

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:25 a.m. on Friday, March 19, 2004 in Room 527-S of the Capitol.

All members were present.

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: None

Others attending: See attached list.

Chairman Vratil announced that final action would have to be postponed on **HCR 5033** until Monday, March 22, as the alternate conference room, Room 527-S, was too small for the public to attend and observe Committee deliberations. He said he would have **HCR 5033** as the first item on the agenda for Monday's, March 22, meeting at 9:30 a.m. in the regular conference room, Room 123-S.

The Chair communicated that Senator Allen had two bills in the House that were not getting the attention they deserved, and he recommended to the Committee that **SB 460**, regarding drivers license and other identification cards relating to taxpayer identification numbers, which passed the Senate by a vote of 40-0, and **SB 466**, concerning drivers licenses and relating to medical information reported to the Division of Motor Vehicles, which passed the Senate by a vote of 34-6, be put into **HB 2404**. The contents of **HB 2404** were placed in another bill last session and passed.

Senator Allen moved to amend **HB 2404** with a substitute bill by deleting everything in it and inserting the contents of **SB 460** and **SB 466**. The motion was seconded by Senator Schmidt.

Upon request, Senator Allen explained the two bills, and stated the bills would strengthen confidentiality in current law. Brief discussion followed.

The Chair called for a vote on the motion. The motion carried. Senator Pugh requested that his "no" vote be recorded.

Senator Jay Emler appeared before the Committee, and requested consideration of three bills not receiving attention in the House. Chairman Vratil said that **SB 388** affects Capitol area security and passed the Senate by a vote of 24-16. **SB 354** concerns pretrial authority of a municipal court judge to detain an individual and passed the Senate by a vote of 40-0. **SB 321** clarifies contempt powers of a municipal court judge and passed the Senate by a vote of 39-1.

Senator Emler explained that for years the Legislature attempted to clean up some provisions of the Municipal Court Procedures Act. Senate votes made it apparent that the Senate understood the intent of these measures. He stated that the bills were supported by the Kansas Judicial Council. Senator Pugh's sub-committee made a few changes and recommended the bills be passed.

The Chair recommended that the contents of **HB 2391** be struck, and the contents of **SB 388** be inserted.

Senator Schmidt made a motion to amend **HB 2391** with a substitute bill by striking the entire contents and inserting the contents of **SB 388**. The motion was seconded by Senator Donovan, and the motion carried.

The Chairman recommended that the contents of **HB 2352** be deleted the contents of **SB 354** and **SB 321** be inserted.

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Senator Goodwin made a motion to amend **HB 2352** with a substitute bill by deleting the entire contents and inserting the contents of **SB 354** and **SB 321**. The motion was seconded by Senator Betts, and the motion carried.

Final Action on:

HB 2889 - KORA; records not required to be open

Chairman Vratil called for discussion and final action on **HB 2889**. He explained the bill, and recalled that the General Council for the Kansas Board of Regents had concerns relating to sub-section (4), lines 30 through 31, on page 1 of the bill. Senator O'Connor had suggested to delete the words "or agreement" because there were redundant. The Chair said there was discussion regarding private money and public money being used to fund employment contracts. He distributed copies of a balloon amendment which would change the language on line 30 to read "employment contracts of employees which provide for compensation funded in whole or in part by public funds appropriated by the state or public funds of any political or taxing subdivision of the state, ...". The language came directly from the definition of a public agency in the Open Records Act, so it embodies the intent of the Open Records Act. (Attachment 1)

Senator Allen moved to adopt the proposed amendment as presented, seconded by Senator O'Connor, and the motion carried. Senators Pugh and Schmidt requested there "no" vote be recorded.

Senator Allen made a motion to recommend **HB 2889** favorably as amended, seconded by Senator Goodwin, and the motion carried.

HB 2603 - Clarifying that prior DUI's are converted to person felonies for criminal history purposes when convicted of involuntary manslaughter while DUI

Chairman Vratil called for discussion and final action on **HB 2603**. The Chair requested Senator Schmidt to explain the bill and give the sub-committee report. (Attachment 2) Committee members received a copy of the Kansas Sentencing Commission's bed space impact which showed minimal or no impact on offender population. (Attachment 3)

Senator Schmidt stated that there were no opponents on **HB 2603**, and recommended the bill for passage with no amendments offered.

Senator Schmidt made the motion to pass HB 2603 out favorably, seconded by Senator Umbarger, and the motion carried.

HB 2554 - Amendments to the Kansas power of attorney act

Chairman Vratil called for discussion and final action on **HB 2554**. He explained the bill and the amendments to the Kansas Power of Attorney Act. The Kansas Bar Association recommended an amendment, but there were some differences of opinion among groups within the Kansas Bar Association as to the proper language. The Chair said that on page 4 of the bill, the Committee needed to amend line 16 to strike the word "by addendum to the power of attorney" and insert in its place the words "in a written document". It should read then: "The principal spouse in a written document, duly acknowledged by the spouse....".

The Chairman called for discussion on the proposed amendment, and comments and discussion followed.

Senator Goodwin made a motion to adopt the motion as outlined, seconded by Senator Donovan, and the motion carried.

Senator Goodwin moved to recommend **HB 2554** favorably as amended, seconded by Senator Umbarger, and the motion carried.

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

Chairman Vratil called for discussion and final action on **Sub HB 2777**. He explained the bill, and said that the bill strikes the words "or compound" that appear in statute. There are new Sections 3 and 4, but

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they are not significant.

Senator Umbarger said that he visited with some of his county attorneys and Randall Hodgkinson, Deputy Appellate Defender in Topeka, who testified before this Committee. The individuals he talked with expressed the desire to have another option in addition to Level 1. They felt there would be still many departures if they were not given another sentencing option like Level 2. He offered a proposed balloon amendment in response to Mr. Hodgkinson's comments. The new language would drop the severity Level 1 or a drug severity Level 2 felony if such person was manufacturing such controlled substance or controlled substance analog for the person's own use. (Attachment 4)

Senator Umbarger made the motion to amend Sub HB 2777 as reflected in the balloon amendment presented, and seconded by Senator Pugh.

Committee discussion and questions followed.

The Chairman called for a vote on the motion to amend. The motion carried.

Chairman Vratil stated another concern with this bill regarded the retroactive provisions in new Section 3, page 3, beginning on line 24. There were several opinions on this subject, one of which stated that it was unconstitutional to apply the provision retroactively. The other opinion held that "we don't necessarily believe that is true, but if it is let the Supreme Court tell us that and we don't do any harm".

Committee discussion and questions followed. The Revisor clarified application of the retroactivity provision.

Senator Pugh moved to remove any retroactivity provisions within the bill. There was no second, and the motion failed.

Senator Schmidt offered an amendment to **Sub HB 2777** and passed out copies of the original language of a bill that was passed out of the Senate last year relating to endangering a child by having children around a meth lab. The bill did not move out of House Committee, but he had visited with the House Chairman this year and the bill was revived by the House Committee, altered and sent out of the House Committee and was pending House floor action. However, the bill was killed by the House. (Attachment 5)

Senator Schmidt made a motion to adopt this amendment and add it to Sub HB 2777, seconded by Senator Umbarger, seconded by Senator Umbarger, and the motion carried.

Senator Schmidt offered a second amendment which he distributed to Committee members. (Attachment 6) He explained a discrepancy he questioned during the hearing on the bill. He had asked the Sentencing Commission why Frazier showed a bed space impact and McAdam did not even though the cases were the exact same scenario. He said that the amendment was from the Sentencing Commission and explained the difference occurred because the Legislature just got unlucky with the timing. He stated that this was an attempt to fix Frazier/SB 243, too. Senator Schmidt disseminated copies of the amended SB 243, passed by the Senate last year, for the Committee's pursuit. (Attachment 7)

Senator Schmidt made a motion to amend the contents of SB 243 into Sub HB 2777, seconded by Senator Umbarger, and the motion carried.

Brief discussion followed.

Senator Schmidt made a motion to pass Sub HB 2777 favorably as amended, seconded by Senator Donovan, and the motion carried.

HB 2649 - Unlawful use of controlled substance

CONTINUATION SHEET

MINUTES OF THE SENATE JUDICIARY COMMITTEE at 9:25 a.m. on Friday, March 19, 2004 in Room 527-S of the Capitol.

Chairman Vratil called for discussion and final action on **HB 2649**. He explained that the bill had no fiscal note or bed space impact, and it was passed by the House by a vote 114-11. The Highway Patrol recommended an amendment to Section 2, line 31, removing the words "Sec. 1" which would allow the officers to stop anyone and request a drug test.

Senator O'Connor made the motion to adopt the Highway Patrol's requested amendment, seconded by Senator Betts, and the motion carried.

Committee discussion followed with concerns expressed regarding two different bed space impacts and the changes to the same, and if any other states have done the same type of legislation. (Attachment 8)

Further discussion and comments followed.

Senator Allen made a motion to table **HB 2649**, seconded by Senator Haley.

Senator Schmidt asked for a Point of Order. He suggested an alternative in a substitute motion for when the Committee worked this bill to recommend that the Committee add to the bill the provisions of **SB 410** which relates to drug testing with respect to Unemployment Compensation law but ran into some difficulty because of politics surrounding Workmen's Compensation in the House. The Revisor had that revision prepared for the Committee, and the Committee could strike the text of **HB 2649** and insert in lieu thereof the text of **SB 410** insuring this bill will get to conference. (Attachment 9)

Discussion followed with the indication of possibly using another bill to do this.

Senator Allen withdrew her motion to table, and Senator Haley agreed to withdraw his second.

Senator Schmidt made a motion to insert **SB 410** into **HB 2649** as a substitute bill, seconded by Senator Umbarger, and the motion carried.

Following discussion, Senator Schmidt withdrew his motion to amend **HB 2649**, with Senator Umbarger agreeing to withdraw his second.

Senator Oleen made a motion to direct the Committee Chairman to request an interim study on **HB 2649** as amended. The motion was seconded by Senator Haley, and the motion carried.

