

Definition of “Possession”; Elements and Severity Levels for Crime of Abuse of a Child; Appearance Bonds; Witness Testimony at Preliminary Examination; Competency Proceedings and Commitment of Certain Persons; HB 2508

HB 2508 amends law in the Kansas Criminal Code concerning the definition of “possession” and the elements of and severity levels for the crime of abuse of a child. It also amends law in the Kansas Code of Criminal Procedure concerning forfeiture of appearance bonds, witness testimony at preliminary examinations, and competency proceedings and commitment of certain persons.

Definition of “Possession”

The bill amends the definition of “possession” to mean “knowingly having joint or exclusive control over an item, or knowingly keeping some item in a place where the person has some measure of access and right of control.”

Under current law, “possession” is defined as “having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.”

The bill removes the definition of “possession” in a Kansas Criminal Code definitions section pertaining specifically to drug crimes.

Elements and Severity Levels for Crime of Abuse of a Child

The bill replaces the elements of the crime of abuse of a child with language stating abuse of a child is committing any of the following acts against a child under 18 years of age:

- Knowingly torturing, cruelly beating, cruelly striking, or cruelly kicking (this conduct is a severity level 5 person felony if the child is at least 6 years of age but less than 18 years of age and a severity level 3 person felony if the child is under 6 years of age);
- Knowingly inflicting cruel and inhuman corporal punishment or knowingly using cruel and inhuman physical restraint, including caging or confining the child in a space not designated for human habitation or binding the child in a way that is not medically necessary (this conduct is a severity level 5 person felony if the child is at least 6 years of age but less than 18 years of age and a severity level 3 person felony if the child is under 6 years of age);
- Recklessly causing great bodily harm, abusive head trauma, permanent disability, or disfigurement (this conduct is a severity level 4 person felony);
- Knowingly causing great bodily harm, abusive head trauma, permanent disability, or disfigurement (this conduct is a severity level 3 person felony);

- Knowingly inflicting cruel and inhuman corporal punishment with a deadly weapon (this conduct is a severity level 3 person felony); or
- Knowingly impeding the normal breathing or circulation of the blood by applying pressure on the throat, neck, or chest of the child or by blocking the nose or mouth of the child in a manner whereby death or great bodily harm may be inflicted (this conduct is a severity level 3 person felony).

Forfeiture of Appearance Bonds

The bill requires, if a defendant fails to appear as directed by the court and guaranteed by an appearance bond, the court in which the bond is deposited to issue an arrest warrant for a defendant. If the defendant is charged with a felony offense, the bill requires the sheriff to enter the warrant into the National Crime Information Center's (NCIC) index within 14 days of issuance and to notify the court if the warrant is not entered into the index.

The bill adds the following to the circumstances under which a court must direct a forfeiture to be set aside:

- The arrest warrant required by the above provision was not issued within 14 days of the forfeiture;
- A warrant that is required to be entered into the NCIC index pursuant to the above provision was not entered within 14 days of issuance, unless there is good cause shown for such failure to enter; or
- The defendant has been arrested outside of Kansas, and the prosecuting attorney has declined to proceed with extradition.

The bill clarifies that a court may impose conditions when it is required to direct that a forfeiture be set aside.

The bill reorganizes some existing provisions within the statute and makes other technical amendments to ensure consistency in statutory phrasing and organization.

Witness Testimony at Preliminary Examination

The bill allows, at a preliminary examination, the defendant and the state to present witness testimony through a two-way electronic audio-video communication device.

Competency Proceedings and Commitment of Certain Persons

The bill amends provisions in the Kansas Code of Criminal Procedure regarding competency of defendants to stand trial, proceedings to determine competency, and commitment of incompetent defendants, persons found not guilty by reason of mental disease or defect, and convicted defendants.

