

SESSION OF 2012

**SUPPLEMENTAL NOTE ON SENATE SUBSTITUTE FOR  
SUBSTITUTE FOR HOUSE BILL NO. 2318**

As Amended by Senate Committee of the Whole

**Brief\***

Senate Sub. for Sub. for HB 2318 would amend several statutes concerning drug crimes, electronic prescriptions, the Prescription Monitoring Program, and the criminal code.

**Drug Crimes**

The bill would adopt a new drug sentencing grid with five levels. The grid would add a new severity level 2 with penalties falling between the current first and second levels of the drug grid. The grid also would expand the presumptive probation boxes to include levels 5-C and 5-D (formerly levels 4-C and 4-D), which would make offenders convicted of certain level 5 crimes (formerly level 4 crimes) eligible for sentences of presumptive probation and certified drug abuse treatment.

The bill would specify that offenders assigned a high risk status, as determined by a drug abuse assessment, and a moderate or high risk status, as determined by the criminal risk-need assessment would be committed to a drug-abuse treatment program. Offenders so committed would be supervised by community correctional services. Otherwise, based on the result of the criminal risk assessment, they would be supervised either by community correctional services or court services.

The border boxes also would be expanded to include

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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>

levels 4-C and 4-D (formerly levels 3-C and 3-D), which would allow the imposition of optional non-prison sentences for certain level 4 offenses (formerly level 3 offenses).

The bill also would make several changes to the statutes governing drug crimes. Specifically, the bill would delete the packaging or repackaging of a substance or labeling or relabeling its container from the definition of "manufacture," and clarify that it does not include the addition of dilutants or adulterants.

Next, it would amend as follows the severity levels for a violation of KSA 21-5703, manufacture or attempted manufacture of a controlled substance or controlled substance analog:

- Change a violation from a drug severity level 1 felony to a drug severity level 2 felony for a first conviction; a second or subsequent conviction for manufacture would be a drug severity level 1 felony; and
- Specify that manufacture of methamphetamine would remain a drug severity level 1 felony.

In KSA 21-5705, the bill would impose new felony classifications on the drug grid, based on quantity, for the crimes of distribution or possession with the intent to distribute the drugs listed in subsection (a) as follows:

- Less than 3.5 grams, severity level 4;
- At least 3.5 grams but less than 100 grams, severity level 3;
- At least 100 grams but less than 1 kilogram, severity level 2; and

- 1 kilogram or more, severity level 1.

The bill would create exceptions to these penalties, as follows:

- Violations involving marijuana would have the following felony classifications on the drug grid based on quantity:
  - Less than 25 grams, severity level 4;
  - At least 25 grams but less than 450 grams, severity level 3;
  - At least 450 grams but less than 30 kilograms, severity level 2; and
  - 30 kilograms or more, severity level 1 felony.
- Violations involving heroin or methamphetamine would have the following felony classifications on the drug grid based on quantity:
  - Less than 1 gram, severity level 4;
  - At least 1 gram but less than 3.5 grams, severity level 3;
  - At least 3.5 grams but less than 100 grams, severity level 2; or
  - 100 grams or more, severity level 1.
- Violations involving substances outlined in KSA 65-4105, 65-4107, 65-4109, or 65-4111 (schedules I-IV) would have the following felony classifications on the drug grid based on quantity:

- Fewer than 10 dosage units, severity level 4;
  - At least 10 dosage units but less than 100 dosage units, severity level 3;
  - At least 100 dosage units but less than 1,000 dosage units, severity level 2; and
  - 1,000 dosage units or more, severity level 1.
- Violations occurring within 1,000 feet of any school property would increase the severity level by 1 level.

The crime of distribution or possession with the intent to distribute controlled substance listed in schedule V would be a class A person misdemeanor, except that if distributed to or possessed with the intent to distribute to a minor, it would be a nondrug severity level 7, person felony.

Cultivation of a controlled substance listed in subsection (a) would have the following felony classifications on the drug grid based on the number of plants cultivated:

- More than 4, but fewer than 50, severity level 3;
- At least 50, but fewer than 100, severity level 2; or
- 100 or more, severity level 1.