Senator Schmidt made a motion to amend **HB 2375** by striking its contents in entirety inserting in lieu thereof the text of **SB 410** as it passed the Senate designating it as a substitute bill and recommend it favorably for passage. The motion was seconded by Senator Umbarger, and the motion carried.

The meeting adjourned at 10:35 a.m. The next scheduled meeting is Monday, March 22, 2004.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Thu, March 19, 2004

NAME	REPRESENTING
Michael White	KCDAA
BOB HANSON	KANSAS NEB. CONU. OF S. BAPTISTS
Dr. Jacob Jacob	Jay 88 Radio
JAMES R. LORD	TRUTH IN LOVE OUTREACH
Tim Roberts	Fairlawn Heights Wesleyan Church
Judy Smith	Concerned Women for Am. of KS
Shar Hoffman	" "
Patricia Mora	Calvary Chapel
Linda Holloway	CWA
Mike Jennings	KCDAA
Janis Mc Millen	League of Women Voters - KS
Larry Harlbert	self
Paul O'good	myself
Eric Enns	self
TIFFANY MULLER	KANSAS UNITY'S PRIDE ALLIANCE
Karen Stribbler	
Kent Olson	
Ronald Chellam	
Bonnie Cuevas	PR-LAC Parents, Families & Friends of Lesbians & Gay

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Fri, March 19, 2004

NAME	REPRESENTING
Arl Cleland	10% of Kansas voters
Don Murray	100% Kansas Voters
Judy DeLoach	KASB
Robert Hannon	KPA
Jayce R Euler	Senator
Larry R Breyer	LHM
Doug Amstutz	KPA
Jim Clarke	KBA

HOUSE BILL No. 2889

By Committee on Federal and State Affairs

2-17

10 AN ACT concerning the Kansas open records act; relating to records not
11 required to be open; amending K.S.A. 2003 Supp. 45-221 and repeal-
12 ing the existing section.
13

14 *Be it enacted by the Legislature of the State of Kansas:*

15 Section 1. K.S.A. 2003 Supp. 45-221 is hereby amended to read as
16 follows: 45-221. (a) Except to the extent disclosure is otherwise required
17 by law, a public agency shall not be required to disclose:

18 (1) Records the disclosure of which is specifically prohibited or
19 restricted by federal law, state statute or rule of the Kansas supreme court
20 or the disclosure of which is prohibited or restricted pursuant to specific
21 authorization of federal law, state statute or rule of the Kansas supreme
22 court to restrict or prohibit disclosure.

23 (2) Records which are privileged under the rules of evidence, unless
24 the holder of the privilege consents to the disclosure.

25 (3) Medical, psychiatric, psychological or alcoholism or drug depend-
26 ency treatment records which pertain to identifiable patients.

27 (4) Personnel records, performance ratings or individually identifica-
28 ble records pertaining to employees or applicants for employment, except
29 that this exemption shall not apply to the names, positions, salaries or
30 actual compensation, employment contracts ~~or agreements~~ and lengths of
31 service of officers and employees of public agencies once they are em-
32 ployed as such.

33 (5) Information which would reveal the identity of any undercover
34 agent or any informant reporting a specific violation of law.

35 (6) Letters of reference or recommendation pertaining to the char-
36 acter or qualifications of an identifiable individual, *except documents re-*
37 *lating to the appointment of persons to fill a vacancy in an elected office.*

38 (7) Library, archive and museum materials contributed by private
39 persons, to the extent of any limitations imposed as conditions of the
40 contribution.

41 (8) Information which would reveal the identity of an individual who
42 lawfully makes a donation to a public agency, if anonymity of the donor
is a condition of the donation, *except if the donation is intended for or*

of employees which provide for compensation funded in whole or in part by public funds appropriated by the state or public funds of any political or taxing subdivision of the state,

March 17, 2004

**Senate Judiciary Subcommittee
Senator Derek Schmidt, Chair**

1. **HB 2603** clarifies that an involuntary manslaughter while driving under the influence of alcohol or drugs (current law states "alcohol and drugs") will count as a person felony for criminal history purposes.

Conferees. The bill was supported by Nanette Weber, Allen County Attorney on behalf of the Kansas County and District Attorneys Association (Attachment 1).

Subcommittee Action. The Subcommittee recommends the bill be passed favorably by the full Committee.

OFFICERS

Gerald W. Woolwine, President
Christine Kenney, Vice-President
Thomas J. Drees, Secretary/Treasurer
Steve Kearney, Executive Director
John M. Settle, Past President



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MARCH 15, 2004

Members of the Committee, my name is Nanette L. Kemmerly-Weber. I am the Allen County Attorney and have been since first elected in 1984. I have prosecuted three cases in which a person was killed due to the intoxication of the driver of a car. In all three, the defendant pled guilty, due to the uncontroverted fact of his intoxication. The latest case involved Scott Manbeck of La Harpe, Kansas. On July 29, 2001, Mr. Manbeck was driving his car with a blood alcohol content of .20, more than double the legal limit of .08. He crossed the center line of Highway 54 and collided head on with a car. That collision ultimately killed Joyce Hiebert of western Kansas. Mr. Manbeck was charged with involuntary manslaughter while driving under the influence of alcohol **or** drugs. At sentencing, his criminal history showed 4 prior DUI convictions. Under K.S.A. 21-4711 (c), as amended in 1996, the defendant's prior DUI convictions can be converted to person felonies only if the defendant was under the influence, at the time of the involuntary manslaughter, of alcohol **and** drugs.

The Kansas Supreme Court has recently ruled in response to my petition for review that "and means and" and that Mr. Manbeck must be resented to a lesser penalty. His original sentence for killing Joyce Hiebert was 162 months. His grid sentence now will be 56 months.

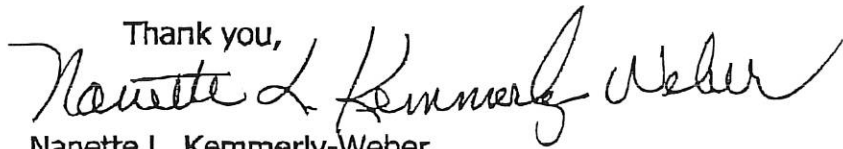
I do not believe the Kansas legislature intended that cases such as this would arise; that people who accumulate 4 DUI convictions and then kill an innocent person while again driving while under the influence of alcohol should not have their prior convictions scored as person felonies. It is my belief that the use of the word "and" was in error and I would ask that you support this bill to correct an error that is having consequences across the state. I believe there are other prosecutors who have prosecuted someone as I have and will now be faced with inmates filing 60-1507 petitions alleging illegal sentencing. The Kansas legislature has always responded to problems involving those who drive while intoxicated, generally by making the penalties tougher. Please correct the error of K.S.A 21-4711 (c) so that those who have accumulated prior DUI convictions can be imprisoned longer. Those who have

Handwritten signature/initials

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prior convictions obviously have not learned from past mistakes and still feel they can drive under the influence. Please do not let this happen again.

Thank you,

A handwritten signature in black ink that reads "Nanette L. Kemmerly-Weber". The signature is written in a cursive style with a large initial 'N' and a long, sweeping underline.

Nanette L. Kemmerly-Weber

Allen County Attorney



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 Arpin

From: Patricia Biggs, Executive Director

Date: January 29, 2004

RE: Fiscal Note on **HB 2603**

SUMMARY OF BILL:

AN ACT concerning crimes, punishment and criminal procedure; amending K.S.A. 2003 Supp. 21-4711 and repealing the existing section.

This bill adopts the language used in K.S.A. 2003 Supp. 21-3442, involuntary manslaughter while driving under the influence of alcohol or drugs, and amendments thereto. The language in K.S.A. 2003 Supp. 21-3442 reflects the change from alcohol and drugs to read alcohol or drugs.

This change is reflected in Section 1 (c) (2). All other subsections remain unchanged.

Section 2 of this bill repeals K.S.A. 2003 Supp. 21-4711.

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 changes proposed in this bill will have no effect on 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.

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

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

KATHLEEN SEBELIUS, GOVERNOR

Note: During FY 2003, 19 offenders were convicted of the crime of involuntary manslaughter in the commission of DUI or drugs. 16 were sentenced to prison and 3 were on probation. The statutory language change from "alcohol and drugs" to "alcohol or drugs" is not anticipated to have an impact on prison admissions.

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.

Note: The statutory language change proposed in this bill -- from "alcohol and drugs" to "alcohol or drugs" -- is not anticipated to have an impact on prison bed usage.

SUMMARY OF HB 2603 IMPACT:

- Prison Admissions: The impact of this bill will result in no changes in prison admissions.
- Prison Beds: The impact of this bill will result in no changes in prison bed usage.

Substitute for HOUSE BILL No. 2777

By Committee on Corrections and Juvenile Justice

2-24

Proposed amendment
Senator Umbarger
March 15, 2004

9 AN ACT concerning controlled substances; relating to manufacturing;
10 amending K.S.A. 65-4161 and 65-4163 and repealing the existing
11 sections. 65-4159,

13 WHEREAS, The Kansas Supreme Court in State v. McAdam, no.
14 88,139, filed January 30, 2004, has noted a conflict and ambiguity in the
15 relationship of statutes, legislative intent and criminal acts covered by
16 K.S.A. 65-4159 and 65-4161; and

17 WHEREAS, The Legislature finds that additional clarification will be
18 helpful to the courts and improve public safety; Now, therefore,

19
20 Be it enacted by the Legislature of the State of Kansas:

21 Section 1. K.S.A. 65-4161 is hereby amended to read as follows: 65-
22 4161. (a) Except as authorized by the uniform controlled substances act,
23 it shall be unlawful for any person to sell, offer for sale or have in such
24 person's possession with intent to sell, deliver or distribute; prescribe;
25 administer; deliver; distribute; or dispense or compound any opiates,
26 opium or narcotic drugs, or any stimulant designated in subsection (d)(1),
27 (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as
28 provided in subsections (b), (c) and (d), any person who violates this
29 subsection shall be guilty of a drug severity level 3 felony.

