

SESSION OF 2017

**CONFERENCE COMMITTEE REPORT BRIEF  
SENATE BILL NO. 112**

As Agreed to May 2, 2017

**Brief\***

SB 112 would amend law regarding crimes and criminal procedure. Specifically, it would create the crime of aggravated domestic battery and amend the crimes of domestic battery, possession of drug paraphernalia, burglary, cruelty to animals, and dog fighting. Further, it would amend provisions concerning illegal sentences, postrelease supervision for persons convicted of sexually violent crimes, and expungement of arrest records. It also would enact the Law Enforcement Protection Act and provisions concerning the electronic recording of certain custodial interrogations.

***Domestic Battery***

Effective July 1, 2017, the bill would create the crime of aggravated domestic battery, which would be defined as:

- Knowingly impeding the normal breathing or circulation of the blood by applying pressure on the throat, neck, or chest of a person with whom the offender is involved or has been involved in a dating relationship or a family or household member, when done in a rude, insulting, or angry manner; or

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- Knowingly impeding the normal breathing or circulation of the blood by blocking the nose or mouth of a person with whom the offender is involved or has been involved in a dating relationship or a family or household member, when done in a rude, insulting, or angry manner.

This crime would be a severity level 7 person felony.

The bill also would amend the existing crime of domestic battery by adding “a person with whom the offender is involved or has been involved in a dating relationship” as a possible victim of the offense. The bill would add a definition of “dating relationship” to this section that is based on the existing definition used in the definitions section of the Criminal Code and in the Protection from Abuse Act.

The bill would amend provisions related to sentencing for domestic battery, as follows. In determining the sentence to be imposed within the limits provided for a first, second, or subsequent offense, the bill would require a court to consider information presented to the court regarding a current or prior protective order issued against the offender. The bill would define “protective order” for these purposes. The bill would also strike language allowing the Department of Corrections to order that certain offenders not be required to undergo domestic violence offender assessments.

### ***Sentencing for Possession of Drug Paraphernalia***

Effective July 1, 2017, the bill would reduce the severity level for unlawful possession of drug paraphernalia from a class A to a class B nonperson misdemeanor when the drug paraphernalia was used to cultivate fewer than five marijuana plants or used to store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body.

### ***Sentencing for Burglary***

The bill would change burglary of a dwelling with intent to commit a felony, theft, or sexually motivated crime therein to a severity level 7 person felony, rather than a severity level 7 nonperson felony.

### ***Cruelty to Animals***

Effective July 1, 2017, the humane killing exclusion from the crime of cruelty to animals would be amended to remove references to “pound,” “incorporated humane society,” and “the operator of” an animal shelter. Provisions allowing an animal to be taken into custody and cared for or treated would be amended to either remove references to “incorporated humane society” or replace such references with “animal shelter.” An existing requirement for notice to an owner or custodian would be expanded from cases in which the animal is placed in the care of an animal shelter to all cases, and written notification would be required.

The existing requirement that the board of county commissioners in the county where the animal was taken into custody establish procedures to allow an animal shelter to petition the district court to be allowed to place the animal for adoption or euthanize the animal would be replaced with a provision allowing the law enforcement agency, district attorney’s office, county prosecutor, veterinarian, or animal shelter to petition the district court in the county in which the animal was taken into custody to transfer ownership of the animal. The bill would remove a provision requiring the board of county commissioners to review the cost of care and treatment being charged by the animal shelter maintaining the animal.

A provision prohibiting an animal from being returned to or allowed to remain with a person adjudicated guilty of this crime would be amended to remove a requirement that the court first be satisfied an animal owned or possessed by the

person would be subjected to such crime in the future. A reference to “duly incorporated humane society” in this provision would be replaced with “animal shelter.”

“Animal shelter” would be defined to mean the same as in the Kansas Pet Animal Act.

### ***Dog Fighting***

Effective July 1, 2017, a provision regarding the placement of a dog taken into custody would be amended to replace a reference to “duly incorporated humane society” with “animal shelter.”

The existing requirement that the board of county commissioners in the county where the animal was taken into custody establish procedures to allow an animal shelter to petition the district court to be allowed to place the animal for adoption or euthanize the animal would be replaced with a provision allowing the law enforcement agency, district attorney’s office, county prosecutor, veterinarian, or animal shelter to petition the district court in the county in which the animal was taken into custody to transfer ownership of the animal. The bill would remove a provision requiring the board of county commissioners to review the cost of care and treatment being charged by the animal shelter maintaining the animal.

A provision requiring costs be paid by the county where the dog was taken into custody if no conviction results would be amended to add law enforcement agencies and veterinarians to the list of entities entitled to payment for expenses incurred for the care, treatment, and boarding of the dog.

“Animal shelter” would be defined to mean the same as in the Kansas Pet Animal Act.

