

SESSION OF 2009

**THIRD CONFERENCE COMMITTEE REPORT BRIEF  
HOUSE BILL NO. 2060**

As Agreed to May 7, 2009

**Brief\***

HB 2060 would amend the current law to:

- Create a special rule in sentencing for a violation of battery on a law enforcement officer where bodily injury occurs;
- Create a special rule in sentencing to enhance the sentence on drug manufacturing, drug trafficking, and some drug possession crimes if the offender carries or discharges a firearm during the commission or furtherance of the drug crime;
- Amend the crime of unlawful conduct of cockfighting;
- Amend the crimes of unlawful conduct of dog fighting and unlawful attendance of dog fighting;
- Amend the sentence for a third or subsequent drug felony conviction to clarify the alternative sentence would be subject to appropriation;
- Amend the statutes on authorized disposition for crimes committed on or after the adoption of the Kansas Sentencing Guidelines Act to add an administrative driver's license suspension for transporting a controlled substance or controlled substance analog in a vehicle;

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\*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kldr>

- Amend the crime of fleeing or eluding a law enforcement officer;
- Amend the crimes of criminal threat and aggravated criminal threat;
- Amend the burden of proof on a subsequent challenge to the defendant's previously established prior criminal history;
- Amend current law to extend the standard probation term for a drug felony sentenced pursuant to KSA 21-4729, commonly referred to as 2003 SB 123, from 12 months to 18 months;
- Delay the implementation of a statewide offender risk assessment analytical tool for community correctional service programs to July 1, 2011;
- Require the Kansas Parole Board to make available to the newly created Joint Committee on Parole Board Oversight redacted documents, records, and reports concerning 30 cases selected by the Secretary of Corrections. A final report and recommendation of the Joint Committee would be required by January 1, 2010; and
- Resolve conflicts in the recodification of drug crimes bill.

**Battery on a Law Enforcement Officer  
(formerly HB 2060, with an amendment  
agreed to by the Conference Committee)**

The bill would amend the current law on sentencing to create a special sentencing rule for a violation of battery on a law enforcement officer where bodily injury occurs. The bill would make the sentence a presumptive prison sentence which would not be considered a departure and would not be subject to an appeal. Additionally, the sentence would be consecutive to any other term or terms of imprisonment imposed.

**Drug Crime Committed with a Firearm  
(formerly SB 26, with amendments  
agreed to by the Conference Committee)**

The bill would amend the felony sentencing statute to create a special rule to enhance the sentence on drug manufacturing, drug trafficking, and some drug possession crimes if the trier of fact makes a finding that the offender carries or discharges a firearm during the commission or furtherance of the drug crime.

The sentence would be presumed imprisonment. In addition to the sentence for the drug crime, an offender's sentence would be enhanced as follows:

- Possessing a firearm would result in an additional six months; and
- Discharging a firearm would result in an additional 18 months.

**Unlawful Conduct of Cockfighting  
(formerly SB 238 as it passed the  
Senate Committee of the Whole,  
without the asset forfeiture provision)**

The bill would amend the current law on the unlawful conduct of cockfighting and the statute on asset seizure and forfeiture to:

- Add the element of causing any gamecock to kill another gamecock to the crime of unlawful conduct of cockfighting;
- Add the elements of grooming, preparing, or medicating any gamecock with the intent to have it kill another gamecock to the crime of unlawful conduct of cockfighting;

- Recodify the crime of attending the unlawful conduct of cockfighting to make it a class B, nonperson misdemeanor;
- Create the crime of unlawful possession of cockfighting paraphernalia and make it a class A, nonperson misdemeanor;
- Increase the penalty for the crime of unlawful conduct of cockfighting from a class A, nonperson misdemeanor, to a level 10, nonperson felony; and
- Redefine “gamecock” to mean a domesticated fowl that is reared or trained for the purpose of fighting with other fowl.