30 (b) If any person who violates this section has one prior conviction
31 under this section or a conviction for a substantially similar offense from
32 another jurisdiction, then that person shall be guilty of a drug severity
33 level 2 felony.

34 (c) If any person who violates this section has two or more prior
35 convictions under this section or substantially similar offenses under the
36 laws of another jurisdiction, then such person shall be guilty of a drug
37 severity level 1 felony.

38 (d) Notwithstanding any other provision of law, upon conviction of
39 any person for a first offense pursuant to subsection (a), such person shall
40 be guilty of a drug severity level 2 felony if such person is 18 or more
41 years of age and the substances involved were possessed with intent to
42 sell, deliver or distribute; sold or offered for sale in or on, or within 1,000
43 feet of any school property upon which is located a structure used by a

Section 1. K.S.A. 65-4159 is hereby amended to read as follows:
65-4159. (a) 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.

(b) Any person violating the provisions of this section with respect to the
unlawful manufacturing or attempting to unlawfully manufacture any controlled
substance or controlled substance analog, upon conviction, is guilty of: (1)
Except as provided in paragraph (2), a drug severity level 1 felony; or (2) a drug
severity level 2 felony, if such person was manufacturing such controlled
substance or controlled substance analog for such person's own use. and The
sentence for which established by this section shall not be subject to statutory
provisions for suspended sentence, community work service, or probation.

(c) The provisions of subsection (d) of K.S.A. 21-3301, and amendments
thereto, shall not apply to a violation of attempting to unlawfully manufacture
any controlled substance pursuant to this section.

Renumber remaining sections accordingly.

Senate Judiciary
3-19-04
Attachment

4-2

stances involved were possessed with intent to sell, sold or offered for sale in or on, or within 1,000 feet of any school property upon which is located a structure used by a unified school district or an accredited non-public school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12 and such person is 18 or more years of age, such person shall be guilty of a drug severity level 2 felony.

Nothing in this subsection shall be construed as requiring that school be in session or that classes are actually being held at the time of the offense or that children must be present within the structure or on the property during the time of any alleged criminal act. If the structure or property meets the description above, the actual use of that structure or property at the time alleged shall not be a defense to the crime charged or the sentence imposed.

(c) It shall not be a defense to charges arising under this section that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance.

(d) For purposes of the uniform controlled substances act, the prohibitions contained in this section shall apply to controlled substance analogs as defined in subsection (bb) of K.S.A. 65-4101 and amendments thereto.

(e) The provisions of this section shall be part of and supplemental to the uniform controlled substances act.

New Sec. 3. On or before the effective date of this act, any person violating the provisions of K.S.A. 65-4159, and amendments thereto, upon conviction, is guilty of a drug severity level 1 felony. Such sentence shall not be reduced to violating the provisions of K.S.A. 65-4161 or 65-4163, and amendments thereto, because prior to this act, such statutes prohibited the identical conduct.

New Sec. 4. If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

Sec. 5. ~~K.S.A. 65-4161 and 65-4163 are hereby repealed.~~

65-4159,

Sec. 6. This act shall take effect and be in force from and after its publication in the Kansas register.

1 —(1) Was postdated, unless such check, draft or order was presented
2 for payment prior to the postdated date, or

3 —(2) was given to a payee who had knowledge or had been informed,
4 when the payee accepted such check, draft or order, that the maker did
5 not have sufficient funds in the hands of the drawee to pay such check,
6 draft or order upon presentation, unless such check, draft or order was
7 presented for payment prior to the date the maker informed the payee
8 there would be sufficient funds.

9 —(c) (1) Giving a worthless check is a severity level 7, nonperson felony
10 if the check, draft or order is drawn for ~~\$25,000 or more.~~

11 —(2) Giving a worthless check is a severity level 9, nonperson felony if
12 the check, draft or order is drawn for at least \$500 ~~\$2,000~~ but less than
13 ~~\$25,000.~~

14 —(3) Giving a worthless check is a class A nonperson misdemeanor if
15 the check, draft or order is drawn for less than \$500 ~~\$2,000.~~

16 —(4) Giving a worthless check, draft or order drawn for less than \$500
17 ~~\$2,000~~ is a severity level 9, nonperson felony if committed by a person
18 who has, within five years immediately preceding commission of the
19 crime, been convicted of giving a worthless check two or more times.

20 Sec. 4. 3.M—K.S.A. 21-3720 is hereby amended to read as follows:
21 21-3720. (a) Criminal damage to property is by means other than by fire
22 or explosive:

23 —(1) Intentionally injuring, damaging, mutilating, defacing, destroying,
24 or substantially impairing the use of any property in which another has
25 an interest without the consent of such other person; or

26 —(2) injuring, damaging, mutilating, defacing, destroying, or substan-
27 tially impairing the use of any property with intent to injure or defraud
28 an insurer or lienholder.

29 —(b) (1) Criminal damage to property is a severity level 7, nonperson
30 felony if the property is damaged to the extent of \$25,000 or more.

31 —(2) Criminal damage to property is a severity level 9, nonperson fel-
32 ony if the property is damaged to the extent of at least \$500 ~~\$2,000~~ \$1,000
33 but less than \$25,000.

34 —(3) Criminal damage to property is a class B nonperson misdemea-
35 nor if the property damaged is of the value of less than \$500 ~~\$2,000~~ \$1,000
36 or is of the value of \$500 ~~\$2,000~~ \$1,000 or more and is damaged to the
37 extent of less than \$500 ~~\$2,000~~ \$1,000.

38 Sec. 3. K.S.A. 21-3608 is hereby amended to read as follows:
39 21-3608. (a) Endangering a child is:

40 [(1) Intentionally and unreasonably causing or permitting a
41 child under the age of 18 years to be placed in a situation in which
42 the child's life, body or health may be injured or endangered; or
43 [(2) knowingly and intentionally causing or permitting a child under

1 the age of 18 years to be present where:

2 [(A) A person is selling, offering for sale or having in such person's
3 possession with intent to sell, deliver or distribute; prescribe; administer;
4 deliver; distribute; dispense; compound; unlawfully manufacturing; or at-
5 tempt to unlawfully manufacture any methamphetamine as defined by
6 subsections (d)(3) or (f)(1) of K.S.A. 65-4107, and amendments thereto;
7 or

8 [(B) drug paraphernalia or volatile, toxic or flammable chemicals are
9 stored for the purpose of unlawfully manufacturing or attempting to un-
10 lawfully manufacture any methamphetamine as defined by subsections
11 (d)(3) or (f)(1) of K.S.A. 65-4107, and amendments thereto.

12 [(b) Nothing in this section shall be construed to mean a child
13 is endangered for the sole reason the child's parent or guardian, in
14 good faith, selects and depends upon spiritual means alone through
15 prayer, in accordance with the tenets and practice of a recognized
16 church or religious denomination, for the treatment or cure of dis-
17 ease or remedial care of such child.

18 [(c) Endangering a child is a class A person misdemeanor is a se-
19 verity level 9, person felony.

20 [(d) As used in this section: "Manufacture" shall have the meaning
21 ascribed to that term in K.S.A. 65-4101, and amendments thereto, and
22 "drug paraphernalia" shall have the meaning ascribed to that term in
23 K.S.A. 65-4150, and amendments thereto.

24 [Sec. 4. K.S.A. 2002 Supp. 21-4704 is hereby amended to read
25 as follows: 21-4704. (a) For purposes of sentencing, the following
26 sentencing guidelines grid for nondrug crimes shall be applied in
27 felony cases for crimes committed on or after July 1

Senate Judiciary
3-19-04
Attachment 5

Senate Judiciary
3-19-04
Attachment 5



KANSAS

KATHLEEN SEBELIUS, GOVERNOR

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

MEMORANDUM

To: Senator Schmidt
From: Patricia Biggs, Executive Director
Date: March 17, 2004
RE: Follow-up to question regarding Frazier/SB 243 Impact versus McAdam/HB 2777 Impact

In response to your question of earlier this week, posed in the Senate Judiciary Committee meeting, I have reviewed the sequence of event with regard to the decision of the Frazier case and the prison population impact of SB 243, as compared to the decision of the McAdam case and the prison population impact of HB 2777. I have found the following:

The decision in the **Frazier case** was handed down March 15, 2002. This decision moved possession of precursors of methamphetamines (K.S.A. 65-7006) from a Drug Severity Level 1 to a Drug Severity Level 4. The decision in this case impacted downward the prison population projections produced in September 2001 by the Sentencing Commission. Subsequent projections by the Sentencing Commission, published in September 2002, took into account the Frazier ruling's sentence for offenders sentenced in violation of K.S.A. 65-7006 to a Drug Severity Level 4 sentence. In those projections, all future violators of K.S.A. 65-7006 were assumed to receive a Drug Severity Level 4 sentence.

During the 2003 legislative session, **SB 243** was introduced. This prison population impact of this bill was estimated at 61 to 100 additional prison beds need by the end of FY 2004 and 381 to 612 additional prison beds needed by the end of FY 2013. This incremental need for additional prison beds is above the prison population projections published in September 2002. Again, this projection assumed that all violators of 65-7006 are sentenced at Drug Severity Level 4 whereas under SB 243 violators of 65-7006 are sentenced at Drug Severity Level 1.

Prison population projections were again published in September 2003 (and Revised in November 2003 due to a re-interpretation of SB 123). Subsequent to publication of this set of prison population projections, the **McAdam decision** was handed down. In the Court's decision in the McAdam case, the Kansas Supreme Court determined that the components of K.S.A. 65-4159(a), a Drug Severity Level 1 offense, and the components of K.S.A. 65-4161(a), a Drug Severity Level 3 offense, are equal and, as such, the lesser sentence should be imposed.

700 SW Jackson Street, Suite 501, Topeka, KS 66603 -3714

Voice 785-296-0923 Fax 785-296-0927 <http://www.accesskansas.org/ksc/SiteMap.htm>

Senate Judiciary

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Attachment 6

In our analysis of the impact of the Court's ruling on McAdam, we estimate there is the potential for a prison population bed need reduction of 113 in 2004 to 835 in 2013. This is the incremental change we expect based against the projections published in November 2003.