### ***Expungement of Arrest Records***

Effective July 1, 2017, if a person has been arrested as a result of mistaken identity or as a result of another person using identifying information of the named person and the charge against the named person is dismissed or not prosecuted, the bill would require the prosecuting attorney or other judicial officer who ordered the dismissal or declined to prosecute to provide notice to the court of such action and petition the district court for the expungement of such arrest record. Further, the bill would require the court to order the arrest record and any subsequent court proceedings expunged and purged from all applicable state and federal systems.

The bill would define “mistaken identity” as the erroneous arrest of a person for a crime as a result of misidentification by a witness or law enforcement, confusion on the part of a witness or law enforcement as to the identity of a person who committed the crime, misinformation provided to law enforcement as to the identity of a person who committed the crime, or some other mistake on the part of a witness or law enforcement as to the identity of the person who committed the crime. Further, the bill would exclude from the definition of “mistaken identity” any situation in which an arrestee intentionally provides false information to law enforcement officials in an attempt to conceal such person’s identity.

The bill would allow any person who may have relevant information about the petitioner to testify at the hearing on such petition and would allow the court to inquire into the background of the petitioner. Such a petition would be required to include the same information required in other petitions for expungement of arrest records.

When a court orders expungement of arrest records as described above, the bill would require the order to state the information required in the petition and the grounds for expungement. Additionally, the bill would require the order to

direct the Kansas Bureau of Investigation (KBI) to purge the arrest information from the Criminal Justice Information System central repository and all applicable state and federal databases. The clerk of the court would be required to send a certified copy of the order to the KBI, which would carry out the order and notify the Federal Bureau of Investigation, the Secretary of Corrections, and any other criminal justice agency that may have a record of the arrest. If an order of expungement is entered, the bill would provide that the person eligible for mandatory expungement as described above would be treated as not having been arrested.

### ***Illegal Sentences***

The existing right to a hearing regarding an illegal sentence would be made inapplicable if the motion, files, and records of the case conclusively show that the defendant is entitled to no relief. The bill also would define “illegal sentence” and specify that a sentence would not fall within that definition due to a change in the law occurring after the sentence is pronounced.

### ***Postrelease Supervision for Persons Convicted of Sexually Violent Crimes***

The bill would clarify that lifetime postrelease supervision is to be imposed on offenders sentenced to imprisonment for a sexually violent crime committed on or after July 1, 2006, if the offender was 18 years of age or older when the crime was committed. It would further establish a mandatory period of 60 months postrelease supervision, plus good time and program credit earned and retained, for offenders sentenced to imprisonment for a sexually violent crime committed on or after the effective date of the bill, if the offender was under 18 years of age when the crime was committed. Current statute provides for lifetime postrelease supervision for all persons convicted of a sexually violent crime committed on or after July 1, 2006, regardless of the offender’s age.

The bill also would clarify that a separate provision regarding postrelease supervision for persons sentenced to a term of imprisonment for a sexually violent crime applies only to such crimes committed on or after July 1, 1993, but prior to July 1, 2006.

### ***Law Enforcement Protection Act***

Effective July 1, 2017, the bill would enact the Law Enforcement Protection Act, which would enhance the sentencing of felony crimes committed against law enforcement officers in the performance of their duties, or due to their status as a law enforcement officer.

The bill would create a special sentencing rule with enhanced penalties that would apply if a trier of fact finds beyond a reasonable doubt that an offender committed a nondrug felony offense (or the offender committed an attempt or conspiracy to commit such offense) against a law enforcement officer while the officer was performing the officer's duty or solely due to the officer's status as a law enforcement officer. The special sentencing rule would be applied as follows:

- Felonies levels 2 through 10;
  - Sentencing would be enhanced by 1 level;
- Level 1 felonies
  - The minimum sentence would be life in prison;
  - The offender would not be eligible for a sentence modification or probation;
  - the offender could not be released on parole before serving 25 years of the sentence;
  - The offender would not be eligible for good time credit; and
  - No other sentence would be permitted.

If an offender would be subject to a minimum presumptive sentence due to criminal history, the minimum sentence of 25 years would not apply. Instead, the longer minimum sentence would apply.

The sentence imposed would not be considered a departure from the sentencing grid and could not be appealed. Further, the enhancements would not apply to crimes where the factual aspect concerning a law enforcement officer is a statutory element of the offense.

Finally, the bill would define “law enforcement officer” by reference to two of the three categories included in the definition provided of the term provided in the criminal code definitions section. This definition would include any person who by virtue of such person’s office or public employment is vested by law with the duty to maintain public order or to make arrests for crimes, and any university or campus police officer.