Appropriate State, County, or Private Institution or Facility

The bill defines “appropriate state, county, or private institution or facility” (appropriate facility) to mean a facility with sufficient resources, staffing, and space to conduct the evaluation or restoration treatment of the defendant. The term does not include a jail or correctional facility as a location where evaluation and restoration treatment services are provided unless the administrative head or law enforcement official in charge of the jail or correctional facility agrees that the facility has the appropriate physical and care capabilities that such services may be provided by:

- The state security hospital or its agent or a state hospital or its agent;
- A qualified mental health professional, as defined in the Care and Treatment Act for Mentally Ill Persons, who is qualified by training and expertise to conduct competency restoration treatment;
- An individual who is qualified by training and experience to conduct competency evaluations and restoration treatment and is licensed by the Behavioral Sciences Regulatory Board; or
- A physician who is qualified by training and experience to conduct competency evaluations and restoration treatment and is licensed by the State Board of Healing Arts.

Proceedings to Determine Competency

The bill replaces language allowing a court to commit a defendant to the state security hospital or an appropriate facility for competency examination and report to the court with language allowing the court to order an evaluation to be completed by an appropriate facility to be conducted in person or by use of available electronic means while the defendant is in jail, at any secure location, or on pretrial release.

The bill replaces language allowing the court to designate certain appropriate clinics, centers, or facilities to conduct the examination with language allowing the court to designate an appropriate facility to conduct the examination and add “any secure location” as a place where the defendant may be located.

The bill reduces the minimum number of physicians or psychologists the court may appoint to examine the defendant from two to one and clarifies the qualifications of such physicians or psychologists.

The bill clarifies the procedure and time limitation for commitment of the defendant to an institution or facility for the examination, and requires, before the expiration of the 60-day evaluation period, the professional approved by the court to examine the defendant or, if the defendant is committed for inpatient examination, the chief medical officer or head of the appropriate institution or facility to certify to the court whether the defendant is competent to stand trial.

Evaluation and Treatment of Incompetent Defendant

The bill amends provisions requiring a defendant found incompetent to stand trial to be committed for evaluation and treatment to instead require such defendant to be ordered for evaluation and treatment, conducted on an outpatient or inpatient basis, by an appropriate facility. The bill states that evaluation or restorative treatment of a defendant shall not be conducted in a jail unless the administrative head or law enforcement official in charge of the jail agrees to such evaluation or restorative treatment being conducted in such jail.

The bill allows an evaluation and treatment to be ordered to be conducted on an outpatient basis in person or by use of available electronic means while the defendant is in jail, at any secure location, on pretrial release, or in any other appropriate setting.

The bill allows outpatient evaluation and treatment at an appropriate facility to be ordered to be conducted for a defendant charged with a misdemeanor offense. For a defendant charged with a felony offense, the bill allows an inpatient commitment to the state security hospital or its agent or a state hospital or its agent, or an outpatient commitment to such facilities or agents if the defendant meets screening criteria established by the state security hospital. In ordering an inpatient commitment, the court is required to consider the defendant's mental condition, behaviors, and the availability of outpatient evaluation and treatment options.

A provision requiring notification of the county or district attorney in the county where the criminal proceeding is pending, at the time of commitment, for the purpose of providing victim notification is moved and amended to standardize terms and reflect the new procedures provided by the bill.

A provision requiring the chief medical officer of the institution to certify to the court within 90 days of commitment whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future is amended to reflect the new evaluation and treatment options provided by the bill. The bill requires the court to set a hearing within 21 days after such certification, unless exceptional circumstances warrant delay, for the purpose of determining competency.

If such probability does exist, the bill expands the places the court may order the defendant to remain to include jail, a secure location, on pretrial release, or at an appropriate setting. If such probability does not exist, the bill requires the prosecuting attorney where the charges are filed (if the evaluation and treatment was not provided by the state security hospital or its agent or a state hospital or its agent), or the prosecuting attorney or the Secretary for Aging and Disability Services (if the evaluation and treatment was provided by the state security hospital or its agent or a state hospital or its agent), to commence involuntary commitment proceedings, and requires such proceedings to commence within 21 days of receipt of the certification, unless exceptional circumstances warrant delay. The bill implements similar requirements if a defendant, who was found to have had a substantial probability of attaining competency, has not attained competency within six months from the date of the original commitment.

[*Note:* The certification and involuntary commitment procedures are repeated throughout the bill for each of the new evaluation and treatment options. Although the language appears to be entirely new each time, it reflects the procedures outlined above, modified slightly for each evaluation and treatment option.]

