

As Amended by House Committee

Session of 2023

HOUSE BILL No. 2398

By Committee on Corrections and Juvenile Justice

2-10

1 AN ACT concerning crimes, punishment and criminal procedure; relating
2 to crimes involving controlled substances; adding the placing of
3 controlled substances into pills into the definition of manufacture;
4 **excluding materials used to detect the presence of fentanyl,**
5 **ketamine or gamma hydroxybutyric acid from the definition of**
6 **drug paraphernalia;** increasing the criminal penalties for
7 manufacturing fentanyl-related controlled substance; creating a special
8 sentencing rule for distributing fentanyl-related controlled substance;
9 amending K.S.A. 2022 Supp. 21-5701, 21-5703 and 21-6805 and
10 repealing the existing sections; also repealing K.S.A. 2022 Supp. 21-
11 5701b.

12

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

14 Section 1. K.S.A. 2022 Supp. 21-5701 is hereby amended to read as
15 follows: 21-5701. As used in K.S.A. 2022 Supp. 21-5701 through 21-
16 5717, and amendments thereto:

17 (a) "Controlled substance" means any drug, substance or immediate
18 precursor included in any of the schedules designated in K.S.A. 65-4105,
19 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

20 (b) (1) "Controlled substance analog" means a substance that is
21 intended for human consumption, and at least one of the following:

22 (A) The chemical structure of the substance is substantially similar to
23 the chemical structure of a controlled substance listed in or added to the
24 schedules designated in K.S.A. 65-4105 or 65-4107, and amendments
25 thereto;

26 (B) the substance has a stimulant, depressant or hallucinogenic effect
27 on the central nervous system substantially similar to the stimulant,
28 depressant or hallucinogenic effect on the central nervous system of a
29 controlled substance included in the schedules designated in K.S.A. 65-
30 4105 or 65-4107, and amendments thereto; or

31 (C) with respect to a particular individual, such individual represents
32 or intends the substance to have a stimulant, depressant or hallucinogenic
33 effect on the central nervous system substantially similar to the stimulant,
34 depressant or hallucinogenic effect on the central nervous system of a
35 controlled substance included in the schedules designated in K.S.A. 65-
36 4105 or 65-4107, and amendments thereto.

1 (2) "Controlled substance analog" does not include:

2 (A) A controlled substance;

3 (B) a substance for which there is an approved new drug application;

4 or

5 (C) a substance with respect to which an exemption is in effect for
6 investigational use by a particular person under section 505 of the federal
7 food, drug, and cosmetic act, 21 U.S.C. § 355, to the extent conduct with
8 respect to the substance is permitted by the exemption.

9 (c) "Cultivate" means the planting or promotion of growth of five or
10 more plants that contain or can produce controlled substances.

11 (d) "Distribute" means the actual, constructive or attempted transfer
12 from one person to another of some item whether or not there is an agency
13 relationship. "Distribute" includes, but is not limited to, sale, offer for sale
14 or any act that causes some item to be transferred from one person to
15 another. "Distribute" does not include acts of administering, dispensing or
16 prescribing a controlled substance as authorized by the pharmacy act of the
17 state of Kansas, the uniform controlled substances act or otherwise
18 authorized by law.

19 (e) (1) "Drug" means:

20 (A) Substances recognized as drugs in the official United States
21 pharmacopeia, official homeopathic pharmacopoeia of the United States or
22 official national formulary or any supplement to any of them;

23 (B) substances intended for use in the diagnosis, cure, mitigation,
24 treatment or prevention of disease in humans or animals;

25 (C) substances, other than food, intended to affect the structure or any
26 function of the body of humans or animals; and

27 (D) substances intended for use as a component of any article
28 specified in subparagraph (A), (B) or (C).

29 (2) "Drug" does not include devices or their components, parts or
30 accessories.