**Unlawful Conduct of Dog Fighting  
(formerly SB 238 as it passed the  
Senate Committee of the Whole)**

The bill would amend the current law to create the crime of unlawful possession of dog fighting paraphernalia, a class A, nonperson misdemeanor, and to define the crime of unlawful attendance of dog fighting, a class B, nonperson misdemeanor. Dog fighting paraphernalia would be defined as any braking stick, treadmill, wheel, hot walker, cat mill, cat walker, jenni, or other paraphernalia together with evidence that the paraphernalia is being used or is intended for use in the unlawful conduct of dog fighting.

Further, the bill would authorize the seizure of any dog owned or kept on the premises of any person arrested for unlawful possession of dog fighting paraphernalia.

**Third or Subsequent Felony Drug Conviction**

The bill would amend the current law on the sentence for a third or subsequent felony drug conviction to provide, subject

to appropriation, and if the Secretary of Corrections determines substance abuse treatment resources are available, that the term of imprisonment may be served in a facility designated by the Secretary for intensive substance abuse treatment. The determination regarding the availability of treatment resources would not be subject to review.

**Administrative Driver's License Suspension  
(formerly Sub. for SB 28 as it passed  
the House Committee of the Whole)**

The bill would add an administrative driver's license suspension or restriction to the penalty or disposition already imposed by law for a conviction of unlawful possession of a controlled substance or controlled substance analog if the trier of fact makes a finding that the unlawful possession occurred while transporting the controlled substance or controlled substance analog in any vehicle on a highway or street.

**Fleeing or Eluding a Law Enforcement Officer  
(formerly Sub. for SB 28 as it passed  
the House Committee of the Whole)**

The bill would amend the current law on fleeing or eluding a law enforcement officer by clarifying that the law enforcement officer must be either in or upon an appropriately marked vehicle or bicycle or in uniform prominently displaying the law enforcement officer's badge of office when giving a signal to a driver of a motor vehicle to stop his or her vehicle.

The bill would define appropriately marked vehicle or bicycle to include, but not be limited to, any police vehicle or bicycle equipped with functional emergency lights or siren, or both.

The bill would provide an affirmative defense to any prosecution if the driver has a reasonable belief that the vehicle or bicycle pursuing the driver is not a police vehicle or police bicycle.

**Criminal Threat and Aggravated Criminal Threat  
(formerly Sub. for SB 28 as it passed  
the House Committee of the Whole)**

The bill would amend current law on criminal threat and aggravated criminal threat to expand the crimes to include the intent to cause, or recklessly cause, the lock down or disruption of regular, ongoing activities of any building, place of assembly, or facility of transportation.

**Prior Criminal History  
(formerly Sub. for SB 28 as it passed  
the House Committee of the Whole)**

The bill would amend current law in the specific situation where an offender's prior criminal history was either admitted by the offender or judicially determined by a preponderance of the evidence but the offender subsequently challenges his or her criminal history. If the offender subsequently challenges his or her criminal history, the burden of proof would be on the offender to prove his or her criminal history by a preponderance of the evidence.

**Extend Probation  
(formerly Senate Sub. for HB 2097)**

The bill would amend current law to extend the standard probation term for a drug felony sentenced pursuant to KSA 21-4729, commonly referred to as 2003 SB 123, from 12 months to 18 months.

**Risk Assessment Tool  
(formerly Senate Sub. for HB 2097)**

The bill would delay the implementation of a statewide offender risk assessment analytical tool for community correctional service programs to July 1, 2011.

**Kansas Parole Board  
(Modified from Sub. for HB 2340)**

The bill would amend current law to require the Kansas Parole Board (KPB) to make available to the newly created Joint Committee on Parole Board Oversight redacted documents, records, and reports concerning 30 cases selected by the Secretary of Corrections. The KPB also would be required to provide to the Joint Committee a summary statement listing the factors and rationale used to grant or deny parole in each such case and any correspondence received by the KPB relating to such grant or denial. The Joint Committee is required to submit a final report and recommendation to the Legislature on or before January 1, 2010.