During the 2004 legislative session, Sub. HB 2777 was introduced. This bill looks to re-specify the methamphetamine manufacture language such that violations of such an offense would be sentenced at Drug Severity Level 1. The prison population impact of this bill is to bring the projected prison population projections back to the level they were estimated at in November 2003.

In summary, it is the timing of the events of that caused dissimilar impact results under the Frazier/SB 243 and McAdam/Sub. HB 2777 scenarios. In Frazier, the projections included the ruling so when SB 243 looked to restore the Drug Severity Level 1 offense, there resulted an incremental need for additional prison beds. In McAdam, the decision was handed down after the projections were published, thus, the projections did not include the impact of the McAdam decision. In our analysis of Sub HB 2777, the impact of McAdam is reversed and the projections are returned to their initial state.

I hope this answers your question. Should you need additional information, please feel free to contact me.

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SUPPLEMENTAL NOTE ON SENATE BILL NO. 243

As Amended by Senate Committee on
Judiciary

Brief*

SB 243 adds the drug "dichloralphenazone" to Schedule IV of the Uniform Controlled Substances Act and the bill clarifies the definition of "drug paraphernalia" to exclude any drug product containing ephedrine and various other chemicals that can be used in the manufacture of methamphetamines. Various conforming amendments are made to criminal statutes to reflect the definitional clarification.

The Senate Committee added the clarification to the definition of "drug paraphernalia."

Background

The Senate Committee amendments are intended to address the 2002 Kansas Court of Appeals case of *State v. Frazier*, __KA2d__ 42 P.3d 188 (2002).

The Court vacated a sentence imposed for a conviction of possession of ephedrine or psuedoephedrine, ingredients used for the manufacture of methamphetamine, a drug severity level 1 felony under KSA 65-7006(a) and held instead the proper sentence was for the crime of possession of drug paraphernalia under KSA 65-4152(a)(3), a drug severity level 4 crime. The defendant had argued and the Court agreed that both crimes had identical elements, therefore, he should have been sentenced under the crime with the less severe sentence.

The Kansas Sentencing Commission had based its prison population estimates using the *Frazier* Court ruling. The Commission estimates the Senate Committee amendment will increase prison bed needs by 61 to 100 by the end of FY 2004 and between 381 to 612 added beds by the end of FY 2013.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org/kldr>

Senate Judiciary

3.19-04

Attachment 7

SENATE BILL No. 243

By Committee on Ways and Means

2-20

10 AN ACT concerning the uniform controlled substances act; amending
11 K.S.A. 65-4111, 65-4150, 65-4159, 65-4160, 65-4161 and 65-7006
12 and repealing the existing section sections.

13
14 Be it enacted by the Legislature of the State of Kansas:

15 Section 1. K.S.A. 65-4111 is hereby amended to read as follows: 65-
16 4111. (a) The controlled substances listed in this section are included in
17 schedule IV and the number set forth opposite each drug or substance is
18 the DEA controlled substances code which has been assigned to it.

19 (b) Any material, compound, mixture or preparation which contains
20 any quantity of the following substances including its salts, isomers and
21 salts of isomers whenever the existence of such salts, isomers and salts of
22 isomers is possible within the specific chemical designation and having a
23 potential for abuse associated with a depressant effect on the central
24 nervous system:

25 (1) Alprazolam..... 2882
26 (2) Barbitol 2145
27 (3) Bromazepam 2748
28 (4) Camazepam 2749
29 (5) Chloral betaine 2460
30 (6) Chloral hydrate 2465
31 (7) Chlordiazepoxide 2744
32 (8) Clobazam 2751
33 (9) Clonazepam 2737
34 (10) Clorazepate 2768
35 (11) Clotiazepam 2752
36 (12) Cloxazolam 2753
37 (13) Delorazepam 2754
38 (14) Diazepam 2765
39 (15) Dichloralphenazone 2467
40 (15) (16) Estazolam 2756
41 (16) (17) Ethchlorvynol 2540
42 (17) (18) Ethinamate 2545
43 (18) (19) Ethyl loflazepate 2758

(19) (20) Fludiazepam.....	2759
(20) (21) Flunitrazepam.....	2763
(21) (22) Flurazepam.....	2767
(22) (23) Halazepam.....	2762
(23) (24) Haloxazolam.....	2771
(24) (25) Ketazolam.....	2772
(25) (26) Loprazolam.....	2773
(26) (27) Lorazepam.....	2885
(27) (28) Lormetazepam.....	2774
(28) (29) Mebutamate.....	2800
(29) (30) Medazepam.....	2836
(30) (31) Meprobamate.....	2820
(31) (32) Methohexital.....	2264
(32) (33) Methylphenobarbital (mephobarbital).....	2250
(33) (34) Midazolam.....	2884
(34) (35) Nimetazepam.....	2837
(35) (36) Nitrazepam.....	2834
(36) (37) Nordiazepam.....	2838
(37) (38) Oxazepam.....	2835
(38) (39) Oxazolam.....	2839
(39) (40) Paraldehyde.....	2585
(40) (41) Petrichloral.....	2591
(41) (42) Phenobarbital.....	2285
(42) (43) Pinazepam.....	2883
(43) (44) Prazepam.....	2764
(44) (45) Quazepam.....	2881
(45) (46) Temazepam.....	2925
(46) (47) Tetrazepam.....	2886
(47) (48) Triazolam.....	2887
(48) (49) Zolpidem.....	2783
(49) (50) Zaleplon.....	2781

(c) Any material, compound, mixture, or preparation which contains any quantity of fenfluramine (1670), including its salts, isomers (whether optical, position or geometric) and salts of such isomers, whenever the existence of such salts, isomers and salts of isomers is possible. The provisions of this subsection (c) shall expire on the date fenfluramine and its salts and isomers are removed from schedule IV of the federal controlled substances act (21 United States code 812; 21 code of federal regulations 1308.14).

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position or

1	geometric) and salts of such isomers whenever the existence of such salts,	
2	isomers and salts of isomers is possible within the specific chemical designation:	
3		
4	(1) Cathine ((+)-norpseudoephedrine).....	1230
5	(2) Diethylpropion.....	1610
6	(3) Fencamfamin.....	1760
7	(4) Fenproporex.....	1575
8	(5) Mazindol.....	1605
9	(6) Mefenorex.....	1580
10	(7) Pemoline (including organometallic complexes and chelates thereof).....	1530
11		
12	(8) Phentermine.....	1640
13	The provisions of this subsection (d)(8) shall expire on the date phentermine and its salts and isomers are removed from schedule IV of the federal controlled substances act (21 United States code 812; 21 code of federal regulations 1308.14).	
14		
15		
16		
17	(9) Pipradrol.....	1750
18	(10) SPA((-)-1-dimethylamino-1,2-diphenylethane).....	1635
19	(11) Sibutramine.....	1675
20	(12) Mondafinil.....	1680
21	(e) Unless specifically excepted or unless listed in another schedule,	
22	any material, compound, mixture or preparation which contains any quantity of the following, including salts thereof:	
23		
24	(1) Pentazocine.....	9709
25	(2) Butorphanol (including its optical isomers).....	9720
26	(f) Unless specifically excepted or unless listed in another schedule,	
27	any material, compound, mixture or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:	
28		
29		
30	(1) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.....	9167
31		
32	(2) Dextropropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane).....	9278
33		
34	(g) Butyl nitrite and its salts, isomers, esters, ethers or their salts.	
35	(h) The board may except by rule and regulation any compound, mixture or preparation containing any depressant substance listed in subsection (b) from the application of all or any part of this act if the compound, mixture or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.	
36		
37		
38		
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41		
42		
43		

Sec. 2. K.S.A. 65-4150 is hereby amended to read as follows:

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65-4150. As used in this act:

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

(b) "Deliver" or "delivery" means actual, constructive or attempted transfer from one person to another, whether or not there is an agency relationship.

(c) "Drug paraphernalia" means all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of the uniform controlled substances act. "Drug paraphernalia" shall not include any drug product containing ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers or any product containing the same. "Drug paraphernalia" shall include, but is not limited to:

(1) Kits used or intended for use in planting, propagating, cultivating, growing or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used or intended for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances.

(3) Isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used or intended for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances.

(5) Scales and balances used or intended for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine hydrochloride, sorbitol, mannite, dextrose and lactose, which are used or intended for use in cutting controlled substances.

(7) Separation gins and sifters used or intended for use in removing twigs and seeds from or otherwise cleaning or refining marijuana.

(8) Blenders, bowls, containers, spoons and mixing devices used

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1 (9) Capsules, balloons, envelopes and other containers used or
2 intended for use in packaging small quantities of controlled sub-
3 stances.

4 (10) Containers and other objects used or intended for use in
5 storing or concealing controlled substances.

6 (11) Hypodermic syringes, needles and other objects used or
7 intended for use in parenterally injecting controlled substances into
8 the human body.

9 (12) Objects used or intended for use in ingesting, inhaling or
10 otherwise introducing marijuana, cocaine, hashish, or hashish oil
11 into the human body, such as:

12 (A) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes
13 with or without screens, permanent screens, hashish heads or punc-
14 tured metal bowls;

15 (B) water pipes;

16 (C) carburetion tubes and devices;

17 (D) smoking and carburetion masks;

18 (E) roach clips (objects used to hold burning material, such as
19 a marijuana cigarette, that has become too small or too short to be
20 held in the hand);

21 (F) miniature cocaine spoons and cocaine vials;

22 (G) chamber pipes;

23 (H) carburetor pipes;

24 (I) electric pipes;

25 (J) air-driven pipes;

26 (K) chillums;

27 (L) bongs; and

28 (M) ice pipes or chillers.

29 (d) "Person" means any individual, corporation, government or
30 governmental subdivision or agency, business trust, estate, trust,
31 partnership, association or other legal entity.

32 (e) "Simulated controlled substance" means any product which
33 identifies itself by a common name or slang term associated with a
34 controlled substance and which indicates on its label or accompa-
35 nying promotional material that the product simulates the effect of
36 a controlled substance.

