

**SECOND CONFERENCE COMMITTEE REPORT BRIEF
SENATE SUBSTITUTE FOR HOUSE BILL NO. 2010**

As Agreed to April 6, 2023

Brief*

Senate Sub. for HB 2010 would create law in the Kansas Code of Criminal Procedure (Code) regarding jailhouse witness testimony; make technical updates to certain cross references to statutes that have been repealed; amend the definition of criminal discharge of a firearm; create special sentencing rules related to the use of firearms; amend law concerning eligibility for certain offenders for the nonprison sanction of placement in a certified drug abuse treatment (SB 123) program; and amend law concerning the tolling of postrelease supervision time.

Jailhouse Witness Testimony (Sections 1 and 9)

Disclosure Requirements

The bill would require, in any criminal prosecution, the prosecuting attorney (prosecutor) to disclose any intent to introduce testimony of a jailhouse witness, as defined by the bill, regarding statements made by a suspect or defendant, while the jailhouse witness and suspect or defendant were both incarcerated, within the time provided by the section of the Code governing discovery.

The bill would also require the prosecutor to disclose to the defense:

- The criminal history of the jailhouse witness, including pending or dismissed criminal charges;
- The jailhouse witness's cooperation agreement and any benefit, as defined by the bill, that has been provided to, or will be provided in the future to the witness;
- The contents of any statement allegedly given by the suspect or defendant to the jailhouse witness and the contents of any statement given by the witness to law enforcement regarding the statements allegedly made by the suspect or defendant, including the time and place such statements were given;

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- Any information regarding the jailhouse witness recanting testimony or statements, including the time and place of recantation, the nature of the recantation, and the names of the people present at the recantation; and
- Any cooperation agreement and any benefit that the jailhouse witness received in any criminal case in which the testimony of such jailhouse witness was introduced.

The court could allow the prosecutor to comply with these disclosure requirements after the time limit described above if the court finds the jailhouse witness was not known or the information the bill would require to be disclosed could not be discovered or obtained by the prosecutor exercising due diligence within such time period.

If the court finds that disclosure of the above information is likely to cause bodily harm to the jailhouse witness, the bill would allow the court to order that the evidence be viewed only by defense counsel and not by the defendant or others, or issue a protective order.

Database

The bill would require each prosecutor's office to maintain a central record containing information regarding cases in which jailhouse witness testimony is introduced or is intended to be introduced by a prosecutor regarding statements made by a suspect or defendant, the substance of such testimony, and any benefit requested by, provided to, or to be provided in the future to such witness in connection with testimony provided by the witness.

The bill would require the prosecutor's office to forward this information to the Kansas Bureau of Investigation (KBI), which would be required to maintain a statewide database of such information. The database would be accessible only to prosecutors and its records would otherwise remain confidential and not subject to disclosure under the Kansas Open Records Act (KORA), and this confidentiality provision would not be subject to expiration or review under KORA.

Statutory Cross References (Sections 2, 6, and 7)

The bill would update statutory cross references in statutes concerning:

- Jury instructions for persons who lack the required mental state to commit a crime;
- Annual hearings on the continued commitment of persons who were found to lack the required mental state to commit a crime; and
- Municipal zoning of group homes.

The bill would also make technical amendments to ensure consistency in statutory phrasing.

Definition of Criminal Discharge of a Firearm (Section 3)

The bill would amend the definition of criminal discharge of a firearm to include the reckless and unauthorized discharge of any firearm at a motor vehicle in which there is a human being, regardless of whether the offender knows or has reason to know that a human being is present. The bill would also make technical changes to the definition.

Special Sentencing Rules (Section 4)

Violation of Criminal Possession of a Weapon by a Convicted Felon

The bill would create a special sentencing rule stating that, notwithstanding statutory provisions regarding lesser and included crimes or any other provisions of law to the contrary, the sentence for a violation of criminal possession of a weapon by a convicted felon would be a presumptive term of imprisonment, required to be served consecutively to any other term(s) of imprisonment imposed. The rule would be triggered if the trier of fact finds beyond a reasonable doubt that:

- The weapon the offender possessed during such violation was a firearm; and
- Such firearm was used by the offender during the commission of any violent felony, as defined by the bill.