A rebuttable presumption of intent to distribute would be created for possession of the following amounts of controlled substances:

- 450 grams or more of marijuana;
- 3.5 grams or more of heroin or methamphetamine;

- 100 dosage units or more containing a controlled substance listed by statute in the Uniform Controlled Substances Act; or
- 100 grams or more of any other controlled substance listed under the Act.

The bill also would amend KSA 21-5705 to bar the use of certain defenses and define some key terms.

In KSA 21-5710, the subsections with enhanced penalties for distribution or causing paraphernalia to be distributed to a minor on or within 1,000 feet of any school property would be amended to strike the requirement that the offender be 18 or older.

The bill would amend KSA 21-5714 to clarify that a person prosecuted for the distribution or possession with the intent to distribute a noncontrolled substance as a controlled substance also could be prosecuted for, convicted of, and punished for theft.

In KSA 21-5716, concerning crimes involving proceeds derived from the commission of any drug crime, the severity level of crimes involving proceeds of \$100,000-\$500,000, would be amended to raise the severity level for proceeds of \$100,000-\$250,000, from a level 2 to a level 3, due to the adoption of the five-level grid. For proceeds of \$250,000-\$500,000, the severity level would remain a level 2.

## **Electronic Prescriptions**

### ***Definitions***

The bill would add the following key definitions, generally found in federal regulations related to electronic orders of controlled substances and electronic prescriptions for controlled substances to the Pharmacy Act and the Uniform Controlled Substances Act:

- An "electronic prescription" would be electronically prepared and authorized and transmitted from the prescriber to the pharmacy using electronic transmission;
- A "pharmacist intern" would be defined to include a pharmacy student, a pharmacy resident, or a foreign pharmacist graduate;
- A "prescriber" would include a practitioner or a mid-level practitioner; and
- A "valid prescription order" would require the prescription to be issued for a legitimate medical purpose by an individual licensed prescriber acting within such prescriber's scope of practice. Prescriptions issued without an appropriate prescriber-patient relationship, but rather issued only on an internet-based questionnaire or consultation, would not be valid.

Other definitions, which also would be added and are based on federal regulations related to electronic orders and electronic prescriptions of controlled substances, include: "application service provider," "Drug Enforcement Agency (DEA)," "electronic prescription application," "electronic signature," "electronically prepared prescription," "facsimile transmission," "intermediary," "pharmacy prescription application," and "readily retrievable."

The following definitions would be expanded by the bill:

- Electronic transmission is defined and distinguished from a facsimile transmission;
- The definition of "pharmacist" would be expanded in the Uniform Controlled Substances Act to mirror the definition in the Pharmacy Act; and
- Prescription or prescription order would be combined as one definition to clarify no distinction is made with regard to the manner in which the prescription is communicated.

Some definitions which appear to have been added are in current law, but would be moved to re-alphabetize the definitions within the Acts.

#### ***Writing, Filling, Refilling and Recording of Prescriptions Under the Pharmacy Act***

Further, the bill would move most of the language found in KSA 2011 Supp. 65-1637 related to the writing, filling, refilling, and recording of prescriptions to a new section, thereby placing all language referring to such current practices together. New language would be added to incorporate requirements pertaining to electronic prescribing of controlled substances found in federal law as follows.

#### ***Validity of Prescriptions***

A valid prescription would need to meet the following requirements:

- Pharmacists must exercise professional judgment regarding the accuracy, validity, and authenticity of any prescription order consistent with federal and state laws and rules and regulations;

- A pharmacist would be prohibited from dispensing a prescription drug, if a pharmacist exercising professional judgment determines a prescription is not a valid prescription order;
- The prescriber may authorize an agent to transmit to the pharmacy a prescription order orally, by fax, or by electronic transmission with the first and last name of the transmitting agent included;
- A new written or electronic prescription must be signed manually or electronically by the prescriber and include the first and last name of the transmitting agent;
- A prescription for a controlled substance which is written or printed from an electronic prescription application must be signed by the prescriber manually prior to the delivery of the prescription to the patient or prior to the facsimile transmission to the pharmacy; and
- An electronically prepared prescription cannot be electronically transmitted if it has been printed prior to transmission and, if the prescription is printed after electronic transmission, must be clearly labeled as a copy and is not valid for dispensing.

