

SESSION OF 2009

**SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2332**

As Amended by House Committee on  
Corrections and Juvenile Justice

**Brief\***

HB 2332, as amended, would amend the drug code and criminal code.

Sections 1 through 17 of the bill incorporate the recommendations of the Recodification Commission revisions concerning the drug code. The sections are identical to the provisions in HB 2236, which passed the House Committee of the Whole and has had a hearing in the Senate Judiciary Committee, with the following exceptions:

- Amended the definition of “manufacture”;
- Added a definition of “minor” and “presence of a minor”;
- Amended the definition of “school property”;
- In the crimes of drug distribution, drug marketing, and distribution or manufacture a simulated controlled substance, or both, it is unlawful to conduct such activity within 450 feet of school property. Current law is 1,000 feet;
- Amended manufacturing a controlled substance or controlled substance analog into two penalties: manufacturing methamphetamine, a severity level 3, person felony, and all other manufacturing is a severity level 5, person felony;

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\*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>

- Established quantities of drugs for different levels of penalties for unlawfully distributing or possessing with the intent to distribute;
- Redrafted the crime of unlawful possession of ephedrine;
- Made changes throughout sections 1 through 17 to reflect the policy recommendation to have the penalty enhancement be based on “to a minor or in the presence of a minor” and not “within 1,000 feet of school property”;
- Amended severity levels to reflect the policy change recommended by the Kansas Sentencing Commission (KSC) to combine the drug and the nondrug grids;
- Clarified that distributing or possessing with the intent to distribute any substance which is not a controlled substance, may also be prosecuted, convicted, and punished for the crime of theft by deception; and
- Amended the crime of unlawfully receiving proceeds penalty to be based on the dollar amounts of the value of the proceeds, to be uniform with the KSC proportionality recommendations.

The bill adopts the Kansas Sentencing Commission’s proportionality study recommendation to combine the nondrug grid and the drug grid which would create a single new grid with 13 additional presumed imprisonment border boxes. The bill also adopts the recommendation to create new levels of severity involving loss of money, productivity, or value of resources if the violation is in an amount of:

- \$100,000 or more is a severity level 5, nonperson felony;
- At least \$75,000 but less than \$100,000 is a severity level 6, nonperson felony;

- At least \$50,000 but less than \$75,000 is a severity level 7, nonperson felony;
- At least \$25,000 but less than \$50,000 is a severity level 8, nonperson felony;
- At least \$2,000 but less than \$25,000 is a severity level 9, nonperson felony;
- At least \$1,000 but less than \$2,000 is a severity level 10, nonperson felony;
- At least \$500 but less than \$1,000 is a class A nonperson misdemeanor; and
- Less than \$500 is a class B nonperson misdemeanor.

Amendments to current criminal laws implementing the new levels of severity involving loss money, productivity, or value of resources would be as follows:

- KSA 9-2012, bank embezzlement;
- KSA 16-305, misappropriating funds in violation of a funeral and cemetery merchandise agreement;
- KSA 17-1311a, misuse of a permanent maintenance fund;
- KSA 19-3519, fraudulent claim from a water district;
- KSA 21-3437, mistreatment of a dependent adult;
- KSA 21-3701, theft;
- KSA 21-3704, theft of services;
- KSA 21-3707, giving a worthless check;
- KSA 21-3720, criminal damage to property;
- KSA 21-3729, criminal use of a financial card;
- KSA 21-3734, impairing a security interest;
- KSA 21-3761, damaging railroad property;
- KSA 21-3763, counterfeiting;
- KSA 21-3846, making a false claim to the medicaid program;
- KSA 21-3902, official misconduct;
- KSA 21-3904, presenting a false claim;

- KSA 21-3905, permitting a false claim;
- KSA 21-3910, misuse of public funds;
- KSA 21-4018, identity theft;
- KSA 21-4111, criminal desecration;
- KSA 39-717, illegally selling or acquiring social welfare assistance;
- KSA 39-720, fraudulently obtaining social welfare assistance;
- KSA 40-2,118, fraudulent insurance act;
- KSA 40-247, insurance agent or broker fraud;
- KSA 40-5013, viatical settlement contract fraud;
- KSA 44-5,125, workers compensation benefits fraud;
- KSA 44-719, making a false statement to obtain or increase benefit under employment security law;
- KSA 47-1827, intentionally damaging an animal facility; and
- KSA 65-4167, trafficking in counterfeit drugs;

The bill provides the intentional violation of the Kansas Uniform Securities Act, KSA 17-12a508, would increase severity levels for securities fraud as follows:

- A conviction for an intentional violation of KSA 17-12a501 or KSA 17-12a502, and amendments thereto, if the violation resulted in a loss of an amount of:
  - \$1,000,000 or more is a severity level 2, nonperson felony;
  - At least \$250,000 but less than \$1,000,000 would be a severity level 3, nonperson felony;
  - At least \$100,000 but less than \$250,000 would be a severity level 4, nonperson felony;
  - At least \$75,000 but less than \$100,000 would be a severity level 5, nonperson felony;

- At least \$50,000 but less than \$75,000 would be a severity level 6, nonperson felony;
- At least \$25,000 but less than \$50,000 would be a severity level 7, nonperson felony; and
- At least \$25,000 but less than \$1,000 would be a severity level 8, nonperson felony.

