

SESSION OF 2016

**CONFERENCE COMMITTEE REPORT BRIEF
HOUSE BILL NO. 2501**

As Agreed to April 28, 2016

Brief*

HB 2501 would create the new crimes of unlawful transmission of a visual depiction of a child, aggravated unlawful transmission of a visual depiction of a child, and unlawful possession of a visual depiction of a child. The bill also would amend the crimes of breach of privacy and blackmail. Finally, the bill would amend the definition of a crime committed with an electronic monitoring device.

***Unlawful Transmission or Possession of a Visual
Depiction of a Child***

Unlawful transmission of a visual depiction of a child would be defined as knowingly transmitting a visual depiction of a child at least 12 years of age but less than 18 years of age in a state of nudity when the offender is less than 19 years of age. Aggravated transmission of a visual depiction of a child would require the same elements and would add the requirement that the transmitting occur with the intent to harass, embarrass, intimidate, defame, or otherwise inflict emotional, psychological, or physical harm. There would be a rebuttable presumption the offender had this intent if the offender transmitted such visual depiction to more than one person. It also would constitute aggravated transmission if the transmission was made for pecuniary or tangible gain or with

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the intent to exhibit or transmit the depiction to more than one person.

Unlawful transmission would be a class A, person misdemeanor for a first conviction and a severity level 10, person felony for a subsequent conviction. Aggravated unlawful transmission would be a severity level 9, person felony for a first conviction and a severity level 7, person felony for a subsequent conviction.

These crimes would not apply to the transmission of a depiction of a child in a state of nudity by the child who is the subject of the depiction. The crimes also would not apply to a visual depiction of a child engaged in sexually explicit conduct or a depiction that constitutes obscenity. The bill would specify that it would not be unlawful for a person under the age of 19 to possess a visual depiction of a child in a state of nudity who is 16 years of age or older.

Unlawful possession of a visual depiction of a child would be defined as the knowing possession of a visual depiction of a child at least 12 years of age but less than 16 years of age in a state of nudity, if the possessor is less than 19 years of age and received the depiction directly and exclusively from the child who is the subject of the depiction. This crime would be a class B, person misdemeanor. It would be a defense to the crime that the recipient of a depiction received it without requesting, coercing, or otherwise attempting to obtain the depiction; did not transmit, exhibit, or disseminate the depiction; and made a good faith effort to erase, delete, or destroy the depiction. The crime would not apply to the possession of a depiction of a child in a state of nudity by the child who is the subject of the depiction or to a visual depiction of a child engaged in sexually explicit conduct or a depiction that constitutes obscenity.

The bill would define “sexually explicit conduct,” “state of nudity,” “transmission,” and “visual depiction” for the purposes of the new crimes. “Transmission” would include, among other communications, a request to receive a transmission of

a visual depiction if the request results in such a transmission.

The crime of sexual exploitation of a child would be amended to except the circumstances covered by the crimes created by the bill and to add a provision stating sexual exploitation of a child shall not apply to possession of a depiction of a child in a state of nudity by the child who is the subject of the depiction.

The bill also would amend the Kansas Offender Registration Act to specify the definition of “offender” would not include persons convicted or adjudicated of these newly created crimes. Further, notwithstanding any other provision of law, the bill would prohibit a court from ordering a person to register under the Act for these offenses.

Breach of Privacy

The bill would amend the crime of breach of privacy to include disseminating or permitting the dissemination of any videotape, photograph, film, or image of another identifiable person 18 years of age or older who is nude or engaged in sexual activity and under circumstances in which the other person had a reasonable expectation of privacy, with the intent to harass, threaten, or intimidate the other person, and the other person did not consent to its dissemination. This offense would be a severity level 8, person felony or a level 5, person felony upon a second or subsequent conviction within the previous five years.

The breach of privacy provisions of this bill would not apply to interactive computer service providers for content provided by another person, radio common carriers, and local exchange carriers. The provisions also would not apply to persons acting with a *bona fide* and lawful scientific, educational, governmental, news, or other similar public purpose.

Blackmail

The bill would amend the crime of blackmail to include disseminating any videotape, photograph, film, or image obtained in violation of these new provisions, which would be a level 4, person felony.

Crime Committed with an Electronic Device

The bill would amend the definition of a crime committed with an electronic device to add the words “including but not limited to” before the list of crimes in the statute, making the list non-exhaustive. The crimes currently listed in the statute are criminal use of a financial card, unlawful acts concerning computers, identity theft and identity fraud, and electronic solicitation.

Conference Committee Action

The Conference Committee agreed to the Senate version of HB 2501, regarding blackmail, breach of privacy, and crimes committed with an electronic device. The Conference Committee further agreed to add the provisions of SB 391, as passed by the Senate, creating the crimes of unlawful transmission and unlawful possession of a visual depiction of a child, with additional language specifying it shall not be unlawful for a person under the age of 19 to possess a visual depiction of a child in a state of nudity who is 16 years of age or older.

Background

The House Committee on Corrections and Juvenile Justice introduced HB 2501 at the request of the Kansas Attorney General. As introduced, the bill amended the definition of a crime committed with an electronic device.