The bill would specify that this sentencing rule would not apply to an offender who is prohibited from possessing a weapon as a result of a juvenile adjudication.

The bill would define “violent felony” to mean the following crimes as defined in statute:

- Capital murder or first- or second-degree murder;
- Voluntary manslaughter;
- Kidnapping, when the crime involves holding a person for ransom or as a shield or hostage, or aggravated kidnapping;
- Aggravated assault, when committed with a deadly weapon, or aggravated assault of a law enforcement officer, when committed with a deadly weapon;
- Aggravated battery, when the conduct causes great bodily harm or disfigurement, or when the conduct causes bodily harm that could cause great bodily harm, disfigurement or death or aggravated battery against a law enforcement officer, unless the conduct involves bodily harm caused with a motor vehicle;
- Mistreatment of a dependent adult or mistreatment of an elder person, when the conduct involves infliction of physical injury or unreasonable confinement or punishment;
- Rape;
- Aggravated criminal sodomy;

- Abuse of a child, unless the acts constituting the crime are committed recklessly;
- Any felony offense under statutes prohibiting the unlawful manufacturing, cultivation, or distribution of controlled substances;
- Treason;
- Criminal discharge of a firearm, when the acts constituting the crime are committed in the presence of another human being;
- Fleeing or attempting to elude a police officer;
- Any felony that includes the domestic violence designation, as determined by the trier of fact under the relevant statutory procedure; or
- Any attempt, conspiracy, or criminal solicitation of any felony offense described above.

A whereas clause would designate amendments made in this section as the “Reduce Armed Violence Act.”

Violation of Criminal Discharge of a Firearm

The bill would create a special sentencing rule for a violation of criminal discharge of a firearm involving the reckless and unauthorized discharge of a firearm at a dwelling, building, structure, or motor vehicle.

The rule would be triggered if the trier of fact makes a finding beyond a reasonable doubt that the offender discharged a firearm and that the offender knew or reasonably should have known a person was present at the above-mentioned locations.

When the person present is 14 years of age or older, the sentence would be a presumptive term of imprisonment per the Kansas Sentencing Guidelines, plus 60 months of additional imprisonment, to be served consecutively to any other term(s) of imprisonment.

When the person present is less than 14 years of age, the sentence would be a presumptive term of imprisonment per the Kansas Sentencing Guidelines plus 120 months of additional imprisonment, to be served consecutively to any other term(s) of imprisonment.

The bill would provide that a sentence imposed under both special rules would not be considered a departure sentence and would not be subject to appeal, and for a sentence imposed for a violation of criminal possession of a weapon by a convicted felon, no other sentence would be permitted.

SB 123 Program Eligibility (Section 5)

The bill would amend law to expand eligibility for certain offenders for the nonprison sanction of placement in a certified drug abuse treatment (SB 123) program.

The bill would amend law to allow a defendant convicted of a nonperson severity level 7, 8, 9, or 10 felony with a criminal history score of C through I to participate in a certified drug abuse treatment program if the defendant has no prior convictions for manufacturing a controlled substance, cultivating or distributing a controlled substance, or unlawful acts involving proceeds from drug crimes.

The bill would amend law to allow a defendant convicted of a nonperson severity level 7, 8, 9, or 10 felony with a criminal history score of A or B to be able to participate in a certified drug abuse treatment program if the defendant has no prior convictions for manufacturing a controlled substance, cultivating or distributing a controlled substance, or unlawful acts involving proceeds from drug crimes, and:

- The person felonies in the defendant's history are nondrug severity level 8 or lower, and
- The court finds that the safety of the members of the public will not be jeopardized by the placement of the defendant in a certified drug abuse treatment program.

Tolling of Postrelease Supervision Time (Section 8)

The bill would amend a statute governing parole, conditional release, and postrelease supervision to specify that the service of postrelease supervision time would not toll, except as provided in the statute governing violations of conditions of release.