The Secretary of Corrections would be required to select 30 cases representative of a variety of circumstances, including, but not limited to: inmates with different custody levels, inmates with different types of offenses that resulted in such inmates' incarceration, and inmates incarcerated at different state correctional facilities. Fifteen of the cases would be required to come from the group of inmates who were sentenced to prison for a crime committed prior to the enactment of the Kansas Sentencing Guidelines Act (July 1, 1993), who were not eligible for retroactive application of the Sentencing Guidelines Act, and who are still incarcerated. Fifteen of the cases would be required to come from the group of inmates who were sentenced for a crime committed prior the enactment of the Kansas Sentencing Guidelines Act and while on probation, parole, conditional release or in a community corrections program that crime, was sentenced to prison for a crime committed after July 1, 1993, who were not eligible for retroactive application of the Sentencing Guidelines Act on the prior sentence, and who are still incarcerated.

The Joint Committee on Parole Board Oversight would consist of six members of the Legislature as follows:

- The chairperson and the ranking minority member of the standing Senate Committee on Judiciary;

- The chairperson and the ranking minority member of the standing House Committee on Corrections and Juvenile Justice;
- One member appointed by the chairperson of the standing Senate Committee on Judiciary; and
- One member appointed by the chairperson of the standing House Committee on Corrections and Juvenile Justice.

The chairperson of the standing House Committee on Corrections and Juvenile Justice would be the chairperson of the Joint Committee.

The bill would authorize the Joint Committee to convene an executive session and would require the redacted documents, records, and reports be received while the Committee is in an executive session. All copies of redacted documents, records, and reports would be required to be returned prior to the open meeting resuming. Unauthorized disclosure may subject such members to discipline or censure from the House of Representatives or the Senate. Further, the redacted documents, records, reports and summary statement listing the factors and rationale used to grant or deny parole would be confidential and not subject to disclosure of compulsory process seeking disclosure.

### **Conference Committee Action**

The Conference Committee adopted the Senate amendments to the bill with the following changes:

- Delete the provision in the bill that would have enhanced an offender's sentence if the offender brandished a firearm during the commission or furtherance of a drug crime;
- Require the presumptive prison sentence pursuant to a conviction for battery of a law enforcement officer where bodily harm occurs to be consecutive to any other term or terms of imprisonment imposed;

- Require the trier of fact to make a finding that an offender carried or discharged the firearm during the commission or furtherance of a drug crime;
- Amend the enhanced penalty for possessing a firearm during the commission or furtherance of a drug crime to six months, rather than 12 months;
- Amend the enhanced penalty for discharging a firearm during the commission or furtherance of a drug crime to 18 months, rather than 24 months;
- Clarify the provision for intensive substance abuse treatment in a facility designated by the Secretary of Corrections is subject to appropriation;
- Make a technical amendment to the reference to the crime of unlawful attendance of dog fighting in the bill;
- Add the provisions of SB 28 as it passed the House Committee of the Whole regarding administrative drivers' license suspension, fleeing or eluding, criminal threat and aggravated criminal threat, and prior criminal history;
- Add the provisions of Senate Sub. for HB 2097 as it passed the Senate Committee of the Whole regarding amending current law to extend the standard probation term for a drug felony sentenced pursuant to KSA 21-4729, commonly referred to as 2003 SB 123, from 12 months to 18 months; and delay the implementation of a statewide offender risk assessment analytical tool for community correctional service programs to July 1, 2011; and
- Add modified provisions from

Sub. for SB  
2340 regarding the Kansas Parole Board to create the Joint Committee on Parole Board Oversight to review 30 cases, selected by the Secretary of Corrections. The KPB also would be required to provide to the Joint Committee

a summary statement using the factors and rationale used to grant or deny parole in each such case and any correspondence received by the KPB relating to such grant or denial. The Joint Committee is required to submit a final report and recommendation to the Legislature on or before January 1, 2010.

## **Background**

**Battery on a Law Enforcement Officer.** The proponents of the bill's provision regarding battery on a law enforcement officer, as introduced, who testified at the House Committee hearing were Representative Jeff King; Captain Bob Keller, Johnson County Sheriff's Office; Ed Klumpp on behalf of the Kansas Association of Chiefs of Police and the Kansas Peace Officers Association; and Tom Stanton, Deputy Reno County District Attorney and President of the Kansas County and District Attorneys Association.

The proponents in the Senate Committee on Judiciary were Representative Jeff King; Captain Bob Keller, Johnson County Sheriff's Office; and Ed Klumpp on behalf of the Kansas Association of Chiefs of Police and the Kansas Peace Officers Association.