Further, if the loss resulted in \$25,000 or more, the sentence would be presumed imprisonment. Finally, intentional violations of certain securities fraud and failing to comply with a cease and desist order would be increased to a severity level 6, nonperson felony.

The bill would implement the recommendations of the Kansas Sentencing Commission's study on proportionality of sentences as follows:

- For violation of the Kansas mortgage business act, KSA 9-2203, the penalty would decrease from a severity level 7, to a severity level 8, nonperson felony;
- For domestic battery, KSA 21-3412a, the bill would place the crime on grid for a third or subsequent conviction and would make it a severity level 7, person felony, but the bill would retain the special sentencing rules if such crimes occur within five years. The mandatory sentences within the five year time frame would be required to be served in county jail unless because of the offender's criminal history, such offender would be sentenced to presumptive imprisonment. Offenders serving the mandatory sentence would be supervised by community corrections upon release. Subject to availability, such supervision shall include the offender participating in a behavior modification treatment program;
  - A second conviction of domestic battery on probation or parole will be supervised by court services;

- A third or subsequent conviction within five years of domestic battery and the offender is placed on probation, the supervision will be by community corrections;
  - The mandatory fine on a third or subsequent conviction is deleted;
  - Clarifies that the third and fourth convictions within five years if placed on probation, the mandatory sentence would be served in county jail, fifth or subsequent, in prison; and
  - On a third or subsequent conviction within five years, if the offender does not complete the behavior modification treatment program, the offender will serve the underlying prison sentence.
- For battery against a law enforcement officer, KSA 21-3413(a)(3), the penalty would be decreased from a severity level 5, to a severity level 9, person felony. The sentence would be required to be presumed imprisonment;
  - For aggravated battery, KSA 21-3414 (a)(2)(A) and (a)(2)(B), the penalties would be decreased as follows:
    - For recklessly causing great bodily harm or disfigurement to another the penalty would be decreased from a severity level 5, to a severity level 6, person felony;
    - For recklessly causing bodily harm to another with a deadly weapon or in any manner whereby great bodily harm, disfigurement or death can be inflicted, penalty decreased from a severity level 8, to a severity level 9, person felony.

- For aggravated battery against a law enforcement officer, KSA 21-3415, the penalty would be decreased from a severity level 4, to a severity level 5, person felony and would eliminate the special sentencing rule regarding presumed imprisonment for certain offenders;
- For infecting with a life threatening communicable disease, KSA 21-3435, the penalty would be increased from a severity level 7, to a severity level 6, person felony;
- For aggravated trafficking where the victim is 14 or older, KSA 21-3447, the penalty would be decreased from a severity level 1, to a severity level 2, person felony;
- For intentionally receiving property for the purpose of committing terrorism or illegal use of weapons of mass destruction, KSA 21-3451, the penalty would be increased from a severity level 1, to an offgrid person felony;
- For aggravated endangering a child, KSA 21-3608a, the bill would delete the term “injured or” and the penalty would increased from a severity level 9, to a severity level 7, person felony;
- For abuse of a child, KSA 21-3609, the bill would amend the crime into 2 severity levels: for intentionally torturing, cruelly beating, or shaking which results in great bodily harm, the penalty would be a severity level 3, person felony; for intentionally inflicting cruel and inhuman corporal punishment, the penalty would be a severity level 6, person felony. Under current law, both crimes are a severity level 5, person felony;
- For criminal deprivation of property, KSA 21-3705, the bill, on a second conviction, would increase the penalty from a class A nonperson misdemeanor, to a severity level 8, nonperson felony. On a third or subsequent conviction, the penalty would be increased from a severity level 9, to a severity level 8, nonperson felony;