Second Conference Committee Action

The second Conference Committee agreed to the provisions of Senate Sub. for HB 2010, as passed by the Senate, and to insert the contents of HB 2293, as amended by the Senate Committee on Judiciary, with the following modifications:

- Adjust the information required to be disclosed to the defense by the prosecutor concerning the introduction of jailhouse witness testimony;
- Remove the whereas clause designating the bill as the Pete Coones Memorial Act.
- Remove the requirement that the prosecutor notify victims of any benefit received by a jailhouse witness in connection with offering or providing testimony; and
- Adjust language with respect to information required to be maintained in the database required to be established by the bill.

Background

The second Conference Committee agreed to the contents of Senate Sub. for HB 2010, as passed by the Senate, and agreed to further amend and include the contents of HB 2293, as amended by the Senate Committee on Judiciary.

The Senate Committee on Judiciary recommended a substitute bill be passed containing the provisions of HB 2010, HB 2069, HB 2070, all as passed by the House, and SB 193, as amended by the Senate Committee on Judiciary.

HB 2010 (Statutory Cross References)

The bill was prefiled for introduction by Representative Highberger on January 6, 2023.

House Committee on Judiciary

In the House Committee on Judiciary hearing on the bill on January 23, 2023, Representative Highberger testified as a **proponent**, stating he had come across the needed updates while conducting research.

The House Committee amended the bill to add updated statutory references in statutes concerning commitment of persons found not guilty due to lacking the required mental state to commit a crime and municipal zoning of group homes.

Senate Committee on Judiciary

In the Senate Committee on Judiciary hearing on the bill on March 15, 2023, a Senior Assistant Revisor of Statutes provided an overview of the bill. No testimony was provided.

On March 22, 2023, the Senate Committee recommended a substitute bill be passed containing the provisions of the bill, as passed by the House; the provisions of SB 193, as amended by the Senate Committee on Judiciary; and the provisions of HB 2069 and HB 2070, as passed by the House. [*Note: The Conference Committee retained the amendment.*]

SB 193 and SB 183 (Special Sentencing Rules; Criminal Discharge of Firearm Definition)

[*Note: Provisions concerning a special sentencing rule related to a violation of a criminal discharge of a firearm and the definition of that crime (SB 183) were amended into SB 193 when the Senate Committee took final action on that bill.*]

SB 193 (Special Sentencing Rule)

The bill was introduced by the Senate Committee on Judiciary at the request of Senator Warren.

[*Note: A companion bill, HB 2031, was introduced by the House Committee on Corrections and Juvenile Justice on January 13, 2023. The bill was recommended as amended by the House Committee on February 6, 2023, and was stricken from the Calendar on February 23, 2023.*]

In the Senate Committee on Judiciary hearing on February 15, 2023, **proponent** testimony was provided by a representative of the Johnson County Sheriff's Office and a representative of

the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association, who indicated the intent of the bill was to address a rise in violent crime being committed by convicted felons while using firearms.

Opponent testimony was provided by a private citizen, who in general was in support of the bill, except for the one section that referenced crimes involving possession of controlled substances. No other testimony was provided.

On February 23, 2023, the bill was withdrawn from the Senate Calendar and referred to the Senate Committee on Ways and Means. On March 1, 2023, the bill was withdrawn from the Committee and re-referred to the Senate Committee of the Whole. On March 21, 2023, the bill was withdrawn from the Senate Calendar and referred to the Senate Committee on Judiciary.

On March 22, 2023, the Senate Committee on Judiciary amended the bill to:

- Require a firearm be used, rather than possessed, during the commission of any violent felony to trigger the special sentencing rule [*Note: The Conference Committee retained this amendment;*];
- Modify the list of crimes that would constitute a “violent felony” [*Note: The Conference Committee retained this amendment;*]; and
- Add provisions creating a special sentencing rule for violations of criminal discharge of a firearm and adjusting that crime’s definition (SB 183). [*Note: The Conference Committee retained this amendment*].

SB 183 (Special Sentencing Rule; Criminal Discharge of Firearm Definition)

The bill was introduced by Senator Haley on February 7, 2023, and referred to the Senate Committee on Judiciary on February 8, 2023.

HB 2069 (Tolling of Postrelease Supervision Time)

The bill was introduced by the House Committee on Corrections and Juvenile Justice at the request of a representative of the Kansas Sentencing Commission (Commission).