According to the fiscal note on the bill's provision on battery on a law enforcement officer where bodily injury occurs, as introduced, the Kansas Sentencing Commission estimates that passage of the bill would require seven additional adult prison beds in FY 2010 and 11 additional adult prison beds by FY 2019. The current capacity for male inmates is 8,553 and projections indicate that this capacity will be exceeded by the end of FY 2016. If the bill, as introduced, contributes to an increase in the inmate population sufficient to require additional facility capacity, one-time construction and equipment costs would be needed. In addition, annual costs to staff, operate, and maintain the additional capacity would be incurred. The 2007 Legislature authorized a construction package that included capacity expansion projects at El Dorado, Yates Center, Ellsworth, and Stockton in the event population

estimates indicate expansion is needed. If one or more of these projects are necessary, the estimated total costs would range from \$7.0 million for one project at Ellsworth to \$66.4 million for all four projects. The actual construction costs would depend on when construction is undertaken. The actual operating costs incurred would depend on the base salary amounts, fringe benefit rates, food service costs, and inmate health care costs applicable at the time the additional capacity is occupied. If the bill contributes to an increase in the inmate population beyond this additional capacity, other expansion projects would need to be identified.

If the effect from this provision of the bill does not require expansion of capacity, the additional annual costs would be approximately \$2,400 per inmate for basic support, including food services. Additional expenditures for health care could also be incurred if the increase in the inmate population requires adjustments in the medical contract. The health care contract provides that whenever the inmate count at a facility changes by more than a specified percentage, an adjustment in contract payments is made. The amount of any adjustment would depend on the specific facility involved.

The Board of Indigents' Defense Services indicates that passage of this provision of the bill would increase the number of cases that require court trials and, as a result, an additional attorney would be needed to handle the increased workload. Total compensation for 1.00 FTE Attorney II position would be \$53,404 for FY 2010. Any fiscal effect resulting from this bill has not been included in *The FY 2010 Governor's Budget Report*.

**Drug Crime Committed with a Firearm.** The proponents of the bill's provision regarding a drug crime committed with a firearm, who presented testimony at the Senate Committee included Senator Derek Schmidt; Kyle Smith, Kansas Association of Chiefs of Police; and Thomas R. Williams, Sheriff, Allen County, Kansas.

There was no testimony on the day of the hearing in opposition to the bill's provision regarding a drug crime committed with a firearm. Subsequently, written testimony in

opposition to the bill was submitted by Jennifer Roth, Kansas Association of Criminal Defense Lawyers.

According to the fiscal note on the bill's provisions on a drug crime committed with a firearm, as introduced, the Kansas Sentencing Commission estimates that passage of the bill would require additional adult prison beds; however, the precise number is unknown, because there is no existing data for drug offenses that are committed with firearms. The current capacity for male inmates is 8,553 and projections indicate that this capacity will be exceeded by the end of FY 2016. If the bill contributes to an increase in the inmate population sufficient to require additional facility capacity, one-time construction and equipment costs would be needed. In addition, annual costs to staff, operate, and maintain the additional capacity would be incurred. The 2007 Legislature authorized a construction package that included capacity expansion projects at El Dorado, Yates Center, Ellsworth, and Stockton in the event population estimates indicate expansion is needed. If one or more of these projects are necessary, the estimated total costs would range from \$7.0 million for one project at Ellsworth to \$66.4 million for all four projects. The actual construction costs would depend on when construction is undertaken. The actual operating costs incurred would depend on the base salary amounts, fringe benefit rates, food service costs, and inmate health care costs applicable at the time the additional capacity is occupied. If the bill contributes to an increase in the inmate population beyond this additional capacity, other expansion projects would need to be identified.

If the effect from the bill does not require expansion of prison capacity, the additional annual costs would be approximately \$2,400 per inmate for basic support, including food services. Additional expenditures for health care also could be incurred if the increase in the inmate population requires adjustments in the medical contract. The health care contract provides that whenever the inmate count at a facility changes by more than a specified percentage, an adjustment in contract payments is made. The amount of any adjustment would depend on the specific facility involved. Any fiscal effect

resulting from this bill has not been included in *The FY 2010 Governor's Budget Report*.

