

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 increasing the criminal penalties for manufacturing fentanyl-related
5 controlled substance; creating a special sentencing rule for distributing
6 fentanyl-related controlled substance; amending K.S.A. 2022 Supp. 21-
7 5701, 21-5703 and 21-6805 and repealing the existing sections; also
8 repealing K.S.A. 2022 Supp. 21-5701b.
9

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

11 Section 1. K.S.A. 2022 Supp. 21-5701 is hereby amended to read as
12 follows: 21-5701. As used in K.S.A. 2022 Supp. 21-5701 through 21-
13 5717, and amendments thereto:

14 (a) "Controlled substance" means any drug, substance or immediate
15 precursor included in any of the schedules designated in K.S.A. 65-4105,
16 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

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

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

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

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

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

35 (A) A controlled substance;

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

1 or

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

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

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

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

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

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

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

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

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

28 (f) (1) "Drug paraphernalia" means all equipment and materials of
29 any kind that are used, or primarily intended or designed for use in
30 planting, propagating, cultivating, growing, harvesting, manufacturing,
31 compounding, converting, producing, processing, preparing, testing,
32 analyzing, packaging, repackaging, storing, containing, concealing,
33 injecting, ingesting, inhaling or otherwise introducing into the human body
34 a controlled substance and in violation of this act. "Drug paraphernalia"
35 shall include, but is not limited to:

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

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

41 ~~(C)~~(C) isomerization devices used or intended for use in increasing
42 the potency of any species of plant that is a controlled substance;

43 ~~(D)~~(D) testing equipment used or intended for use in identifying or in

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

1 purpose;

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

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

4 (2) "Drug paraphernalia"—~~shall~~ does not include any products,
5 chemicals or materials described in K.S.A. 2022 Supp. 21-5709(a), and
6 amendments thereto.

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

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

20 ~~(H)~~(i) "Isomer" means all enantiomers and diastereomers.

21 ~~(I)~~(j) "Manufacture" means the production, preparation, propagation,
22 compounding, conversion or processing of *or placing into pill or capsule*
23 *form* a controlled substance either directly or indirectly or by extraction
24 from substances of natural origin or independently by means of chemical
25 synthesis or by a combination of extraction and chemical synthesis.
26 "Manufacture" does not include:

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

30 (A) By a practitioner or the practitioner's agent pursuant to a lawful
31 order of a practitioner as an incident to the practitioner's administering or
32 dispensing of a controlled substance in the course of the practitioner's
33 professional practice; or

34 (B) by a practitioner or by the practitioner's authorized agent under
35 such practitioner's supervision for the purpose of or as an incident to
36 research, teaching or chemical analysis or by a pharmacist or medical care
37 facility as an incident to dispensing of a controlled substance; or

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

41 ~~(J)~~(k) "Marijuana" means all parts of all varieties of the plant
42 Cannabis whether growing or not, the seeds thereof, the resin extracted
43 from any part of the plant and every compound, manufacture, salt,

1 derivative, mixture or preparation of the plant, its seeds or resin.
 2 "Marijuana" does not include:

3 (1) The mature stalks of the plant, fiber produced from the stalks, oil
 4 or cake made from the seeds of the plant, any other compound,
 5 manufacture, salt, derivative, mixture or preparation of the mature stalks,
 6 except the resin extracted therefrom, fiber, oil or cake or the sterilized seed
 7 of the plant that is incapable of germination;

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

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

12 (4) cannabidiol (other trade name: 2-[(3-methyl-6-(1-methylethenyl)-
 13 2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol); or

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

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

18 ~~(m)~~ "Narcotic drug" means any of the following whether produced
 19 directly or indirectly by extraction from substances of vegetable origin or
 20 independently by means of chemical synthesis or by a combination of
 21 extraction and chemical synthesis:

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

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

27 (3) opium poppy and poppy straw;

28 (4) coca leaves and any salt, compound, derivative or preparation of
 29 coca leaves and any salt, compound, isomer, derivative or preparation
 30 thereof that is chemically equivalent or identical with any of these
 31 substances, but not including decocainized coca leaves or extractions of
 32 coca leaves that do not contain cocaine or ecgonine.

33 ~~(n)~~ "Opiate" means any substance having an addiction-forming or
 34 addiction-sustaining liability similar to morphine or being capable of
 35 conversion into a drug having addiction-forming or addiction-sustaining
 36 liability. "Opiate" does not include, unless specifically designated as
 37 controlled under K.S.A. 65-4102, and amendments thereto, the
 38 dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts
 39 (dextromethorphan). "Opiate" does include its racemic and levorotatory
 40 forms.