House Committee on Corrections and Juvenile Justice

In the House Committee hearing on January 23, 2023, representatives of the Commission and the Kansas Department of Corrections (KDOC) testified as **proponents** of the bill, stating the bill would clarify how time spent in jail should be credited when a person is an alleged postrelease supervision violator who has been arrested on a KDOC warrant and at the same time is awaiting trial on new criminal charges. No other testimony was provided.

Senate Committee on Judiciary

In the Senate Committee hearing on March 9, 2023, the same **proponents** testified as in the House Committee hearing, and provided substantially similar testimony. No other testimony was provided.

HB 2070 (SB 123 Program Eligibility)

SB 123 (2003) created a nonprison sanction of certified drug abuse treatment for certain drug offenders. Commonly referred to as the “Senate Bill 123 Program,” this program is administered by the Commission.

The bill was introduced by the House Committee on Corrections and Juvenile Justice at the request of the Commission.

House Committee on Corrections and Juvenile Justice

In the House Committee hearing on January 24, 2023, a representative of the Commission testified as a **proponent** of the bill, stating individuals convicted of these nondrug crimes sometimes committed these crimes because of their addiction, 85 percent of felons require appointed council because they are indigent, and felony offenders are not likely to have health insurance to seek their own substance abuse treatment.

Written-only proponent testimony was submitted by a representative of the State Board of Indigents’ Defense Services (BIDS) and a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association. The written testimony indicated treating an individual’s drug addiction treats the underlying cause of the crime and could prevent future criminal acts. No other testimony was provided.

Senate Committee on Judiciary

In the Senate Committee hearing on March 9, 2023, a representative of the Commission testified as a **proponent** and gave substantially similar testimony to the testimony provided to the House Committee. Written-only proponent testimony was provided by representatives of BIDS and the Kansas Community Corrections Association and by a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association. No other testimony was provided.

HB 2293 (Jailhouse Witness Testimony)

The bill was introduced by the House Committee on Judiciary at the request of a representative of the Innocence Project.

House Committee on Judiciary

In the House Committee hearing on February 13, 2023, representatives of BIDS, the Innocence Project, and the Executive Director of the Midwest Innocence Project provided **proponent** testimony, generally stating the bill is an important step in preventing wrongful convictions and creates critical safeguards for the use of jailhouse witnesses in court. A representative of Americans for Prosperity provided written-only proponent testimony.

On February 15, 2023, **opponent** testimony was provided by a representative of the Kansas County & District Attorneys Association (KCDAA), generally stating the bill proposes requirements already imposed by current statutes, case law, rules of professional conduct, and court rules. No other testimony was provided.

The House Committee adopted an amendment to remove provisions related to pretrial hearings in criminal prosecutions for murder or rape in which the prosecutor intended to introduce the testimony of a jailhouse witness and jury instructions involving the use of such testimony [*Note: The Conference Committee retained this amendment.*]

Senate Committee on Judiciary

In the Senate Committee hearing on March 14, 2023, **proponent** testimony was provided by representatives of BIDS and the Midwest Innocence Project, who generally stated the bill would provide transparency and enhance reliability regarding testimony of jailhouse witnesses. Written-only proponent testimony was provided by a representative of Americans for Prosperity.

Opponent testimony was provided by a representative of the KCDAA, who provided substantially similar testimony as in the House Committee hearing. Written-only opponent testimony was provided by the Sedgwick County District Attorney.

The Senate Committee amended the bill to remove legislative review of the confidentiality provision under KORA with respect to records held by the database that would be created by the bill. [*Note: The Conference Committee retained this amendment.*]

Fiscal Information

HB 2010 (Statutory Cross References)

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Office of Judicial Administration (OJA) states enactment of the bill would not have a fiscal effect on the operations of the Judicial Branch.

SB 193 (Special Sentencing Rule)

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Commission estimates that enactment of the bill would result in an increase of 29 adult prison beds needed by the end of FY 2024. By the end of FY 2033, 232 additional beds would be needed. The current estimated available bed capacity is 9,428 for males and 936 for

females. Based upon the Commission's most recent ten-year projection contained in its FY 2023 Adult Inmate Prison Population Projections report, it is estimated that the year-end population will total 7,933 male and 764 female inmates in FY 2023 and 8,043 male and 740 female inmates in FY 2024.