31 (f) (1) "Drug paraphernalia" means all equipment and materials of
32 any kind that are used, or primarily intended or designed for use in
33 planting, propagating, cultivating, growing, harvesting, manufacturing,
34 compounding, converting, producing, processing, preparing, testing,
35 analyzing, packaging, repackaging, storing, containing, concealing,
36 injecting, ingesting, inhaling or otherwise introducing into the human body
37 a controlled substance and in violation of this act.

38 (2) "Drug paraphernalia" ~~shall include~~ **includes**, but is not limited to:

39 ~~(A)~~ (A) Kits used or intended for use in planting, propagating,
40 cultivating, growing or harvesting any species of plant that is a controlled
41 substance or from which a controlled substance can be derived;

42 ~~(B)~~ (B) kits used or intended for use in manufacturing, compounding,
43 converting, producing, processing or preparing controlled substances;

- 1 (3)(C) isomerization devices used or intended for use in increasing
2 the potency of any species of plant that is a controlled substance;
- 3 (4)(D) testing equipment used or intended for use in identifying or in
4 analyzing the strength, effectiveness or purity of controlled substances;
- 5 (5)(E) scales and balances used or intended for use in weighing or
6 measuring controlled substances;
- 7 (6)(F) diluents and adulterants, including, but not limited to, quinine
8 hydrochloride, mannitol, mannite, dextrose and lactose that are used or
9 intended for use in cutting controlled substances;
- 10 (7)(G) separation gins and sifters used or intended for use in
11 removing twigs and seeds from or otherwise cleaning or refining
12 marijuana;
- 13 (8)(H) blenders, bowls, containers, spoons and mixing devices used
14 or intended for use in compounding controlled substances;
- 15 (9)(I) capsules, balloons, envelopes, bags and other containers used or
16 intended for use in packaging small quantities of controlled substances;
- 17 (10)(J) containers and other objects used or intended for use in
18 storing or concealing controlled substances;
- 19 (11)(K) hypodermic syringes, needles and other objects used or
20 intended for use in parenterally injecting controlled substances into the
21 human body;
- 22 (12)(L) objects used or primarily intended or designed for use in
23 ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish,
24 hashish oil, phencyclidine (PCP), methamphetamine or amphetamine into
25 the human body, such as:
- 26 (A)(i) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes
27 with or without screens, permanent screens, hashish heads or punctured
28 metal bowls;
- 29 (B)(ii) water pipes, bongs or smoking pipes designed to draw smoke
30 through water or another cooling device;
- 31 (C)(iii) carburetion pipes, glass or other ~~heat-resistant~~ *heat-resistant*
32 tubes or any other device used, intended to be used or designed to be used
33 to cause vaporization of a controlled substance for inhalation;
- 34 (D)(iv) smoking and carburetion masks;
- 35 (E)(v) roach clips, objects used to hold burning material, such as a
36 marijuana cigarette, that has become too small or too short to be held in
37 the hand;
- 38 (F)(vi) miniature cocaine spoons and cocaine vials;
- 39 (G)(vii) chamber smoking pipes;
- 40 (H)(viii) carburetor smoking pipes;
- 41 (I)(ix) electric smoking pipes;
- 42 (J)(x) air-driven smoking pipes;
- 43 (K)(xi) chillums;

1 ~~(L)~~(xii) bongs;
2 ~~(M)~~(xiii) ice pipes or chillers;
3 ~~(N)~~(xiv) any smoking pipe manufactured to disguise its intended
4 purpose;

5 ~~(O)~~(xv) wired cigarette papers; or

6 ~~(P)~~(xvi) cocaine freebase kits.

