IMPACT:**

- **Admissions:** The impact of this bill will result in 0 additional prison admissions in FY 2005 and 0 to 8 additional prison admissions in FY 2014.
- **Prison Beds:** The impact of this bill will result in the need for 0 additional prison beds by FY 2005 and 0 to 10 additional prison beds by FY 2014.