The bill requires, rather than allows, a defendant committed to a public institution or facility under these provisions who is thereafter sentenced for the crime charged at the time of commitment to be credited with all of the time during which the defendant was committed and confined.

If the defendant is ordered or has met criteria to receive an outpatient evaluation and treatment, and the chief medical officer of the appropriate institution or facility determines that the defendant's mental health condition or behaviors warrant terminating outpatient treatment services and commencing inpatient evaluation and treatment, the chief medical officer or head of the facility or institution is required to provide a report to the court within ten days after outpatient treatment is terminated. The bill provides content and procedural requirements for such report, including procedures for the court to order the sheriff of the county where the charges are filed to transport the defendant to the state security hospital or its agent or a state hospital or its agent for inpatient services.

The bill requires the court, prosecuting attorney, defense counsel, and chief medical officer of any institution or the head of any facility where the defendant is receiving outpatient services to provide requested documentation to the state security hospital or its agent or the state hospital or its agent for the purpose of managing inpatient admission.

Psychotropic Medications

The bill allows, notwithstanding a statute providing certain rights to persons in the custody of the Secretary for Aging and Disability Services, psychotropic medications to be prescribed for any defendant who is ordered or has met the criteria to receive evaluation and treatment on an inpatient or outpatient basis at an appropriate facility. The bill outlines requirements for the prescription, ordering, administration, and review of such medications.

The bill prohibits such medications from being administered to a defendant for two days prior to and during any hearing, if such medications alter the defendant's mental state to adversely affect the defendant's judgment or hamper the defendant in preparing for or participating in the hearing. Prior to the hearing, the bill requires a report of all such medications or other treatment that has been administered to the defendant, and a copy of any written consent signed by the defendant, to be submitted to the court.

The bill allows the defendant's counsel to preliminarily examine the attending physician regarding the administration of any medication to the defendant within two days of the hearing and the effect that medication may have had on the defendant's judgment or ability to prepare for or participate in the hearing. If the court determines that medication or other treatment has been administered that adversely affects the defendant's judgment or ability to prepare for or participate in the hearing, the court may grant the defendant a reasonable continuance to allow the defendant to be better able to prepare for or participate in the hearing. The bill required the court to order that such medication or other treatment be discontinued until the conclusion of the hearing, unless the court finds that such medication or other treatment is necessary to sustain the defendant's life or to protect the defendant or others, in which case the court is required to order the hearing to proceed.

The bill requires, if a defendant who is charged with a felony is receiving treatment under this section and is not deemed a present danger to self or others objects to taking any

medication prescribed for the purpose of restoring the defendant to competency, the defendant's objection to be recorded in the defendant's medical record and written notice of such objection to be forwarded to the medical director of the treatment institution or facility or the director's designee and to the court where the criminal charges are pending. The bill permits the medication to be administered over the defendant's objection only if the court finds that:

- The medication is substantially unlikely to have side effects that may undermine the fairness of the trial;
- The medication is medically appropriate;
- Less intrusive alternatives have been considered;
- The medication is necessary to advance significantly important governmental trial interests; and
- The administrative head or law enforcement official in charge of the jail has agreed to having the medication administered over the defendant's objection in the jail.

The bill prohibits the administration of any experimental medication without the consent of the defendant or defendant's legal guardian.

Commitment of Persons Found Not Guilty By Reason of Mental Disease or Defect

The bill amends the statute governing commitment of persons found not guilty by reason of mental disease or defect to allow commitment to an appropriate secure facility in addition to the state security hospital as permitted under continuing law. Accordingly, the bill amends various procedural provisions to incorporate the licensed psychologist at or head of such appropriate secure facility. The bill amends hearing timing requirements in this statute to allow delay if the court finds that such delay is warranted by exceptional circumstances.

Commitment of Convicted Defendants

The bill amends a statute allowing commitment for mental examination, evaluation, and report of a convicted defendant as part of the presentence investigation, to provide that all such commitments shall be to the state security hospital. Under current law, such commitment may also be to a suitable local mental health facility or to a private hospital.

Other Amendments

Throughout the bill, references to "county or district attorney" are changed to "prosecuting attorney," and technical changes are made to ensure consistency in statutory style, references, and phrasing.