7 ~~(2)~~**(3)** "Drug paraphernalia" ~~shall~~ does not include:

8 **(A)** Any products, chemicals or materials described in K.S.A. 2022
9 Supp. 21-5709(a), and amendments thereto; **or**

10 **(B) any materials used or intended for use to test a substance for**
11 **the presence of fentanyl, a fentanyl analog, ketamine or gamma**
12 **hydroxybutyric acid.**

13 (g) "*Fentanyl-related controlled substance*" means any substance
14 designated in K.S.A. 65-4105(b)(1), (b)(2), (b)(4), (b)(10), (b)(11), (b)(14),
15 (b)(15), (b)(16), (b)(20), (b)(22), (b)(23), (b)(24), (b)(37), (b)(41), (b)(45),
16 (b)(46), (b)(47), (b)(49), (b)(57), (b)(58), (b)(59), (b)(60), (b)(61), (b)(62),
17 (b)(73), (b)(74), (b)(78), (g)(1) or (g)(2) or 65-4107(c)(1), (c)(6), (c)(9),
18 (c)(26), (c)(28), (c)(30), (f)(3)(A) or (f)(3)(B), and amendments thereto, or
19 any analog thereof.

20 (h) "Immediate precursor" means a substance that the state board of
21 pharmacy has found to be and by rules and regulations designates as being
22 the principal compound commonly used or produced primarily for use and
23 that is an immediate chemical intermediary used or likely to be used in the
24 manufacture of a controlled substance, the control of which is necessary to
25 prevent, curtail or limit manufacture.

26 ~~(h)~~(i) "Isomer" means all enantiomers and diastereomers.

27 ~~(i)~~(j) "Manufacture" means the production, preparation, propagation,
28 compounding, conversion or processing of *or placing into pill or capsule*
29 *form* a controlled substance either directly or indirectly or by extraction
30 from substances of natural origin or independently by means of chemical
31 synthesis or by a combination of extraction and chemical synthesis.

32 "Manufacture" does not include:

33 (1) The preparation or compounding of a controlled substance by an
34 individual for the individual's own lawful use or the preparation,
35 compounding, packaging or labeling of a controlled substance:

36 **(A)** By a practitioner or the practitioner's agent pursuant to a lawful
37 order of a practitioner as an incident to the practitioner's administering or
38 dispensing of a controlled substance in the course of the practitioner's
39 professional practice; or

40 **(B)** by a practitioner or by the practitioner's authorized agent under
41 such practitioner's supervision for the purpose of or as an incident to
42 research, teaching or chemical analysis or by a pharmacist or medical care
43 facility as an incident to dispensing of a controlled substance; or

1 (2) the addition of diluents or adulterants, including, but not limited
2 to, quinine hydrochloride, mannitol, mannite, dextrose or lactose that are
3 intended for use in cutting a controlled substance.

4 ~~(j)~~(k) "Marijuana" means all parts of all varieties of the plant
5 Cannabis whether growing or not, the seeds thereof, the resin extracted
6 from any part of the plant and every compound, manufacture, salt,
7 derivative, mixture or preparation of the plant, its seeds or resin.
8 "Marijuana" does not include:

9 (1) The mature stalks of the plant, fiber produced from the stalks, oil
10 or cake made from the seeds of the plant, any other compound,
11 manufacture, salt, derivative, mixture or preparation of the mature stalks,
12 except the resin extracted therefrom, fiber, oil or cake or the sterilized seed
13 of the plant that is incapable of germination;

14 (2) any substance listed in schedules II through V of the uniform
15 controlled substances act;

16 (3) drug products approved by the United States food and drug
17 administration as of the effective date of this act;

18 (4) cannabidiol (other trade name: 2-[(3-methyl-6-(1-methylethenyl)-
19 2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol); or

20 (5) industrial hemp as defined in K.S.A. 2-3901, and amendments
21 thereto, when cultivated, produced, possessed or used for activities
22 authorized by the commercial industrial hemp act.

23 ~~(k)~~(l) "Minor" means a person under 18 years of age.