### ***Policies for the Electronic Recording of Custodial Interrogations***

Effective July 1, 2017, the bill would require all Kansas law enforcement agencies to adopt a detailed, written policy concerning the electronic recording of custodial interrogations conducted at a place of detention and to implement such policy on or before July 1, 2018. In developing such policy, the bill would require local law enforcement agencies to collaborate with the county or district attorney in the appropriate jurisdiction regarding its contents. The policy would require electronic recording of the entirety of a custodial interrogation that concerns a homicide or felony sex offense, as well as the making and signing of a statement during the course of such interrogation. The policy also would include retention and storage requirements and a statement of exceptions in some circumstances, such as equipment malfunction or inadvertent failure to operate the recording equipment properly.



The bill would require the policy to be available to all officers and for public inspection during normal business hours. During trial, the bill would allow for officers to be questioned pursuant to the rules of evidence regarding any violation of such a policy. Finally, the bill would provide that every electronic recording of any statement shall be confidential and exempt from the Kansas Open Records Act.

### ***Effective Date***

Except as noted above, the bill would be in effect upon publication in the *Kansas Register*.

### **Conference Committee Action**

The Conference Committee agreed to the House version of SB 112, containing provisions regarding the penalties for possession of drug paraphernalia and residential burglary, electronic recording of custodial interrogations, and aggravated domestic battery. The Conference Committee also agreed to add the contents of:

- HB 2049, as amended by the House Committee on Judiciary, enacting the Law Enforcement Protection Act;
- HB 2071, as amended by the Senate Committee on Judiciary, regarding domestic battery and the custody and disposition of cruelly treated animals; and
- HB 2085, as amended by Senate Committee on Judiciary, regarding postrelease supervision of persons convicted of sexually violent crimes and correction of illegal sentences.

## **Background**

### ***SB 112—Drug Paraphernalia***

SB 112 was introduced at the request of the Kansas County and District Attorneys Association (KCDAA). In the Senate Committee on Judiciary hearing, representatives of the KCDAA and the Kansas Association of Criminal Defense Lawyers provided testimony in support of the bill and explained the change would make the sentence proportional to the sentence for possession of marijuana, which was made a class A misdemeanor during the 2016 Session. A private citizen was an opponent of the bill.

The Senate Committee agreed to amend the bill by adding the contents of SB 113, to make residential burglary a person felony. Further background information regarding SB 113 is provided below.

In the House Committee on Judiciary, a representative of the KCDAA testified in support of the bill. A private citizen testified as an opponent.

The House Committee amended the bill to make the burglary provision effective upon publication in the *Kansas Register*. The House Committee also adopted amendments adding the contents of SB 92, as amended by the Senate Committee, regarding electronic recording of custodial interrogations, and SB 136, as amended by the Senate Committee, regarding mandatory expungement of arrest records. Finally, the House Committee added language based upon HB 2034, regarding aggravated domestic battery. Further background information regarding SB 92, SB 136, and HB 2034 is provided below.

According to the fiscal note prepared by the Division of the Budget on SB 112, as introduced, the Office of Judicial Administration indicates the bill would have no fiscal effect on Judicial Branch operations. The Kansas Sentencing

Commission (Commission) indicates the bill would have no fiscal effect on prison admissions or bed space or the Commission's journal entry workload. Fiscal note information regarding SB 113, SB 92, SB 136, and HB 2034 is provided below.

#### *SB 113—Residential Burglary*

SB 113 was introduced at the request of the KCDAA. In the Senate Committee on Judiciary hearing, representatives of the KCDAA and the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs' Association appeared in support of the bill. The proponents explained residential burglary was made a nonperson felony in the 2016 Session; however, because of the invasive and potentially dangerous nature of the crime, it is important to victims that it be a person felony. Additionally, the person felony classification would result in a longer sentence for a person convicted of subsequent crimes. No other testimony was provided.

According to the fiscal note prepared by the Division of the Budget, the Office of Judicial Administration indicates SB 113 would have no fiscal effect on Judicial Branch operations. The Commission indicates the bill would have no fiscal effect on prison admissions or bed space or the Commission's journal entry workload.

#### *SB 92—Custodial Interrogations*

SB 92 was introduced following a Judicial Council study of 2016 HB 2593. In the Senate Committee on Judiciary hearing, representatives of the Innocence Project; Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs' Association; Kansas County and District Attorneys Association; and the Project for Innocence and Post-Conviction Remedies at the University of Kansas School of Law appeared in support of the bill. The

proponents offered an amendment to clarify that recordings of written statements would only be required in cases involving a homicide or felony sex offense. Representatives of the Kansas Association of Criminal Defense Lawyers and the Kansas Judicial Council offered written-only testimony in support of the bill. A representative of the League of Kansas Municipalities gave opponent testimony but indicated the League's concerns would be addressed by the proposed amendment.

The Senate Committee adopted the amendment offered by the proponents.