In the House Committee hearing, proponent testimony was provided by a representative of the Office of the Attorney General. Written proponent testimony was provided by a representative of the Kansas Association of Chiefs of Police, Kansas Sheriffs' Association, and Kansas Peace Officers Association. There was no neutral or opponent testimony. The House Committee recommended the bill be placed on the Consent Calendar.

The House Committee of the Whole amended the bill to include provisions amending the crimes of breach of privacy and blackmail. This amendment was modified from language originally included in 2015 HB 2080. Further information regarding HB 2080 is provided later.

In the hearing before the Senate Committee on Corrections and Juvenile Justice, Representative Carlin and representatives of the Office of the Attorney General and the Kansas Coalition Against Sexual and Domestic Violence testified in support of HB 2501. Written proponent testimony was provided by a citizen and by a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs' Association. A representative of the Motion Picture Association of America testified in opposition to the bill, requesting the addition of an intent to harass element.

The Senate Committee adopted an amendment removing "state of undress" from the breach of privacy provision and replacing it with language regarding sexual activity, reasonable expectation of privacy, and an intent to harass, threaten, or intimidate.

According to the fiscal note prepared by the Division of the Budget, the Office of Judicial Administration (OJA) indicated HB 2501, as introduced, could result in additional filings or criminal charges in existing cases. Additionally, the OJA states there could be a fiscal effect on both docket fees and fine revenue if additional cases are filed. Until the courts have had an opportunity to operate under the provisions of

the bill, an accurate estimate of the fiscal effect upon the Judicial Branch cannot be given.

The Kansas Sentencing Commission estimates passage of the bill could result in an increase of adult prison beds needed in FY 2017. As of January 15, 2016, the available bed capacity is 9,636. Based upon the Commission's most recent ten-year projection contained in its FY 2016 Adult Inmate Prison Population Projections report, it is estimated the year-end population will exceed available male capacity by 326 inmates in FY 2016 and 516 inmates in FY 2017.

In an updated prison bed impact assessment reflecting the amendments by the House Committee of the Whole (adding the provisions of HB 2080), the Sentencing Commission indicates the bill would require one additional prison bed in FY 2017 and four additional prison beds in FY 2026.

Any fiscal effect associated with HB 2501 is not reflected in *The FY 2017 Governor's Budget Report*.

Background of 2015 HB 2080

HB 2080 was introduced in the House Committee on Judiciary at the request of Representative Clayton. In the House Committee on Judiciary hearing, proponent testimony was provided by Representative Carlin, a representative of the Kansas Coalition Against Sexual and Domestic Violence, and a private citizen. Written proponent testimony was provided by Representative Clayton. Written opponent testimony was provided by a representative of the American Civil Liberties Union.

[*Note:* the language used in the House Committee of the Whole amendment to HB 2501 differs from the language of HB 2080 in that the amendment removes language regarding clothing and simplifies language regarding consent. The

amendment also removes other conditions required for the offense that were in the original bill.]

According to the 2015 fiscal note prepared by the Division of the Budget on HB 2080, the OJA indicated the bill could have a fiscal effect on the Judicial Branch by allowing prosecutors to file new cases, increasing staff time and effort required but also resulting in added docket fee revenue. However, the fiscal effect on the courts was not expected to be large.

In an updated 2016 bed impact assessment by the Kansas Sentencing Commission, the Commission estimated the bill would result in one additional prison bed needed in FY 2017 and four additional prison beds needed by FY 2026. [Note: this impact was included in the updated assessment for HB 2501, as amended by the House Committee of the Whole, discussed in the previous section of this brief.] The bill would increase the Commission's journal entry workload by six to eight additional journal entries per year.

Any fiscal effect of HB 2080 was not reflected in *The FY 2016 Governor's Budget Report*.

Background of SB 391

SB 391 was introduced by the Senate Committee on Corrections and Juvenile Justice at the request of Senator Baumgardner. At the Senate Corrections and Juvenile Justice Committee hearing, Senator Baumgardner, a citizen, and representatives of American Family Action of Kansas and Missouri, the Jefferson County Sheriff's Office, the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs' Association testified in support of the bill. A representative of the Kansas Coalition Against Sexual and Domestic Violence submitted written testimony in support of the bill. A representative of the Kansas Association of Criminal Defense Lawyers testified in

opposition to section 2 of SB 391, regarding possession of a visual depiction of a child.

The Senate Committee adopted an amendment to provide persons convicted under the provisions of the bill would not be required to register pursuant to the Kansas Offender Registration Act.

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Kansas Sentencing Commission estimated the bill would result in an increase of 36 to 54 juvenile probationers in FY 2017 and require 2 or 3 additional juvenile facility beds each year. The bill would not impact adult bed space needs or the Commission's journal entry workload.

The OJA indicated the bill could increase the number of cases, requiring increased time by staff. The bill also could result in the collection of added revenue from docket fees. However, a precise fiscal effect cannot be determined.

Any fiscal effect associated with SB 391 was not reflected in *The FY 2017 Governor's Budget Report*.

unlawful transmission of a visual depiction of a child; unlawful possession of a visual depiction of a child; blackmail; breach of privacy; sexual exploitation of a child; Kansas Offender Registration Act; crime committed with an electronic device

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