24 ~~(l)~~(m) "Narcotic drug" means any of the following whether produced
25 directly or indirectly by extraction from substances of vegetable origin or
26 independently by means of chemical synthesis or by a combination of
27 extraction and chemical synthesis:

28 (1) Opium and opiate and any salt, compound, derivative or
29 preparation of opium or opiate;

30 (2) any salt, compound, isomer, derivative or preparation thereof that
31 is chemically equivalent or identical with any of the substances referred to
32 in paragraph (1) but not including the isoquinoline alkaloids of opium;

33 (3) opium poppy and poppy straw;

34 (4) coca leaves and any salt, compound, derivative or preparation of
35 coca leaves and any salt, compound, isomer, derivative or preparation
36 thereof that is chemically equivalent or identical with any of these
37 substances, but not including decocainized coca leaves or extractions of
38 coca leaves that do not contain cocaine or ecgonine.

39 ~~(m)~~(n) "Opiate" means any substance having an addiction-forming or
40 addiction-sustaining liability similar to morphine or being capable of
41 conversion into a drug having addiction-forming or addiction-sustaining
42 liability. "Opiate" does not include, unless specifically designated as
43 controlled under K.S.A. 65-4102, and amendments thereto, the

1 dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts
2 (dextromethorphan). "Opiate" does include its racemic and levorotatory
3 forms.

4 ~~(n)~~(o) "Opium poppy" means the plant of the species *Papaver*
5 *somniferum* L. except its seeds.

6 ~~(o)~~(p) "Person" means an individual, corporation, government or
7 governmental subdivision or agency, business trust, estate, trust,
8 partnership, association or any other legal entity.

9 ~~(p)~~(q) "Poppy straw" means all parts, except the seeds, of the opium
10 poppy, after mowing.

11 ~~(q)~~ "Possession" means having joint or exclusive control over an item
12 with knowledge of and intent to have such control or knowingly keeping
13 some item in a place where the person has some measure of access and
14 right of control.

15 (r) "School property" means property upon which is located a
16 structure used by a unified school district or an accredited nonpublic
17 school for student instruction or attendance or extracurricular activities of
18 pupils enrolled in kindergarten or any of the grades one through 12. This
19 definition shall not be construed as requiring that school be in session or
20 that classes are actually being held at the time of the offense or that
21 children must be present within the structure or on the property during the
22 time of any alleged criminal act. If the structure or property meets the
23 above definition, the actual use of that structure or property at the time
24 alleged shall not be a defense to the crime charged or the sentence
25 imposed.

26 (s) "Simulated controlled substance" means any product that
27 identifies itself by a common name or slang term associated with a
28 controlled substance and that indicates on its label or accompanying
29 promotional material that the product simulates the effect of a controlled
30 substance.

31 Sec. 2. K.S.A. 2022 Supp. 21-5703 is hereby amended to read as
32 follows: 21-5703. (a) It shall be unlawful for any person to manufacture
33 any controlled substance or controlled substance analog.

34 (b) Violation or attempted violation of subsection (a) is a:

35 (1) Drug severity level 2 felony, except as provided in subsections (b)
36 (2) and (b)(3);

37 (2) drug severity level 1 felony if:

38 (A) The controlled substance is not methamphetamine, as defined by
39 ~~subsection (d)(3) or (f)(1) of K.S.A. 65-4107(d)(3) or (f)(1), and~~
40 amendments thereto, or an analog thereof; ~~and~~

41 (B) *the controlled substance is not a fentanyl-related controlled*
42 *substance; and*

43 (C) the offender has a prior conviction for unlawful manufacturing of

1 a controlled substance under this section, K.S.A. 65-4159, prior to its
2 repeal, K.S.A. 2010 Supp. 21-36a03, prior to its transfer, or a substantially
3 similar offense from another jurisdiction and the substance was not
4 methamphetamine, as defined by ~~subsection (d)(3) or (f)(1)~~ of K.S.A. 65-
5 4107(d)(3) or (f)(1), and amendments thereto, or an analog thereof, in any
6 such prior conviction; and

7 (3) drug severity level 1 felony if the controlled substance is
8 methamphetamine, as defined by ~~subsection (d)(3) or (f)(1)~~ of K.S.A. 65-
9 4107(d)(3) or (f)(1), and amendments thereto, or an analog thereof, *or is a*
10 *fentanyl-related controlled substance*.