37 Sec. 3. K.S.A. 65-4159 is hereby amended to read as follows:
38 65-4159. (a) Except as authorized by the uniform controlled sub-
39 stances act, it shall be unlawful for any person to manufacture or
40 attempt to manufacture any controlled substance or controlled sub-
41 stance analog.

42 (b) Any person violating the provisions of this section with re-
43 spect to the unlawful manufacturing or attempting to unlawfully

1 manufacture any controlled substance or controlled substance an-
2 analog, upon conviction, is guilty of a drug severity level 1 felony and
3 the sentence for which shall not be subject to statutory provisions
4 for suspended sentence, community work service, or probation.

5 (c) The provisions of subsection (d) of K.S.A. 21-3301, and
6 amendments thereto, shall not apply to a violation of attempting to
7 unlawfully manufacture any controlled substance pursuant to this
8 section.

9 Sec. 4. K.S.A. 65-4160 is hereby amended to read as follows:
10 65-4160. (a) Except as authorized by the uniform controlled sub-
11 stances act, it shall be unlawful for any person to possess or have
12 under such person's control any opiates, opium or narcotic drugs,
13 or any stimulant designated in subsection (d)(1); or (d)(3) or ~~(f)(1)~~
14 of K.S.A. 65-4107 and amendments thereto. Except as provided in
15 subsections (b) and (c), any person who violates this subsection
16 shall be guilty of a drug severity level 4 felony.

17 (b) If any person who violates this section has one prior conviction
18 under this section or a conviction for a substantially similar
19 offense from another jurisdiction, then that person shall be guilty
20 of a drug severity level 2 felony.

21 (c) If any person who violates this section has two or more prior
22 convictions under this section or substantially similar offenses un-
23 der the laws of another jurisdiction, then such person shall be guilty
24 of a drug severity level 1 felony.

25 (d) It shall not be a defense to charges arising under this section
26 that the defendant was acting in an agency relationship on behalf
27 of any other party in a transaction involving a controlled substance.

28 (e) For purposes of the uniform controlled substances act, the
29 prohibitions contained in this section shall apply to controlled sub-
30 stance analogs as defined in subsection (bb) of K.S.A. 65-4101 and
31 amendments thereto.

32 (f) The provisions of this section shall be part of and supple-
33 mental to the uniform controlled substances act.

34 Sec. 5. K.S.A. 65-4161 is hereby amended to read as follows:
35 65-4161. (a) Except as authorized by the uniform controlled sub-
36 stances act, it shall be unlawful for any person to sell, offer for sale
37 or have in such person's possession with intent to sell, deliver or
38 distribute; prescribe; administer; deliver; distribute; dispense or
39 compound any opiates, opium or narcotic drugs, or any stimulant
40 designated in subsection (d)(1); or (d)(3) or ~~(f)(1)~~ of K.S.A. 65-4107
41 and amendments thereto. Except as provided in subsections (b), (c)
42 and (d), any person who violates this subsection shall be guilty of
43 a drug severity level 3 felony.

1 (b) If any person who violates this section has one prior conviction
2 under this section or a conviction for a substantially similar
3 offense from another jurisdiction, then that person shall be guilty
4 of a drug severity level 2 felony.

5 (c) If any person who violates this section has two or more prior
6 convictions under this section or substantially similar offenses un-
7 der the laws of another jurisdiction, then such person shall be guilty
8 of a drug severity level 1 felony.

9 (d) Notwithstanding any other provision of law, upon conviction
10 of any person for a first offense pursuant to subsection (a), such
11 person shall be guilty of a drug severity level 2 felony if such person
12 is 18 or more years of age and the substances involved were pos-
13 sessed with intent to sell, deliver or distribute; sold or offered for
14 sale in or on, or within 1,000 feet of any school property upon which
15 is located a structure used by a unified school district or an ac-
16 credited nonpublic school for student instruction or attendance or
17 extracurricular activities of pupils enrolled in kindergarten or any
18 of the grades one through 12.

19 Nothing in this subsection shall be construed as requiring that
20 school be in session or that classes are actually being held at the
21 time of the offense or that children must be present within the struc-
22 ture or on the property during the time of any alleged criminal act.
23 If the structure or property meets the description above, the actual
24 use of that structure or property at the time alleged shall not be a
25 defense to the crime charged or the sentence imposed.

26 (e) It shall not be a defense to charges arising under this section
27 that the defendant was acting in an agency relationship on behalf
28 of any other party in a transaction involving a controlled substance.

29 (f) For purposes of the uniform controlled substances act, the
30 prohibitions contained in this section shall apply to controlled sub-
31 stance analogs as defined in subsection (bb) of K.S.A. 65-4101 and
32 amendments thereto.

33 (g) The provisions of this section shall be part of and supple-
34 mental to the uniform controlled substances act.

35 Sec. 6. K.S.A. 65-7006 is hereby amended to read as follows:
36 65-7006. (a) It shall be unlawful for any person to possess ephed-
37 rine, pseudoephedrine, red phosphorus, lithium metal, sodium
38 metal, iodine, anhydrous ammonia, pressurized ammonia or phen-
39 ylpropanolamine, or their salts, isomers or salts of isomers with
40 intent to use the product same to manufacture a controlled sub-
41 stance.

42 (b) It shall be unlawful for any person to market, sell, distrib-
43 ute, advertise, or label any drug product containing ephedrine,

57

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1 *pseudoephedrine, red phosphorus, lithium metal, sodium metal, io-*
2 *dine, anhydrous ammonia, pressurized ammonia or phenylpropan-*
3 *olamine, or their salts, isomers or salts or of isomers if the person*
4 *knows or reasonably should know that the purchaser will use the*
5 *product same to manufacture a controlled substance.*

6 (c) *It shall be unlawful for any person to market, sell, distribute,*
7 *advertise or label any drug product containing ephedrine, pseudo-*
8 *ephedrine, or phenylpropanolamine, or their salts, isomers or salts*
9 *of isomers for indication of stimulation, mental alertness, weight*
10 *loss, appetite control, energy or other indications not approved pur-*
11 *suant to the pertinent federal over-the-counter drug final mono-*
12 *graph or tentative final monograph or approved new drug appli-*
13 *cation.*

14 (d) *A violation of this section shall be a drug severity level 1*
15 *felony.*

16 Sec. ~~2~~ 7. K.S.A. 65-4111 is, 65-4150, 65-4159, 65-4160, 65-4161
17 and 65-7006 are hereby repealed.

18 Sec. ~~3~~ 8. This act shall take effect and be in force from and after
19 its publication in the statute book.

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: Stephanie Buchanan

From: Patricia Biggs, Executive Director

Date: March 12, 2004

RE: Fiscal Note on HB 2649 Amended by House Committee

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 violation of:*
 - *Section 1, abuse of a child, aggravated assault or battery or domestic battery to request 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 violation of Section 1, 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 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.

Estimation of Costs

<u>Type of Cost</u>	<u>Min</u>	<u>Max</u>	<u># days</u>	<u>SUBTOTAL</u>	
				<u>Min</u>	<u>Max</u>
Salary	\$32,500.00	\$37,500.00			
Fringe (28%)	\$8,125.00	\$9,375.00			
Subtotal: Salary & Fringe				\$40,625.00	\$46,875.00
Personal Computer	\$2,000.00	\$2,300.00			
Computer Server	\$5,000.00	\$6,000.00			
Subtotal: Computer Hardware				\$7,000.00	\$8,300.00
DISC Small Agency Support - time to set up server & PC (10 -20hr at \$42/hour)				\$420.00	\$840.00
<u>Software:</u>	--	--			
SPSS-Base	\$1,249.00	\$1,249.00			
SPSS-Advanced	--	--			
SPSS-Regression	\$699.00	\$699.00			
SPSS-Tables	\$799.00	\$799.00			
SPSS-Trends					
Subtotal: Statistical Package for Social Science Components				\$2,747.00	\$2,747.00
<u>Training</u>					
Complex Samples	--		--		
Intro to SPSS Data Entry	\$899.00		2		
Advanced: Regression	--		--		
Advanced: ANOVA	--		--		
Time Series & Forecasting	--		--		
Syntax I & Syntax II	\$1,498.00		3		
Subtotal: Training				\$2,397.00	\$2,397.00
<u>Travel for Training</u>					
total days			5		
at \$7.50/quarter	\$37.50				
air fare (training in Chicago, Denver, or Dallas)	\$300.00				
accommodations @\$125/night	\$625.00				
Ground Travel (to/from airport, parking, taxi, etc.)	\$495.00				
Subtotal: Travel associated with Training				\$1,457.50	\$1,457.50
TOTAL Cost Impact to KSC				\$54,646.50	\$62,616.50

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.

4. The long-range fiscal estimates of the Commission. – Salary and associated benefits constitute on on-going long-range cost.

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: No information is available for the crime of using controlled substances as set forward in HB 2649 section 1.

During FY 2003, there were 1827 felony *drug possession* convictions reported to the Sentencing Commission. Of this number:

- 1526 (83.5%) were convicted of possession under K.S.A. 65-4160 and
- 301 (16.5%) were convicted of possession under K.S.A. 65-4162.

These are *drug possessions*, however; the number of drug users would be anticipated to be greater.

Of the possession offenders:

- 488 (32%) of the 1526 violators of K.S.A. 65-4160 were sentenced to prison.
 - 190 were new court commitments,
 - 268 were probation condition violators,
 - 30 were probation violators with new sentences.
- 67 (22.3%) of the 301 violators of K.S.A. 65-4162 were sentenced to prison.
 - 22 were new court commitments,
 - 38 were probation condition violators,
 - 7 were probation violators with new sentences.

It is anticipated that the number of drug users would be greater than the number of drug possessors but the number of users who would receive a prison sentence (second or subsequent usage conviction) cannot be quantified with available information.

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.
 have impact but cannot be quantified with data available.

Note: Similar to the note above, the increase in prison population under the provisions of this bill cannot be quantified at this time but is anticipated to be notable.