**Unlawful Cockfighting.** The proponents of the bill's provision on unlawful cockfighting, as introduced, who presented testimony at the Senate Committee hearing were Captain Bob Keller, Johnson County Sheriff's Office, and Midge Grinstead, Executive Director, Lawrence Humane Society.

No opponents of the bill's provision on unlawful cockfighting presented testimony at the Senate hearing.

According to the fiscal note on the bill's provision on unlawful conduct of cockfighting that was prepared prior to the Senate Committee amendment to the bill, the Office of Judicial Administration and League of Kansas Municipalities report the passage of the bill would have no fiscal effect on their operating budgets. Additionally, the Kansas Sentencing Commission estimates the passage of the bill, as introduced, would require additional adult prison beds; however, the precise number is unknown, because there is no existing data for unlawful conduct of cockfighting.

**Dog Fighting.** There is no fiscal note on the bill's provisions on unlawful conduct of dog fighting. It was added to the bill as a floor amendment in the Senate Committee of the Whole.

**Third or Subsequent Felony Drug Conviction.** This provision was added in Conference Committee when the subject of felony sentencing was discussed. There is no fiscal note on the bill's provision regarding the sentence on a third or subsequent felony drug conviction since it is current law. The change made by the bill is a clarification that the treatment in a facility designated by the Secretary of Corrections is subject to appropriation.

**Administrative Driver's License Suspension.** The proponents of the bill's provision on the administrative driver's license suspension, as introduced, who presented testimony in the Senate Committee hearing were Senator Derek Schmidt;

Danny Thayer, Neodesha Chief of Police; and Kyle Smith, Kansas Association of Chiefs of Police.

There was no testimony in opposition to the bill in the Senate Committee hearing.

The proponents of the bill, as amended by the Senate, who presented testimony in the House Committee on Corrections and Juvenile Justice were Ed Klumpp, Kansas Association of Chiefs of Police and the Kansas Peace Officers Association, and Danny Thayer, Neodesha Chief of Police.

The House Committee amended the bill to clarify that the trier of fact would be required to make a finding that the unlawful possession occurred while transporting the controlled substance or controlled substance analog in any vehicle on a highway or street in order to impose an administrative driver's license suspension or restriction.

In the fiscal note, the Kansas Sentencing Commission indicates the bill, as introduced, would have no effect on prison beds. The bill has the potential for increasing litigation in the courts because of the new crime created by the bill. (KLRD Staff Note: The bill, as amended by the Senate Committee, does not create a new crime but adds an administrative driver's license suspension or restriction on an existing crime.) If it does, the Office of Judicial Administration indicates that there would be a fiscal effect on the operations of the court system. However, it is not possible to predict the number of additional court cases that would arise or how complex and time-consuming they would be. Therefore, a precise fiscal effect cannot be determined. In any case, the fiscal effect would most likely be accommodated within the existing schedule of court cases and would not require additional resources.

The Kansas Association of Counties indicates that the bill, as introduced, would require additional investigation by local law enforcement, but does not have enough information to provide a cost estimate at this time. Any fiscal effect resulting from this bill has not been included in *The FY 2010 Governor's Budget Report*.

**Fleeing or Eluding a Law Enforcement Officer.** The proponent who testified in the House Committee hearing was Kevin Graham, Assistant Attorney General. Written testimony in support of the bill was received from Representative Paul Davis, 46<sup>th</sup> District.

No opponents testified in the House Committee hearing.

This provision of the bill was passed out of the House Committee on Corrections and Juvenile Justice as it was introduced. There was a concern in the House Committee of the Whole that a person may be charged with the crime of fleeing or eluding even when the person had a reasonable belief that the pursuing vehicle or bicycle may not be a law enforcement vehicle or bicycle. The bill was referred to Appropriations and then re-referred to the House Committee on Corrections and Juvenile Justice for possible amendment to address this concern. The House Committee added an affirmative defense to the crime of fleeing or eluding a law enforcement officer. Additionally, the House Committee added provisions that amended criminal threat and aggravated criminal threat, and a provision clarifying burden of proof on prior criminal history.