- For aiding an escape by an employee or volunteer of Kansas Department of Corrections, KSA 21-3811, the penalty would be decreased from a severity level 4, to a severity level 5, nonperson felony;
- For aiding a person required to register under the Offender Registration Act, KSA 21-3812, the penalty would be decreased from a severity level 5, to a severity level 10, person felony;
- For incitement to riot, KSA 21-4105, the penalty would be increased from a severity level 8, to a severity level 6, person felony;
- For criminal possession of a firearm, by a person mentally ill or with alcohol or substance abuse problem subject to involuntary commitment, KSA 21-4204, the penalty would be decreased from a severity level 8, to a severity level 9, nonperson felony;
- For unlawfully tampering with electronic monitoring equipment, KSA 21-4232, the penalty would be decreased from a severity level 6, to a severity level 8, nonperson felony;
- For cruelty to animals, KSA 21-4310, the bill would place the crime on grid as a severity level 10, nonperson felony, but it would retain the special sentencing rule. The mandatory sentences would be required to be served in county jail unless, because of the offender's criminal history, such offender would be sentenced to presumptive imprisonment. Offenders serving the mandatory sentence would be supervised by community corrections upon release;
- For inflicting harm, disability, or death on law enforcement dog, KSA 21-4318, the bill would place the crime on grid, severity level 9, nonperson felony, but it would retain the special sentencing rule. The mandatory sentences would be required to be served in county jail unless because of



the offender's criminal history, such offender would be sentenced to presumptive imprisonment. Offenders serving the mandatory sentence would be supervised by community corrections upon release;

- For sentencing and fine provisions, KSA 21-4603d, offenders who are convicted of a class A misdemeanor would be supervised by a court services officer;
- For the sentencing grid, KSA 21-4704, if criminal history and the current crime of conviction place an offender in a presumptive imprisonment border box, the bill would allow the court to impose an optional nonprison sentence to an appropriate behavior modification program, upon making certain findings on the record. The presentence investigation report by the court services officer would be required to verify the availability of the program and the adequacy of the provider of such program and the treatment or behavioral modification plan;
- For escape from custody while in state pursuant to a detainer, KSA 22-4405, the bill would place the crime on grid, at a severity level 10, nonperson felony;
- For any person required to register under the Offender Registration Act who violates the Act, KSA 22-4903, the penalty would be decreased from a severity level 5, to a severity level 9, person felony. [Also, the presumptive imprisonment penalty is eliminated];
- For alcoholic liquor in a bonded warehouse, KSA 41-405, the bill would place the crime on grid at a severity level 10, nonperson felony;
- For labor law violations, KSA 44-619, the bill would place the crime on grid at a severity level 10, nonperson felony;
- For employment security law violation, KSA 44-719, the bill would make the crime a class C nonperson misdemeanor;

- For illegal branding of livestock, KSA 47-421, the bill would place the crime on grid at a severity level 10, nonperson felony;
- For willfully violating the uniform land sales practices act, KSA 58-3315, the bill would place the crime on grid at a severity level 10, nonperson felony;
- For filing a false diploma or qualifications with the Board of Healing Arts, KSA 65-2859, the bill clarifies that the penalty would be that of forgery;
- For buying or selling a body part for transplant, KSA 65-3235, the penalty would be decreased from a severity level 5, to a severity level 8, nonperson felony;
- For financial gain, intentionally falsifying or concealing an anatomical gift document, KSA 65-3236, the penalty would increase from a severity level 10, to a severity level 8, nonperson felony;
- For a violation of the emergency planning and community right-to-know act, (hazardous chemical information) KSA 65-5709, the bill would place the crime on grid at a severity level 10, nonperson felony;
- For adulterated or misbranded meat, locker plant violations, KSA 65-6a40, the bill would place the crime on grid at a severity level 10, nonperson felony;
- For State treasury violations by the treasurer or the director of accounts and reports, KSA 75-4228, the bill would place the crime on grid at a severity level 10, nonperson felony;
- For public officer or employee who knowingly receives and converts funds without filing an oath, KSA 75-4314, the bill would place the crime on grid at a severity level 10, nonperson felony;

- For failing to pay any tax, failure to make any return, or intentionally signing a fraudulent return by a personal representative, KSA 79-15,235, the bill would place the crime on grid at a severity level 10, nonperson felony; and
- For willfully signing a fraudulent return, KSA 79-3228, the bill would place the crime on grid at a severity level 10, nonperson felony.

The bill would eliminate the follow special sentencing rules:

- The presumptive imprisonment for certain convictions of aggravated assault of a law enforcement officer, KSA 21-3411, and aggravated battery against a law enforcement officer, KSA 21-3415 [also would decrease the severity level];
- For forgery, KSA 21-3710, a third or subsequent conviction would remain a severity level 8, nonperson felony, but would be sentenced on-grid and would delete the requirement of 45 days county jail.
- For aiding a person required to register under the offender registration act, KSA 21-3812, [also, penalty decreased from a severity level 5, to a severity level 10, person felony]; and
- For violation of the provisions of the Offender Registration Act, KSA 22-4903, [also, decreased the penalty from a severity level 5, to a severity level 9, person felony].