The proposed bill is estimated to have the following unquantifiable impact:

- a large impact on drug probation populations,
- a small to a medium impact on prison beds and
- a large impact on the workload of the journal entries of the Commission.

The impact cannot be quantified with available information because:

1. all the drug possession offenders in the above findings might be drug users and they may receive additional charges for drug use or additional sentences running concurrently or consecutively and
2. any person who tests positive for drugs might be charged with drug use even if they were not found in possession of drugs. This creates the possibility that the pool of offenders to whom the provisions of this bill might apply is larger than the number of drug possession offenders.

Findings:

- No information is available for the crime of use of any controlled substances as designed in the proposed House Bill section 1.
- During FY 2003, a total of 1,827 felony *drug possession* convictions were reported to the Kansas Sentencing Commission. Of this number,
 - 1526 offenders were convicted of the drug possession under K.S.A. 65-4160
 - 301 offenders were convicted of the drug possession under K.S.A. 65-4162.
- Of the convictions under K.S.A. 65-4160,
 - 1405 offenders were classified as the first drug possession,
 - 98 offenders were convicted of a second drug possession offense
 - 23 offenders were convicted of third or subsequent drug possession offenses.
- Of the convictions under K.S.A. 65-4162,
 - All 301 offenders were convicted of the offenses of the second or subsequent drug possession.
- During FY 2003, 488 offenders under K.S.A. 65-4160 were admitted to prison, of which,
 - 190 were new court commitments,
 - 268 were probation violators and
 - 30 were probation violators with new sentences.
- During FY 2003, 67 offenders under K.S.A. 65-4162 were admitted to prison, including
 - 22 new court commitments,
 - 38 probation violators and
 - 7 probation violators with new sentences.

SUMMARY OF HB 2649 (Amended by House Committee) IMPACT:

- Prison Admissions: The impact of this bill will likely result in additional prison admissions. The number of increased prison admissions cannot be quantified.
- Prison Beds: The impact of this bill will likely result in the need for additional prison beds. The number of additional prison beds needed cannot be quantified.

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

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.

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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)-1st and 2nd:** 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

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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) 3rd 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 3rd 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,

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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.

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SENATE BILL No. 410

By Senators Schmidt, Adkins, Brownlee, Donovan, Jordan, Kerr, Schor-
dorf, Teichman, Umbarger and Vratil

2-2

11 AN ACT concerning the employment security laws: relating to failure to
12 pass a pre-employment drug screen and misconduct: amending K.S.A.
13 2003 Supp. 44-706 and repealing the existing section.
14

15 *Be it enacted by the Legislature of the State of Kansas:*

16 Section 1. K.S.A. 2003 Supp. 44-706 is hereby amended to read as
17 follows: 44-706. An individual shall be disqualified for benefits:

18 (a) If the individual left work voluntarily without good cause attrib-
19 utable to the work or the employer, subject to the other provisions of this
20 subsection (a). After a temporary job assignment, failure of an individual
21 to affirmatively request an additional assignment on the next succeeding
22 workday, if required by the employment agreement, after completion of
23 a given work assignment, shall constitute leaving work voluntarily. The
24 disqualification shall begin the day following the separation and shall con-
25 tinue until after the individual has become reemployed and has had earn-
26 ings from insured work of at least three times the individual's weekly
27 benefit amount. An individual shall not be disqualified under this sub-
28 section (a) if:

29 (1) The individual was forced to leave work because of illness or injury
30 upon the advice of a licensed and practicing health care provider and,
31 upon learning of the necessity for absence, immediately notified the em-
32 ployer thereof, or the employer consented to the absence, and after re-
33 covery from the illness or injury, when recovery was certified by a prac-
34 ticing health care provider, the individual returned to the employer and
35 offered to perform services and the individual's regular work or compa-
36 rable and suitable work was not available; as used in this paragraph (1)
37 "health care provider" means any person licensed by the proper licensing
38 authority of any state to engage in the practice of medicine and surgery,
39 osteopathy, chiropractic, dentistry, optometry, podiatry or psychology;

40 (2) the individual left temporary work to return to the regular
41 employer;

42 (3) the individual left work to enlist in the armed forces of the United
43 States, but was rejected or delayed from entry;

1 (4) the individual left work because of the voluntary or involuntary
2 transfer of the individual's spouse from one job to another job, which is
3 for the same employer or for a different employer, at a geographic loca-
4 tion which makes it unreasonable for the individual to continue work at
5 the individual's job;

6 (5) the individual left work because of hazardous working conditions;
7 in determining whether or not working conditions are hazardous for an
8 individual, the degree of risk involved to the individual's health, safety
9 and morals, the individual's physical fitness and prior training and the
10 working conditions of workers engaged in the same or similar work for
11 the same and other employers in the locality shall be considered; as used
12 in this paragraph (5), "hazardous working conditions" means working con-
13 ditions that could result in a danger to the physical or mental well-being
14 of the individual; each determination as to whether hazardous working
15 conditions exist shall include, but shall not be limited to, a consideration
16 of (A) the safety measures used or the lack thereof, and (B) the condition
17 of equipment or lack of proper equipment; no work shall be considered
18 hazardous if the working conditions surrounding the individual's work are
19 the same or substantially the same as the working conditions generally
20 prevailing among individuals performing the same or similar work for
21 other employers engaged in the same or similar type of activity;

22 (6) the individual left work to enter training approved under section
23 236(a)(1) of the federal trade act of 1974, provided the work left is not
24 of a substantially equal or higher skill level than the individual's past
25 adversely affected employment (as defined for purposes of the federal
26 trade act of 1974), and wages for such work are not less than 80% of the
27 individual's average weekly wage as determined for the purposes of the
28 federal trade act of 1974;

29 (7) the individual left work because of unwelcome harassment of the
30 individual by the employer or another employee of which the employing
31 unit had knowledge;

32 (8) the individual left work to accept better work; each determination
33 as to whether or not the work accepted is better work shall include, but
34 shall not be limited to, consideration of (A) the rate of pay, the hours of
35 work and the probable permanency of the work left as compared to the
36 work accepted, (B) the cost to the individual of getting to the work left
37 in comparison to the cost of getting to the work accepted, and (C) the
38 distance from the individual's place of residence to the work accepted in
39 comparison to the distance from the individual's residence to the work
40 left;

41 (9) the individual left work as a result of being instructed or requested
42 by the employer, a supervisor or a fellow employee to perform a service
43 or commit an act in the scope of official job duties which is in violation

- 1 of an ordinance or statute;
- 2 (10) the individual left work because of a violation of the work agree-
3 ment by the employing unit and, before the individual left, the individual
4 had exhausted all remedies provided in such agreement for the settlement
5 of disputes before terminating;
- 6 (11) after making reasonable efforts to preserve the work, the indi-
7 vidual left work due to a personal emergency of such nature and com-
8 pelling urgency that it would be contrary to good conscience to impose a
9 disqualification; or
- 10 (12) the individual left work due to circumstances resulting from do-
11 mestic violence, including:
- 12 (A) The individual's reasonable fear of future domestic violence at or
13 en route to or from the individual's place of employment; or
- 14 (B) the individual's need to relocate to another geographic area in
15 order to avoid future domestic violence; or
- 16 (C) the individual's need to address the physical, psychological and
17 legal impacts of domestic violence; or
- 18 (D) the individual's need to leave employment as a condition of re-
19 ceiving services or shelter from an agency which provides support services
20 or shelter to victims of domestic violence; or
- 21 (E) the individual's reasonable belief that termination of employment
22 is necessary to avoid other situations which may cause domestic violence
23 and to provide for the future safety of the individual or the individual's
24 family.
- 25 (b) An individual may prove the existence of domestic violence by
26 providing one of the following:
- 27 (1) A restraining order or other documentation of equitable relief by
28 a court of competent jurisdiction; or
- 29 (2) a police record documenting the abuse; or
- 30 (3) documentation that the abuser has been convicted of one or more
31 of the offenses enumerated in articles 34 and 35 of chapter 21 of the
32 Kansas Statutes Annotated, and amendments thereto, where the victim
33 was a family or household member; or
- 34 (4) medical documentation of the abuse; or
- 35 (5) a statement provided by a counselor, social worker, health care
36 provider, clergy, shelter worker, legal advocate, domestic violence or sex-
37 ual assault advocate or other professional who has assisted the individual
38 in dealing with the effects of abuse on the individual or the individual's
39 family; or
- 40 (6) a sworn statement from the individual attesting to the abuse.
- 41 (c) No evidence of domestic violence experienced by an individual,
42 including the individual's statement and corroborating evidence, shall be
43 disclosed by the department of human resources unless consent for dis-

1 closure is given by the individual.

2 (d) If the individual has been discharged for misconduct connected
3 with the individual's work. The disqualification shall begin the day follow-
4 ing the separation and shall continue until after the individual becomes
5 reemployed and has had earnings from insured work of at least three
6 times the individual's determined weekly benefit amount, except that if
7 an individual is discharged for gross misconduct connected with the in-
8 dividual's work, such individual shall be disqualified for benefits until such
9 individual again becomes employed and has had earnings from insured
10 work of at least eight times such individual's determined weekly benefit
11 amount. In addition, all wage credits attributable to the employment from
12 which the individual was discharged for gross misconduct connected with
13 the individual's work shall be canceled. No such cancellation of wage
14 credits shall affect prior payments made as a result of a prior separation.

15 ~~(1) For the purposes of this subsection (d), "misconduct" is defined as a~~
16 ~~violation of a duty or obligation reasonably owed the employer as a con-~~
17 ~~dition of employment; and the term "gross misconduct" as used in this~~
18 ~~subsection (d) shall be construed to mean is defined as~~ conduct evincing
19 extreme, willful or wanton misconduct as defined by this subsection (d).