In the fiscal note on the bill's provision on fleeing and eluding, the League of Kansas Municipalities states that any fiscal effect resulting from the passage of the bill would be negligible to cities.

**Criminal Threat and Aggravated Criminal Threat.** This provision was added by the House Committee to HB 2235 (fleeing or eluding) after the bill was rereferred. There is no fiscal note on this provision.

**Prior Criminal History.** This provision was added by the House Committee to HB 2235 (fleeing or eluding) after the bill was rereferred. There is no fiscal note on this provision.

**Extend Probation.** The proponents of the bill's provision on extending the probation term on 2003 SB 123 crimes (formerly SB 281, as introduced), who testified in the Senate

Committee on Judiciary were Helen Pedigo, Kansas Sentencing Commission, and Tom Stanton, Kansas County and District Attorneys Association. No opponent of this provision of the bill testified in the Senate Committee.

The fiscal note from the Division of Budget states on the provision of extending the probation term on 2003 SB 123 crimes, as introduced, using historical data, the Department of Corrections estimates that 387 offenders could receive an additional six months of probation under the bill. The monthly community corrections supervision cost is approximately \$210 per offender. As a result, the Department estimates that enactment of the bill would require an additional \$487,620 from the State General Fund for FY 2010 (387 offenders X \$210 for each offender per month X six months). Extending the probation term also would increase the number of caseloads for community corrections program staff.

According to the Sentencing Commission, the provision extending the probation term of 2003 SB 123 crimes could slightly increase the probability that offenders on probation would be revoked to prison; however, the precise number is unknown, because there are no existing data for the extended probation. Any fiscal effect resulting from this bill has not been included in *The FY 2010 Governor's Budget Report*.

**Risk Assessment Tool.** The proponent of the bill's provision on delaying the implementation of the standardized risk assessment tool (formerly SB 283, as introduced) who testified in the Senate Committee on Judiciary was Mark Gleeson, Office of Judicial Administration. No opponent of this provision of the bill testified in the Senate Committee.

The fiscal note states the enactment of the provision of the bill delaying the implementation of the standardized risk assessment tool, as introduced, would have no fiscal effect. This provision affects those offenders who are sentenced to community supervision; enactment of this provision would not result in additional prison admissions.

**Kansas Parole Board.** The proponent of the bill, as introduced, who testified at the House Committee was Representative Mike O'Neal, Speaker, Kansas House of Representatives.

The opponents of the bill, as introduced, who testified at the House Committee were Patti Biggs, Kansas Parole Board; Roger Werholtz, Secretary, Kansas Department of Corrections; Chris Biggs, Commissioner, Kansas Securities Commission; Barry Wilkerson, Kansas County and District Attorneys Association; and Donna Heintz, private citizen.

The House Committee of the Whole amended the bill to require the Parole Board to make available certain documents, records, and reports to the House Committee on Judiciary.

The bill was referred to Senate Judiciary, but did not receive a hearing.

According to the fiscal note on the bill, as introduced, for FY 2010, the Governor's recommendation for the Kansas Parole Board is \$488,386 from the State General Fund, which includes salary and wage costs of \$431,288 for the three members and operating expenses of \$57,098. Under current law, the annual salary of the chairperson of the Board is equal to the annual salary paid to a chief district judge, and the annual salaries of the other two members are \$2,465 less than the chairperson's salary. If it is assumed that the 2009 Legislature approves the Governor's budget recommendation, then \$488,386 plus any amount reappropriated from FY 2009 to FY 2010 would be transferred to the budget of the Department of Corrections. According to DOC, the bill would require \$330,098 in FY 2010 from the State General Fund, which would include \$273,000 for salary and wages of three positions and the same operating expenses of \$57,098. As a result, passage of HB 2340 would create salary and wages savings of \$158,288 (\$431,288 - \$273,000) and eliminate 3.00 FTE positions.

cockfighting; dog fighting; battery on a law enforcement officer; drug crimes; carrying or discharging of a firearm; probation term; fleeing or eluding a law enforcement officer; offender risk assessment analytical tool; prior criminal history; administrative driver's license suspension