The bill would be effective on July 1, 2010.

## **Background**

The proponents of the bill, as introduced, who presented testimony in the House Committee hearing were Professor Tom Stacy, Chairperson, Kansas Criminal Code Recodification

Commission; Tom Drees, Ellis County Attorney and Chairperson of the Kansas Sentencing Commission's Subcommittee on Proportionality; and Tom Stanton, Deputy Reno County District Attorney and President of the Kansas County and District Attorney's Association.

The opponents of the bill, as introduced, who presented testimony in the House Committee hearing were Chris Biggs, Commissioner, Kansas Securities Commission; and Jennifer Roth, Kansas Association of Criminal Defense Lawyers.

The conferees providing neutral testimony on the bill, as introduced, in the House Committee hearing were Mark Gleeson, Office of Judicial Administration; and Roger Werholtz, Secretary, Kansas Department of Corrections.

The House Committee on Judiciary amended the bill to:

- Amend the definition of "school property";
- Amend the crimes of drug distribution, drug marketing and distribution/manufacture a simulated controlled substance, to make it unlawful to conduct such activity within 450 feet of school property, current law is 1,000 feet;
- Increase the severity levels for securities fraud. A conviction for an intentional violation of KSA 17-12a501 or 17-12a502, and amendments thereto, if the violation resulted in a loss of an amount of:
  - \$1,000,000 or more is a severity level 2, nonperson felony;
  - At least \$250,000 but less than \$1,000,000 is a severity level 3, nonperson felony.;
  - At least \$100,000 but less than \$250,000 is a severity level 4, nonperson felony;

- At least \$75,000 but less than \$100,000 is a severity level 5, nonperson felony;
  - At least \$50,000 but less than \$75,000 is a severity level 6, nonperson felony;
  - At least \$25,000 but less than \$50,000 is a severity level 7, nonperson felony;
  - At least \$25,000 but less than \$1,000 is a severity level 8, nonperson felony.
- Expand the special sentencing rule if the loss resulted in \$25,000 or more, the sentence is presumed imprisonment;
  - Increase the penalty of intentional violations of certain securities fraud and failing to comply with a cease and desist order to a severity level 6, nonperson felony;
  - Delete the change to 21-3419a, aggravated criminal threat, loss of productivity to retain current law;
  - Amend domestic battery as follows:
    - A second conviction of domestic battery on probation or parole will be supervised by court services;
    - A third or subsequent conviction within five years of domestic battery and the offender is placed on probation, the supervision will be by community corrections;
    - The mandatory fine on a third or subsequent conviction is deleted;
    - Clarifies that the third and fourth convictions within five years if placed on probation, the mandatory sentence would be served in county jail, fifth or subsequent, in prison;

- On a third or subsequent conviction within five years, if the offender does not complete the behavior modification treatment program, the offender will serve the underlying prison sentence.
- Deleted the provision decreasing the level severity of aggravated kidnapping, KSA 21-3421, to retain the provision of current law making it a severity level 1, person felony;
- Deleted the requirement that any party requesting the nonprison sentence be served by attending and successfully completing a treatment or behavioral modification program to notify the court and opposing counsel 20 days prior to sentencing of the proposed program.

#### **Fiscal Note**

According to the fiscal note on the bill, as introduced, the Kansas Sentencing Commission estimates that passage of HB 2332 would require 265 to 458 additional adult prison beds in FY 2011 and 430 to 719 additional adult prison beds by FY 2020. The current capacity for male inmates is 8,473 and projections indicate that this capacity will be exceeded by the end of FY 2016. If HB 2332 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 HB 2332 contributes to an increase in the inmate population beyond this additional capacity, other expansion projects would need to be identified.

If the effect from HB 2332 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 states that the increase in the number of presumptive imprisonment border boxes would result in more assigned cases going to trial. The Board estimates that the increase in trials would require a total of \$824,000 from the State General Fund in FY 2011. The figure includes \$434,000 (seven attorneys X \$62,000 for salary and wages) for an additional public defender in each of the seven regional offices and \$390,000 for increased appointed counsel costs.

According to the Office of Judicial Administration, enactment of the bill would require all judges and court service officers to receive training on the new sentencing guidelines and new sentencing grid. The Office states that all training costs could be absorbed within existing resources. Any fiscal effect resulting from this bill has not been included in *The FY 2010 Governor's Budget Report*.