KDOC indicates enactment of the bill would increase marginal costs for the operation of the correctional facilities for food, clothing, and other supplies. The annual cost would total \$100,769 based on the FY 2022 marginal cost of \$9.52 per day per occupied bed ($\$9.52 \times 365 \text{ days} \times 29 \text{ beds}$).

OJA indicates enactment of the bill would require findings of certain facts to sentence an offender, which could result in extending the length of trials in certain cases. However, a fiscal effect cannot be estimated.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

SB 183 (Special Sentencing Rule; Criminal Discharge of Firearm Definition)

According to the fiscal note prepared by the Division of the Budget on the bill, the Commission estimates that enactment of the bill would result in an increase of eight adult prison beds needed by the end of FY 2024. By the end of FY 2033, 128 additional beds would be needed. The current estimated available bed capacity is 9,428 for males and 936 for females. Based upon the Commission's most recent ten-year projection contained in its FY 2023 Adult Inmate Prison Population Projections report, it is estimated that the year-end population will total 7,933 male and 764 female inmates in FY 2023 and 8,043 male and 740 female inmates in FY 2024.

KDOC states that enactment of the bill would have a negligible impact on current operations that could be absorbed within existing resources. The KDOC notes that marginal costs such as food, clothing, and supplies for each resident total \$9.52 per day per resident.

OJA indicates enactment of the bill would have a negligible fiscal effect on the Judicial Branch that could be absorbed within existing resources.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

HB 2070 (SB 123 Program Eligibility)

According to the fiscal note prepared by the Division of the Budget on the bill, the Commission estimates enactment of the bill may have an impact on prison admissions and bed space, but the effect cannot be determined at this time. The Commission indicates the bill would increase the SB 123 program cost by \$592,322, \$1,184,644, or \$1,776,966 in FY 2024, depending on which scenario occurs. The Commission reports an average cost of \$4,057 per SB 123 treatment offender in FY 2022.

KDOC indicates the bill would not have a significant fiscal effect on the agency.

OJA indicates the bill would require courts to hold hearings and provide rulings, and could require court services officers to provide supervision to defendants who participate in a certified drug treatment program instead of going to prison. This would require additional work by district court judges, clerks, and court services officers. OJA is unable to estimate the fiscal effect on its budget.

The Kansas Association of Counties (KAC) indicates the fiscal effect on local governments would depend on how many qualified defendants participate in the certified drug abuse programs but it is unable to estimate the fiscal effect.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

HB 2069 (Tolling of Postrelease Supervision Time)

According to the fiscal note prepared by the Division of the Budget on the bill, the Commission indicates enactment of the bill could result in a need for additional prison beds, but the fiscal effect cannot be determined. OJA and KDOC indicate the bill would have no fiscal effect on their agencies. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

HB 2293 (Jailhouse Witness)

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the KBI estimates enactment of the bill would result in additional expenditures of \$182,180 from the State General Fund in FY 2024, incidental costs for security requirements of the system, and negligible costs for prosecuting attorneys who wish to access the system who are not already active users of the Kansas Criminal Justice Information System. The KBI estimates the initial cost for the database would be \$165,000 for licensing with an additional cost of \$12,410 for training and installation, and \$4,770 for maintenance, for a total of \$182,180 that is scalable according to number of concurrent users needed for the database.

The Office of Judicial Administration states the bill's enactment could have a fiscal effect on Judicial Branch operations because the bill's provisions could extend the length of certain cases, and the fiscal effect cannot be estimated until there has been an opportunity for the Judicial Branch to operate under the bill's provisions. Any fiscal effect associated with the bill is not reflected in *The FY 2024 Governor's Budget Report*.

Statutory cross references; sentencing; postrelease supervision; jail time; Kansas Department of Corrections; parole; conditional release; jail time credit; certified drug abuse treatment program; SB 123 program; Office of Judicial Administration; Kansas Association of Counties; sentencing grid; felons; firearms; sentence enhancement; violent felony; crimes; punishment; criminal discharge of a firearm; criminal prosecutions; jailhouse witness testimony; disclosures; database; Pete Coones Memorial Act; Kansas Open Records Act

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