### ***Electronic Transmission Study***

The State Board of Pharmacy would be required to conduct a study on electronic transmission of prior authorization and step therapy protocols to be completed and submitted to the Legislature by January 15, 2013. The Board also would be authorized to conduct pilot projects related to any new technology implementation when necessary and practicable.

### ***Filling or Refilling of Prescription Orders***

A refill is defined as one or more dispensings of a prescription drug or device resulting in the patient's receipt of a single fill as per the prescription and as authorized by the prescriber. In order to fill or refill a prescription, the following conditions would need to be met:

- When refilling a prescription or renewing or continuing a drug therapy, an authorization may be transmitted orally, in writing, by fax, or by electronic means initiated by or directed by the prescriber;
- The prescriber's signature is not required on a fax or alternate electronic transmission when the first and last name of the prescriber's agent making the transmission is provided;
- Any refill order or renewal order which differs from an original order must be signed by the prescriber, unless transmitted by fax or electronically by the prescriber's agent and the first and last name of such agent is provided;
- Only pharmacists or pharmacy interns are authorized to receive a new order;
- A pharmacist, pharmacist intern or a registered pharmacy technician (if authorized to do so by the supervising pharmacist) may receive a refill or renewal order;
- No more than 12 refills within 18 months of the issuance of the prescription may be authorized for a prescription drug or device which is not a controlled substance; and
- Prescriptions for Schedule III, IV, or V controlled substances would be limited to five refills within six months of the issuance of the prescription.

## **Prescription Monitoring Program (PMP) Act**

The Board of Pharmacy (Board) would be authorized, for the purpose of furthering the PMP Act, to apply for and accept grants and to accept any donation, gift or bequest. All moneys received by the Board would be submitted for deposit in the state treasury to the credit of the Non-federal Gifts and Grants Fund of the Board.

The bill would replace the Kansas Health Policy Authority (KHPA) with the Kansas Department of Health and Environment (KDHE) as the entity authorized to obtain PMP information regarding authorized Medicaid program recipients, as necessitated by the passage of Executive Reorganization Order No. 38 in 2011 which reorganized KHPA into the Division of Health Care Finance within KDHE.

The bill also would allow access to PMP data to two new categories of persons. Prescribers and dispensers would be allowed access to the data when an individual appears to be obtaining prescriptions for the misuse, abuse or diversion of scheduled substances or drugs of concern. The Board also would be able to provide information to medical examiners, coroners or other persons authorized by law to investigate or determine causes of death.

### ***PMP Monitoring Program Advisory Committee Review***

The PMP Monitoring Program Advisory Committee would review and analyze PMP data to identify patterns and activity of concern. When individuals were suspected of obtaining prescriptions indicating misuse or abuse of controlled substances, the Advisory Committee could contact the prescribers and dispensers. If the individuals were suspected of criminal activity, the Advisory Committee could notify the appropriate law enforcement agency.

If the PMP information appears to indicate the occurrence of a violation on the part of a prescriber or

dispenser in prescribing controlled substances or drugs of concern inconsistent with recognized standards of care for the profession, the Advisory Committee would determine if a report to the appropriate professional licensing, certification or regulatory agencies or law enforcement agency would be warranted.

The Advisory Committee would consult with appropriate regulatory agencies and professional organizations to establish criteria for standards and would utilize volunteer peer review committees to create such standards and to review individual prescriber or dispenser cases. The volunteer peer review committees would have authority to request and receive information in the PMP database from the PMP Director. If referral to a regulatory or law enforcement agency would not be warranted, the Advisory Committee could refer prescribers or dispensers to educational or professional advising, as appropriate.

#### ***Penalty for Unauthorized Access to PMP Information***

An unauthorized person who knowingly obtains or attempts to obtain prescription monitoring information would be guilty of a severity level 10, nonperson felony.