20 ~~(2) For the purposes of this subsection (d), the use of or impairment~~
21 ~~caused by an alcoholic beverage, a cereal malt beverage or a nonprescri-~~
22 ~~bed controlled substance by an individual while working shall be conclu-~~
23 ~~sive evidence of misconduct and the possession of an alcoholic beverage,~~
24 ~~a cereal malt beverage or a nonprescribed controlled substance by an~~
25 ~~individual while working shall be prima facie evidence of conduct which~~
26 ~~is a violation of a duty or obligation reasonably owed to the employer as~~
27 ~~a condition of employment. For purposes of this subsection (d), the dis-~~
28 ~~qualification of an individual from employment which disqualification is~~
29 ~~required by the provisions of the drug free workplace act, 41 U.S.C. 701~~
30 ~~et seq. or is otherwise required by law because the individual refused to~~
31 ~~submit to or failed a chemical test which was required by law, shall be~~
32 ~~conclusive evidence of misconduct. Refusal to submit to a chemical test~~
33 ~~administered pursuant to an employee assistance program or other drug~~
34 ~~or alcohol treatment program in which the individual was participating~~
35 ~~voluntarily or as a condition of further employment shall also be conclu-~~
36 ~~sive evidence of misconduct. Alcoholic liquor shall be defined as provided~~
37 ~~in K.S.A. 41-102 and amendments thereto. Cereal malt beverage shall be~~
38 ~~defined as provided in K.S.A. 41-2701 and amendments thereto. Con-~~
39 ~~trolled substance shall be defined as provided in K.S.A. 65-4101 and~~
40 ~~amendments thereto of the uniform controlled substances act. As used~~
41 ~~in this subsection (d)(2), "required by law" means required by a federal~~
42 ~~or state law, a federal or state rule or regulation having the force and~~
43 ~~effect of law, a county resolution or municipal ordinance, or a policy~~

1 relating to public safety adopted in open meeting by the governing body
2 of any special district or other local governmental entity. An individual's
3 refusal to submit to a chemical test shall not be admissible evidence to
4 prove misconduct unless the test is required by and meets the standards
5 of the drug free workplace act, 41 U.S.C. 701 et seq., the test was ad-
6 ministered as part of an employee assistance program or other drug or
7 alcohol treatment program in which the employee was participating vol-
8 untarily or as a condition of further employment, the test was otherwise
9 required by law and the test constituted a required condition of employ-
10 ment for the individual's job, or, there was probable cause to believe that
11 the individual used, possessed or was impaired by an alcoholic beverage,
12 a cereal malt beverage or a controlled substance while working.

13 (1) (A) As used in this subsection (d): (i) "Alcohol" shall be defined as:
14 (a) Alcoholic liquor as provided in K.S.A. 41-102, and amendments
15 thereto; or (b) cereal malt beverage as provided in K.S.A. 41-2701, and
16 amendments thereto.

17 (ii) "Controlled substances" shall be defined as provided in K.S.A. 65-
18 4101, and amendments thereto of the uniform controlled substances act.

19 (iii) "Allowed by law" is defined as allowed by a federal or state law,
20 a federal or state rule or regulation having the force and effect of law, a
21 county resolution or municipal ordinance, or a policy relating to public
22 safety adopted in an open meeting by the governing body of any special
23 district or other local governmental entity.

24 (B) For the purpose of this subsection (d), the following shall be con-
25 clusive evidence of misconduct:

26 (i) The individual refuses to submit to or fails any chemical test that
27 is allowed by law;

28 (ii) the individual is impaired by a controlled substance or alcohol
29 while at the work place;

30 (iii) the individual uses a controlled substance or alcohol at the work-
31 place; **or**

32 (iv) the individual possesses a controlled substance or alcohol at the
33 workplace; ~~or.~~

34 ~~(v) the individual fails a pre-employment drug screen required by the~~
35 ~~employer and the employer has agreed to employ the person before drug~~
36 ~~screen results are known to the employer.~~

37 (C) The results of a chemical test shall not be admissible evidence to
38 prove misconduct unless the following conditions were met:

39 (A) ~~Either (i) the test was required by law, the test was administered~~
40 ~~pursuant to the drug free workplace act, 41 U.S.C. 701 et seq., (ii) the~~
41 ~~test was administered as part of an employee assistance program or other~~
42 ~~drug or alcohol treatment program in which the employee was partici-~~
43 ~~pating voluntarily or as a condition of further employment, (iii) the test~~

1 was required by law and the test constituted a required condition of em-
2 ployment for the individual's job, or ~~(iv)~~ there was probable cause to
3 believe that the individual used, had possession of, or was impaired by
4 the alcoholic beverage, the cereal malt beverage or the controlled sub-
5 stance while working;

6 ~~(B)~~ (i) The test sample was collected either ~~(i)~~ (a) as prescribed by
7 the drug free workplace act, 41 U.S.C. 701 et seq., ~~(ii)~~ (b) as prescribed
8 by an employee assistance program or other drug or alcohol treatment
9 program in which the employee was participating voluntarily or as a con-
10 dition of further employment, ~~(iii)~~ (c) as prescribed by a test which was
11 required by law and which constituted a required condition of employ-
12 ment for the individual's job, or ~~(iv)~~ (d) at a time contemporaneous with
13 the events establishing probable cause;

14 ~~(C)~~ (ii) the collecting and labeling of the test sample was performed
15 by a licensed health care professional or any other individual authorized
16 to collect or label test samples by federal or state law, or a federal or state
17 rule or regulation having the force and effect of law, including law en-
18 forcement personnel;

19 ~~(D)~~ (iii) the test was performed by a laboratory approved by the
20 United States department of health and human services or licensed by
21 the department of health and environment, except that a blood sample
22 may be tested for alcohol content by a laboratory commonly used for that
23 purpose by state law enforcement agencies;

24 ~~(E)~~ (iv) the test was confirmed by gas chromatography, gas chroma-
25 tography-mass spectroscopy or other comparably reliable analytical
26 method, except that no such confirmation is required for a blood alcohol
27 sample; and

28 ~~(F)~~ (v) the foundation evidence must establish, beyond a reasonable
29 doubt, that the test results were from the sample taken from the
30 individual.

31 ~~(3)~~ (2) For the purposes of this subsection (d), misconduct shall in-
32 clude, but not be limited to repeated absence, including lateness, from
33 scheduled work if the facts show:

34 (A) The individual was absent without good cause;

35 (B) the absence was in violation of the employer's written absentee-
36 ism policy;

37 (C) the employer gave or sent written notice to the individual, at the
38 individual's last known address, that future absence may or will result in
39 discharge;

40 (D) the employee had knowledge of the employer's written absen-
41 teeism policy; and

42 (E) if an employee disputes being absent without good cause, the
43 employee shall present evidence that a majority of the employee's ab-

1 sences were for good cause.

2 ~~(4)~~ (3) An individual shall not be disqualified under this subsection
3 (d) if the individual is discharged under the following circumstances:

4 (A) The employer discharged the individual after learning the indi-
5 vidual was seeking other work or when the individual gave notice of future
6 intent to quit:

7 (B) the individual was making a good-faith effort to do the assigned
8 work but was discharged due to: (i) Inefficiency, (ii) unsatisfactory per-
9 formance due to inability, incapacity or lack of training or experience, (iii)
10 isolated instances of ordinary negligence or inadvertence, (iv) good-faith
11 errors in judgment or discretion, or (v) unsatisfactory work or conduct
12 due to circumstances beyond the individual's control; or

13 (C) the individual's refusal to perform work in excess of the contract
14 of hire.

15 (e) If the individual has failed, without good cause, to either apply
16 for suitable work when so directed by the employment office of the sec-
17 retary of human resources, or to accept suitable work when offered to
18 the individual by the employment office, the secretary of human re-
19 sources, or an employer, such disqualification shall begin with the week
20 in which such failure occurred and shall continue until the individual
21 becomes reemployed and has had earnings from insured work of at least
22 three times such individual's determined weekly benefit amount. In de-
23 termining whether or not any work is suitable for an individual, the sec-
24 retary of human resources, or a person or persons designated by the
25 secretary, shall consider the degree of risk involved to health, safety and
26 morals, physical fitness and prior training, experience and prior earnings,
27 length of unemployment and prospects for securing local work in the
28 individual's customary occupation or work for which the individual is rea-
29 sonably fitted by training or experience, and the distance of the available
30 work from the individual's residence. Notwithstanding any other provi-
31 sions of this act, an otherwise eligible individual shall not be disqualified
32 for refusing an offer of suitable employment, or failing to apply for suit-
33 able employment when notified by an employment office, or for leaving
34 the individual's most recent work accepted during approved training, in-
35 cluding training approved under section 236(a)(1) of the trade act of 1974,
36 if the acceptance of or applying for suitable employment or continuing
37 such work would require the individual to terminate approved training
38 and no work shall be deemed suitable and benefits shall not be denied
39 under this act to any otherwise eligible individual for refusing to accept
40 new work under any of the following conditions: (1) If the position offered
41 is vacant due directly to a strike, lockout or other labor dispute; (2) if the
42 remuneration, hours or other conditions of the work offered are substan-
43 tially less favorable to the individual than those prevailing for similar work

1 in the locality; (3) if as a condition of being employed, the individual would
2 be required to join or to resign from or refrain from joining any labor
3 organization; (4) if the individual left employment as a result of domestic
4 violence, and the position offered does not reasonably accommodate the
5 individual's physical, psychological, safety, and/or legal needs relating to
6 said domestic violence.

7 (f) For any week with respect to which the secretary of human re-
8 sources, or a person or persons designated by the secretary, finds that the
9 individual's unemployment is due to a stoppage of work which exists be-
10 cause of a labor dispute or there would have been a work stoppage had
11 normal operations not been maintained with other personnel previously
12 and currently employed by the same employer at the factory, establish-
13 ment or other premises at which the individual is or was last employed,
14 except that this subsection (f) shall not apply if it is shown to the satis-
15 faction of the secretary of human resources, or a person or persons des-
16 ignated by the secretary, that: (1) The individual is not participating in or
17 financing or directly interested in the labor dispute which caused the
18 stoppage of work; and (2) the individual does not belong to a grade or
19 class of workers of which, immediately before the commencement of the
20 stoppage, there were members employed at the premises at which the
21 stoppage occurs any of whom are participating in or financing or directly
22 interested in the dispute. If in any case separate branches of work which
23 are commonly conducted as separate businesses in separate premises are
24 conducted in separate departments of the same premises, each such de-
25 partment shall, for the purpose of this subsection (f) be deemed to be a
26 separate factory, establishment or other premises. For the purposes of
27 this subsection (f), failure or refusal to cross a picket line or refusal for
28 any reason during the continuance of such labor dispute to accept the
29 individual's available and customary work at the factory, establishment or
30 other premises where the individual is or was last employed shall be
31 considered as participation and interest in the labor dispute.