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

43 ~~(p)~~ "Person" means an individual, corporation, government or

1 governmental subdivision or agency, business trust, estate, trust,
2 partnership, association or any other legal entity.

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

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

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

20 (s) "Simulated controlled substance" means any product that
21 identifies itself by a common name or slang term associated with a
22 controlled substance and that indicates on its label or accompanying
23 promotional material that the product simulates the effect of a controlled
24 substance.

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

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

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

31 (2) drug severity level 1 felony if:

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

35 (B) *the controlled substance is not a fentanyl-related controlled*
36 *substance; and*

37 (C) the offender has a prior conviction for unlawful manufacturing of
38 a controlled substance under this section, K.S.A. 65-4159, prior to its
39 repeal, K.S.A. 2010 Supp. 21-36a03, prior to its transfer, or a substantially
40 similar offense from another jurisdiction and the substance was not
41 methamphetamine, as defined by ~~subsection (d)(3) or (f)(1) of K.S.A. 65-~~
42 ~~4107(d)(3) or (f)(1), and~~ amendments thereto, or an analog thereof, in any
43 such prior conviction; and

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

5 (c) The provisions of ~~subsection (d)~~ of K.S.A. 2022 Supp. 21-
6 5301(d), and amendments thereto, shall not apply to a violation of
7 attempting to unlawfully manufacture any controlled substance or
8 controlled substance analog pursuant to this section.

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

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

19 (f) The sentence of a person who violates this section, K.S.A. 65-
20 4159, prior to its repeal or K.S.A. 2010 Supp. 21-36a03, prior to its
21 transfer, shall not be reduced because these sections prohibit conduct
22 identical to that prohibited by K.S.A. 65-4161 or 65-4163, prior to their
23 repeal, K.S.A. 2010 Supp. 21-36a05, prior to its transfer, or K.S.A. 2022
24 Supp. 21-5705, and amendments thereto.

25 Sec. 3. K.S.A. 2022 Supp. 21-6805 is hereby amended to read as
26 follows: 21-6805. (a) The provisions of this section shall be applicable to
27 the sentencing guidelines grid for drug crimes. The following sentencing
28 guidelines grid for drug crimes shall be applicable to felony crimes under
29 K.S.A. 2022 Supp. 21-5701 through 21-5717, and amendments thereto,
30 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	204 194 185	196 186 176	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 such sentence of not to exceed 50% of the mandatory increase provided by this subsection upon making a finding on the record that one or more of the mitigating factors as specified in K.S.A. 2022 Supp. 21-6815, and amendments thereto, justify such a reduction in sentence. Any decision made by the court regarding the

1 reduction in such sentence shall not be considered a departure and shall
 2 not be subject to appeal.

3 (f) (1) The sentence for a third or subsequent felony conviction of
 4 K.S.A. 65-4160 or 65-4162, prior to their repeal, K.S.A. 2010 Supp. 21-
 5 36a06, prior to its transfer, or K.S.A. 2022 Supp. 21-5706, and
 6 amendments thereto, shall be a presumptive term of imprisonment and the
 7 defendant shall be sentenced to prison as provided by this section. The
 8 defendant's term of imprisonment shall be served in the custody of the
 9 secretary of corrections in a facility designated by the secretary. Subject to
 10 appropriations therefore, the defendant shall participate in an intensive
 11 substance abuse treatment program, of at least four months duration,
 12 selected by the secretary of corrections. If the secretary determines that
 13 substance abuse treatment resources are otherwise available, such term of
 14 imprisonment may be served in a facility designated by the secretary of
 15 corrections in the custody of the secretary of corrections to participate in
 16 an intensive substance abuse treatment program. The secretary's
 17 determination regarding the availability of treatment resources shall not be
 18 subject to review. Upon the successful completion of such intensive
 19 treatment program, the offender shall be returned to the court and the court
 20 may modify the sentence by directing that a less severe penalty be
 21 imposed in lieu of that originally adjudged. If the offender's term of
 22 imprisonment expires, the offender shall be placed under the applicable
 23 period of postrelease supervision.

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

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

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

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

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

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

38 (g) (1) Except as provided further, if the trier of fact makes a finding
 39 that an offender carried a firearm to commit a drug felony, or in
 40 furtherance of a drug felony, possessed a firearm, in addition to the
 41 sentence imposed pursuant to K.S.A. 2022 Supp. 21-6801 through 21-
 42 6824, and amendments thereto, the offender shall be sentenced to:

43 (A) Except as provided in subsection (g)(1)(B), an additional 6

1 months' imprisonment; and

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

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

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

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

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

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