11 (c) The provisions of ~~subsection (d)~~ of K.S.A. 2022 Supp. 21-
12 5301(d), and amendments thereto, shall not apply to a violation of
13 attempting to unlawfully manufacture any controlled substance or
14 controlled substance analog pursuant to this section.

15 (d) For persons arrested and charged under this section, bail shall be
16 at least \$50,000 cash or surety, and such person shall not be released upon
17 the person's own recognizance pursuant to K.S.A. 22-2802, and
18 amendments thereto, unless the court determines, on the record, that the
19 defendant is not likely to re-offend, the court imposes pretrial supervision,
20 or the defendant agrees to participate in a licensed or certified drug
21 treatment program.

22 (e) The sentence of a person who violates this section shall not be
23 subject to statutory provisions for suspended sentence, community service
24 work or probation.

25 (f) The sentence of a person who violates this section, K.S.A. 65-
26 4159, prior to its repeal or K.S.A. 2010 Supp. 21-36a03, prior to its
27 transfer, shall not be reduced because these sections prohibit conduct
28 identical to that prohibited by K.S.A. 65-4161 or 65-4163, prior to their
29 repeal, K.S.A. 2010 Supp. 21-36a05, prior to its transfer, or K.S.A. 2022
30 Supp. 21-5705, and amendments thereto.

31 Sec. 3. K.S.A. 2022 Supp. 21-6805 is hereby amended to read as
32 follows: 21-6805. (a) The provisions of this section shall be applicable to
33 the sentencing guidelines grid for drug crimes. The following sentencing
34 guidelines grid for drug crimes shall be applicable to felony crimes under
35 K.S.A. 2022 Supp. 21-5701 through 21-5717, and amendments thereto,
36 except as otherwise provided by law:

SENTENCING RANGE - DRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2+ Misdemeanors	1 Misdemeanor No Record
I	204 194 196 185	186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
V	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

LEGEND
Presumptive Probation
Presumptive Imprisonment

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(b) Sentences expressed in the sentencing guidelines grid for drug crimes in subsection (a) represent months of imprisonment.

(c) (1) The sentencing court has discretion to sentence at any place within the sentencing range. In the usual case it is recommended that the sentencing judge select the center of the range and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure. The sentencing court shall not distinguish between the controlled substances cocaine base (9041L000) and cocaine hydrochloride (9041L005) when sentencing within the sentencing range of the grid block.

(2) In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the:

(A) Prison sentence;

(B) maximum potential reduction to such sentence as a result of good time; and

(C) period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision shall not negate the existence of such period of postrelease supervision.

(3) In presumptive nonprison cases, the sentencing court shall pronounce the prison sentence as well as the duration of the nonprison sanction at the sentencing hearing.

(d) Each grid block states the presumptive sentencing range for an offender whose crime of conviction and criminal history place such offender in that grid block. If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. If an offense is classified in grid blocks 4-E, 4-F, 4-G, 4-H, 4-I, 5-C or 5-D, the court may impose an optional nonprison sentence as provided in ~~subsection (q) of K.S.A. 2022 Supp. 21-6804(q)~~, and amendments thereto.

(e) The sentence for a second or subsequent conviction for unlawful manufacturing of a controlled substance, K.S.A. 65-4159, prior to its repeal, K.S.A. 2010 Supp. 21-36a03, prior to its transfer, K.S.A. 2022 Supp. 21-5703, and amendments thereto, or a substantially similar offense from another jurisdiction, if the controlled substance in any prior conviction was methamphetamine, as defined by ~~subsection (d)(3) or (f)(1) of K.S.A. 65-4107(d)(3) or (f)(1)~~, and amendments thereto, or an analog thereof, shall be a presumptive term of imprisonment of two times the maximum duration of the presumptive term of imprisonment. The court may impose an optional reduction in

1 such sentence of not to exceed 50% of the mandatory increase provided
2 by this subsection upon making a finding on the record that one or
3 more of the mitigating factors as specified in K.S.A. 2022 Supp. 21-
4 6815, and amendments thereto, justify such a reduction in sentence.
5 Any decision made by the court regarding the reduction in such
6 sentence shall not be considered a departure and shall not be subject to
7 appeal.