32 (g) For any week with respect to which or a part of which the indi-
33 vidual has received or is seeking unemployment benefits under the un-
34 employment compensation law of any other state or of the United States,
35 except that if the appropriate agency of such other state or the United
36 States finally determines that the individual is not entitled to such un-
37 employment benefits, this disqualification shall not apply.

38 (h) For any week with respect to which the individual is entitled to
39 receive any unemployment allowance or compensation granted by the
40 United States under an act of congress to ex-service men and women in
41 recognition of former service with the military or naval services of the
42 United States.

43 (i) For the period of one year beginning with the first day following

1 the last week of unemployment for which the individual received benefits,
2 or for one year from the date the act was committed, whichever is the
3 later, if the individual, or another in such individual's behalf with the
4 knowledge of the individual, has knowingly made a false statement or
5 representation, or has knowingly failed to disclose a material fact to obtain
6 or increase benefits under this act or any other unemployment compen-
7 sation law administered by the secretary of human resources.

8 (j) For any week with respect to which the individual is receiving
9 compensation for temporary total disability or permanent total disability
10 under the workmen's compensation law of any state or under a similar
11 law of the United States.

12 (k) For any week of unemployment on the basis of service in an in-
13 structional, research or principal administrative capacity for an educa-
14 tional institution as defined in subsection (v) of K.S.A. 44-703 and amend-
15 ments thereto, if such week begins during the period between two
16 successive academic years or terms or, when an agreement provides in-
17 stead for a similar period between two regular but not successive terms
18 during such period or during a period of paid sabbatical leave provided
19 for in the individual's contract, if the individual performs such services in
20 the first of such academic years or terms and there is a contract or a
21 reasonable assurance that such individual will perform services in any
22 such capacity for any educational institution in the second of such aca-
23 demic years or terms.

24 (l) For any week of unemployment on the basis of service in any
25 capacity other than service in an instructional, research, or administrative
26 capacity in an educational institution, as defined in subsection (v) of
27 K.S.A. 44-703 and amendments thereto, if such week begins during the
28 period between two successive academic years or terms if the individual
29 performs such services in the first of such academic years or terms and
30 there is a reasonable assurance that the individual will perform such serv-
31 ices in the second of such academic years or terms, except that if benefits
32 are denied to the individual under this subsection (l) and the individual
33 was not offered an opportunity to perform such services for the educa-
34 tional institution for the second of such academic years or terms, such
35 individual shall be entitled to a retroactive payment of benefits for each
36 week for which the individual filed a timely claim for benefits and for
37 which benefits were denied solely by reason of this subsection (l).

38 (m) For any week of unemployment on the basis of service in any
39 capacity for an educational institution as defined in subsection (v) of
40 K.S.A. 44-703 and amendments thereto, if such week begins during an
41 established and customary vacation period or holiday recess, if the indi-
42 vidual performs services in the period immediately before such vacation
43 period or holiday recess and there is a reasonable assurance that such

1 individual will perform such services in the period immediately following
2 such vacation period or holiday recess.

3 (n) For any week of unemployment on the basis of any services, sub-
4 stantially all of which consist of participating in sports or athletic events
5 or training or preparing to so participate, if such week begins during the
6 period between two successive sport seasons or similar period if such
7 individual performed services in the first of such seasons or similar per-
8 iods and there is a reasonable assurance that such individual will perform
9 such services in the later of such seasons or similar periods.

10 (o) For any week on the basis of services performed by an alien unless
11 such alien is an individual who was lawfully admitted for permanent res-
12 idence at the time such services were performed, was lawfully present
13 for purposes of performing such services, or was permanently residing in
14 the United States under color of law at the time such services were per-
15 formed, including an alien who was lawfully present in the United States
16 as a result of the application of the provisions of section 212(d)(5) of the
17 federal immigration and nationality act. Any data or information required
18 of individuals applying for benefits to determine whether benefits are not
19 payable to them because of their alien status shall be uniformly required
20 from all applicants for benefits. In the case of an individual whose appli-
21 cation for benefits would otherwise be approved, no determination that
22 benefits to such individual are not payable because of such individual's
23 alien status shall be made except upon a preponderance of the evidence.

24 (p) For any week in which an individual is receiving a governmental
25 or other pension, retirement or retired pay, annuity or other similar pe-
26 riodic payment under a plan maintained by a base period employer and
27 to which the entire contributions were provided by such employer, except
28 that: (1) If the entire contributions to such plan were provided by the
29 base period employer but such individual's weekly benefit amount ex-
30 ceeds such governmental or other pension, retirement or retired pay,
31 annuity or other similar periodic payment attributable to such week, the
32 weekly benefit amount payable to the individual shall be reduced (but
33 not below zero) by an amount equal to the amount of such pension,
34 retirement or retired pay, annuity or other similar periodic payment
35 which is attributable to such week; or (2) if only a portion of contributions
36 to such plan were provided by the base period employer, the weekly
37 benefit amount payable to such individual for such week shall be reduced
38 (but not below zero) by the prorated weekly amount of the pension, re-
39 tirement or retired pay, annuity or other similar periodic payment after
40 deduction of that portion of the pension, retirement or retired pay, an-
41 nuity or other similar periodic payment that is directly attributable to the
42 percentage of the contributions made to the plan by such individual; or
43 (3) if the entire contributions to the plan were provided by such individ-

1 ual. or by the individual and an employer (or any person or organization)
2 who is not a base period employer, no reduction in the weekly benefit
3 amount payable to the individual for such week shall be made under this
4 subsection (p); or (4) whatever portion of contributions to such plan were
5 provided by the base period employer, if the services performed for the
6 employer by such individual during the base period, or remuneration
7 received for the services, did not affect the individual's eligibility for, or
8 increased the amount of, such pension, retirement or retired pay, annuity
9 or other similar periodic payment, no reduction in the weekly benefit
10 amount payable to the individual for such week shall be made under this
11 subsection (p). No reduction shall be made for payments made under the
12 social security act or railroad retirement act of 1974.

13 (q) For any week of unemployment on the basis of services per-
14 formed in any capacity and under any of the circumstances described in
15 subsection (k), (l) or (m) which an individual performed in an educational
16 institution while in the employ of an educational service agency. For the
17 purposes of this subsection (q), the term "educational service agency"
18 means a governmental agency or entity which is established and operated
19 exclusively for the purpose of providing such services to one or more
20 educational institutions.

21 (r) For any week of unemployment on the basis of service as a school
22 bus or other motor vehicle driver employed by a private contractor to
23 transport pupils, students and school personnel to or from school-related
24 functions or activities for an educational institution, as defined in subsec-
25 tion (v) of K.S.A. 44-703 and amendments thereto, if such week begins
26 during the period between two successive academic years or during a
27 similar period between two regular terms, whether or not successive, if
28 the individual has a contract or contracts, or a reasonable assurance
29 thereof, to perform services in any such capacity with a private contractor
30 for any educational institution for both such academic years or both such
31 terms. An individual shall not be disqualified for benefits as provided in
32 this subsection (r) for any week of unemployment on the basis of service
33 as a bus or other motor vehicle driver employed by a private contractor
34 to transport persons to or from nonschool-related functions or activities.

35 (s) For any week of unemployment on the basis of services performed
36 by the individual in any capacity and under any of the circumstances
37 described in subsection (k), (l), (m) or (q) which are provided to or on
38 behalf of an educational institution, as defined in subsection (v) of K.S.A.
39 44-703 and amendments thereto, while the individual is in the employ of
40 an employer which is a governmental entity, Indian tribe or any employer
41 described in section 501(c)(3) of the federal internal revenue code of 1986
42 which is exempt from income under section 501(a) of the code.

43 (t) For any week in which an individual is registered at and attending

1 an established school, training facility or other educational institution, or
2 is on vacation during or between two successive academic years or terms.
3 An individual shall not be disqualified for benefits as provided in this
4 subsection (t) provided:

5 (1) The individual was engaged in full-time employment concurrent
6 with the individual's school attendance; or

7 (2) the individual is attending approved training as defined in sub-
8 section (s) of K.S.A. 44-703 and amendments thereto; or

9 (3) the individual is attending evening, weekend or limited day time
10 classes, which would not affect availability for work, and is otherwise
11 eligible under subsection (c) of K.S.A. 44-705 and amendments thereto.

12 (u) For any week with respect to which an individual is receiving or
13 has received remuneration in the form of a back pay award or settlement.
14 The remuneration shall be allocated to the week or weeks in the manner
15 as specified in the award or agreement, or in the absence of such speci-
16 ficity in the award or agreement, such remuneration shall be allocated to
17 the week or weeks in which such remuneration, in the judgment of the
18 secretary, would have been paid.

19 (1) For any such weeks that an individual receives remuneration in
20 the form of a back pay award or settlement, an overpayment will be
21 established in the amount of unemployment benefits paid and shall be
22 collected from the claimant.

23 (2) If an employer chooses to withhold from a back pay award or
24 settlement, amounts paid to a claimant while they claimed unemployment
25 benefits, such employer shall pay the department the amount withheld.
26 With respect to such amount, the secretary shall have available all of the
27 collection remedies authorized or provided in K.S.A. 44-717, and amend-
28 ments thereto.

29 ***(v) If the individual has been discharged for failing a pre-em-***
30 ***ployment drug screen required by the employer and if such dis-***
31 ***charge occurs not later than seven days after the employer is noti-***
32 ***fied of the results of such drug screen.***

33 Sec. 2. K.S.A. 2003 Supp. 44-706 is hereby repealed.

34 Sec. 3. This act shall take effect and be in force from and after its
35 publication in the Kansas register.