#### **Dispensing Under the Controlled Substances Act**

Controlled substances would be dispensed with the following changes:

- Except when dispensed by a practitioner, other than a pharmacy, to the ultimate user, Schedule II controlled substances would not be allowed to be dispensed unless a practitioner or mid-level practitioner provides a written or electronic prescription. In emergency situations, Schedule II substances could be dispensed upon an oral order

if reduced promptly to writing or transmitted electronically and filled by the pharmacy; and

- Except when dispensed by a practitioner, other than a pharmacy, to the ultimate user, Schedule V drugs, which also are prescription drugs, would be added to Schedule III and IV drugs which could only be dispensed when a paper prescription is manually signed by the prescriber, a facsimile of a manually signed paper prescription is transmitted by the prescriber or the agent, an electronic prescription is digitally signed by a prescriber with a digital certificate, or an oral prescription is made by an individual prescriber and promptly reduced to writing.

A controlled substance could not be distributed or dispensed except by a valid prescription order as defined in this Act.

### **Retention of Prescription Record under the Controlled Substances Act**

The bill would provide for electronic prescriptions to be retained electronically for five years and require the record to be readily retrievable into a format a person could read. Paper, oral, and fax prescriptions would be maintained as a hard copy for five years at the registered location.

### **Criminal Code Amendments**

SB 308 would amend various sections of the Kansas Criminal Code, as recodified by 2010 Session Laws ch. 136. The bill would:

- Create the crime of "endangerment," defined as recklessly exposing another person to a danger of great bodily harm or death. Endangerment would be a class A person misdemeanor;

- Amend the statute governing multiple prosecutions for the same act and lesser-included crimes to add language establishing that a defendant may not be convicted of identical offenses based upon the same conduct, the prosecution may choose which such offense to charge, and, upon conviction, the defendant shall be sentenced according to the charged offense;
- Amend the conspiracy statute to allow the unilateral theory of conspiracy, which does not require the other person(s) with whom the defendant conspired to have the actual intent to commit the underlying crime, provided the defendant believed the other person(s) to have such intent;
- Add abandonment of a child and aggravated abandonment of a child to the list of inherently dangerous felonies in the statute governing first degree murder.
- Amend KSA 2011 Supp. 21-5426, governing human trafficking, so current subsection (b)(2) would no longer be a stand-alone means of committing aggravated human trafficking. Instead, the act would have to first meet the definition of human trafficking;
- Increase the severity level for the crime of incest from a severity level 5, person felony to a severity level 3, person felony if the victim is the offender's biological, step, or adoptive child;
- Expand the crime of unlawful use of recordings to include possession of recordings by a person knowing or having reasonable grounds to know the article was produced in violation of law, which would be a class B nonperson misdemeanor;

- Replace "sexual battery" with "sexually motivated crime" in the burglary statute;
- Expand the crime of interference with law enforcement to include falsely reporting to a law enforcement officer or state investigative agency any known false information with intent to influence, impede, or obstruct an officer or agency's duty, or concealing, destroying, or materially altering evidence with intent to prevent or hinder the apprehension or prosecution of any person;
- Expand the crime of interference with the judicial process to include materially altering evidence of a crime or concealing, destroying, or materially altering evidence with the intent to influence, impede, or obstruct any proceeding, civil or criminal;
- Clarify the culpability standard for the crime of simulating legal process;
- Amend the crime of escape from custody to include escaping while held under arrest without a written charge;
- Amend the bribery statute to add a *quid pro quo* requirement, include the omission of performance of a public duty, and clarify that a public official may accept some gifts consistent with state ethics laws;
- Amend the statute prohibiting smoking in enclosed areas or at public meetings to make it a "strict liability" infraction. Because the current statute has no explicit culpability standard, the general recodification culpability standard of recklessness would apply.