8 (f) (1) The sentence for a third or subsequent felony conviction of
9 K.S.A. 65-4160 or 65-4162, prior to their repeal, K.S.A. 2010 Supp.
10 21-36a06, prior to its transfer, or K.S.A. 2022 Supp. 21-5706, and
11 amendments thereto, shall be a presumptive term of imprisonment and
12 the defendant shall be sentenced to prison as provided by this section.
13 The defendant's term of imprisonment shall be served in the custody of
14 the secretary of corrections in a facility designated by the secretary.
15 Subject to appropriations therefore, the defendant shall participate in an
16 intensive substance abuse treatment program, of at least four months
17 duration, selected by the secretary of corrections. If the secretary
18 determines that substance abuse treatment resources are otherwise
19 available, such term of imprisonment may be served in a facility
20 designated by the secretary of corrections in the custody of the
21 secretary of corrections to participate in an intensive substance abuse
22 treatment program. The secretary's determination regarding the
23 availability of treatment resources shall not be subject to review. Upon
24 the successful completion of such intensive treatment program, the
25 offender shall be returned to the court and the court may modify the
26 sentence by directing that a less severe penalty be imposed in lieu of
27 that originally adjudged. If the offender's term of imprisonment expires,
28 the offender shall be placed under the applicable period of postrelease
29 supervision.

30 (2) Such defendant's term of imprisonment shall not be subject to
31 modification under paragraph (1) if:

32 (A) The defendant has previously completed a certified drug abuse
33 treatment program, as provided in K.S.A. 75-52,144, and amendments
34 thereto;

35 (B) has been discharged or refused to participate in a certified
36 drug abuse treatment program, as provided in K.S.A. 75-52,144, and
37 amendments thereto;

38 (C) has completed an intensive substance abuse treatment program
39 under paragraph (1); or

40 (D) has been discharged or refused to participate in an intensive
41 substance abuse treatment program under paragraph (1).

42 The sentence under this subsection shall not be considered a
43 departure and shall not be subject to appeal.

1 (g) (1) Except as provided further, if the trier of fact makes a
2 finding that an offender carried a firearm to commit a drug felony, or in
3 furtherance of a drug felony, possessed a firearm, in addition to the
4 sentence imposed pursuant to K.S.A. 2022 Supp. 21-6801 through 21-
5 6824, and amendments thereto, the offender shall be sentenced to:

6 (A) Except as provided in subsection (g)(1)(B), an additional 6
7 months' imprisonment; and

8 (B) if the trier of fact makes a finding that the firearm was
9 discharged, an additional 18 months' imprisonment.

10 (2) The sentence imposed pursuant to subsection (g)(1) shall be
11 presumptive imprisonment. Such sentence shall not be considered a
12 departure and shall not be subject to appeal.

13 (3) The provisions of this subsection shall not apply to violations
14 of K.S.A. 2022 Supp. 21-5706 or 21-5713, and amendments thereto.

15 *(h) The sentence for a violation of K.S.A. 2022 Supp. 21-5703,*
16 *and amendments thereto, with respect to material containing any*
17 *quantity of a fentanyl-related controlled substance shall be presumed*
18 *imprisonment and shall be two times the maximum duration of the*
19 *presumptive term of imprisonment. Such sentence shall not be*
20 *considered a departure and shall not be subject to appeal.*

21 Sec. 4. K.S.A. 2022 Supp. 21-5701, 21-5701b, 21-5703 and 21-
22 6805 are hereby repealed.

23 Sec. 5. This act shall take effect and be in force from and after its
24 publication in the statute book.