Similarly, the bill would amend other smoking provisions to clarify the culpability requirements for

smoking where prohibited (strict liability), allowing smoking where prohibited (recklessness), and taking adverse action for reporting or attempting to prosecute a violation of the smoking prohibition (intent to retaliate);

- Amend the criminal disposal of explosives statute to clarify that the action must be taken without lawful authority and that ignorance of the age of the recipient is irrelevant. The severity level of carrying concealed explosives is increased from a class C to a class A person misdemeanor;
- Amend the cruelty to animals statute to eliminate a requirement that a county or district attorney file charges when a valid complaint is filed;
- Remove the use of living rabbits or chickens, ducklings, or goslings as an advertising device or promotion display from the definition of unlawful disposition of animals; and
- Amend the statute governing sentencing in multiple conviction cases to allow a judge to consider the need to impose an overall sentence that is proportionate to the harm and culpability in determining whether sentences should be served concurrently or consecutively. It also would give a judge discretion to impose an entire consecutive sentence or a part of such sentence.

## **Background**

HB 2318, as introduced, was based on the recommendations of the Kansas Judicial Council's Criminal Advisory Committee. In the House Committee on Corrections and Juvenile Justice, representatives of the Kansas County and District Attorneys Association and the Kansas Judicial Council's Criminal Advisory Committee appeared in support of the bill.

The House Committee on Corrections and Juvenile Justice adopted a substitute bill incorporating changes required due to the adoption of a five level drug grid, which was recommended by the Kansas County and District Attorneys Association.

In the Senate Committee on Judiciary, representatives of the Kansas Judicial Council, the Kansas County and District Attorneys Association, and the Attorney General appeared in support of the bill.

The Committee amended the bill by adopting another substitute bill, which is substantially similar to the House substitute, but reverted to current law in KSA 21-5709, concerning drug paraphernalia, and added the provisions of SB 368, concerning presumptive probation and border boxes on the drug sentencing grid.

The Senate Committee of the Whole amended the bill to include the contents of SB 327, which includes the amended provisions of SB 328, concerning electronic prescriptions, and amends the Prescription Monitoring Program Act. The majority of SB 308, which represents the policy recommendations of the Criminal Recodification Commission, was also added to the bill.

The fiscal note for HB 2318, as introduced, indicates that it has the potential to increase litigation, but the fiscal effect would likely be accommodated within existing resources. A revised estimate of the Kansas Sentencing Commission indicates no increase in annual convictions pursuant to HB 2318 in FY 2013 and 23 increases in FY 2022.

The fiscal note for SB 368 indicates passage would require \$101,985 for two new court services officers. The Kansas Sentencing Commission indicates passage would increase the number of offenders eligible for drug treatment by 202 offenders in FY 2012, which would require \$930,640 in additional funding. Further, the Commission estimates a

decrease of 67 adult prison beds in FY 2013 and 146 by FY 2022. An estimate from the Department of Corrections was not available at the time the fiscal note was offered.

The fiscal note for SB 327, as introduced, states the Board of Pharmacy indicated enactment of the bill would have no fiscal effect on its operations. The Kansas Sentencing Commission indicated enactment of the bill would have no fiscal effect on prisons or its operations, but further noted a new crime would be created for which there is no associated data that could be used to make an estimate.

The fiscal note for SB 328, as introduced, states the Board of Pharmacy indicated enactment of the bill would have no fiscal effect.

The bed impact statement prepared by the Kansas Sentencing Commission for SB 308, as introduced, indicated it would result in 193 additional prison admissions by the end of FY 2013 and 231 additional prison admissions by the end of FY 2022, requiring 193 additional prison beds by the end of FY 2013 and 231 additional prison beds by the end of FY 2022. However, this impact was attributed to the section creating the crime of armed criminal action, which was removed by the Senate Judiciary Committee.

The fiscal note for SB 308, as introduced, included information on the prison capacity issues and expenses created by the projected bed space impact. However, as indicated above, the section of the bill driving the bed space impact was removed by the Senate Judiciary Committee. The fiscal note further indicates additional charges may be filed in district courts as a result of the new crimes and expanded violations of current crimes, which would create a fiscal effect due to additional time required for court cases. However, it is not possible to predict how complex and time-consuming these issues would be, and a precise fiscal effect cannot be determined. Any fiscal effect would most likely be accommodated within the existing schedule of court cases and would not require additional resources. Any fiscal effect

is not reflected in *The FY 2013 Governor's Budget Report*.