In the House Committee on Judiciary hearing, a citizen and representatives of the Innocence Project; Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs' Association; Kansas County and District Attorneys Association; and League of Kansas Municipalities appeared in support of the bill. The Director of the KBI, Kansas Association of Criminal Defense Lawyers, and Kansas Judicial Council submitted written-only testimony supporting the bill. No other testimony was provided.

According to the fiscal note prepared by the Division of the Budget, the Office of Judicial Administration indicates enactment of SB 92, as introduced, could increase Judicial Branch expenditures from prolonged court cases; however, an estimate of costs could not be determined. The Kansas Association of Counties and the League of Municipalities indicates county and city government also could incur additional costs; however, neither was able to provide a precise estimate of costs. The Kansas Highway Patrol indicates it would be required to purchase seven sets of recording equipment at a cost of \$13,000 and incur additional costs for labor, materials, and supplies. The KBI indicates any costs incurred would be negligible. Any fiscal effect associated with the bill is not reflected in *The FY 2018 Governor's Budget Report*.

### *SB 136—Expungement of Arrest Records*

SB 136 was introduced at the request of Senator Haley. In the Senate Committee on Judiciary hearing, Senator Haley and a representative of Fitting the Description appeared in support of the bill. A representative of the KBI provided written-only neutral testimony. Proponents stated that an arrest record can negatively impact a person's ability to get a job or secure a loan, and the bill would provide a swift process to ensure a mistaken arrest does not remain on a person's record. No opponent testimony was provided.

The Senate Committee adopted an amendment with changes recommended by the KBI to exclude from the definition of "mistaken identity" any situation in which an arrestee intentionally provides false information to law enforcement officials in an attempt to conceal such person's identity. The amendment also would specify that the arrest record would be expunged and purged from all applicable state and federal systems and would explain the required procedure for such order.

Senator Haley testified in support of the bill in the House Committee on Judiciary hearing. A representative of Fitting the Description submitted written-only testimony supporting the bill. No other testimony was provided.

According to the fiscal note prepared by the Division of the Budget on SB 136, as introduced, the Office of Judicial Administration indicates any fiscal effect resulting from enactment of the bill would be negligible.

### *HB 2034—Aggravated Domestic Battery*

HB 2034 was introduced by the House Committee on Judiciary at the request of the Attorney General. As introduced, the bill would have added elements involving strangulation to the crime of aggravated battery.

In the House Committee hearing, conferees testifying in support of the bill included a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs' Association, and representatives of the Attorney General's Office, Kansas Coalition Against Sexual and Domestic Violence, Johnson County District Attorney's Office, Shawnee Mission Health Forensic Assessment Consultation and Treatment Program, and Shawnee Mission Medical Center. Written-only testimony supporting the bill was submitted by a citizen.

According to the fiscal note prepared by the Division of the Budget on HB 2034, as introduced, the Office of Judicial Administration indicates enactment of the bill could result in more trials and appeals, requiring additional staff time. The bill also could generate additional docket fees. However, a precise fiscal effect cannot be determined. The Commission indicates enactment of the bill would require 5 additional prison beds in FY 2018 and 5-27 additional beds by FY 2027. Based on a contract rate of \$40 per day, the additional beds could cost the Department of Corrections an additional \$14,600 to \$73,000 in FY 2018 and an additional \$29,200 to \$146,000 in FY 2019. These amounts would be from the State General Fund. Any fiscal effect associated with HB 2034 is not reflected in *The FY 2018 Governor's Budget Report*. No fiscal note was available for the modified strangulation language placed in SB 112 at the time of the House Committee action.

#### ***HB 2049—Law Enforcement Protection Act***

HB 2049 was introduced by the House Committee on Corrections and Juvenile Justice at the request of the Kansas Attorney General's Office. In the House Committee hearing, the Attorney General and representatives of the Fraternal Police Lodge Number 5, and the Kansas Association of Chiefs of Police, Kansas Sheriffs' Association, and Kansas Peace Officers Association testified in favor of the bill. The League of Kansas Municipalities provided written-only

testimony in favor of the bill. The Kansas Association of Criminal Defense Lawyers provided written-only neutral testimony suggesting the Committee amend the bill to define “law enforcement officer.” No opponent testimony was provided.

The House Committee amended the bill to define “law enforcement officer” by reference to two categories included in the criminal code definitions section.

In the Senate Committee on Judiciary hearing, the same proponents testified and provided written-only testify as before the House Committee. No neutral or opponent testimony was provided.

According to the fiscal note prepared by the Division of the Budget on HB 2049, as introduced, the Office of Judicial Administration indicates the elevation of severity levels could increase appeals and could result in the collection of docket fees, but a precise fiscal effect could not be determined. The Kansas Sentencing Commission estimates enactment of the bill would result in an additional number of prison beds, but that number could not be determined. Any fiscal effect associated with the bill is not reflected in *The FY 2018 Governor’s Budget Report*.

***HB 2071—Domestic Battery***

HB 2071 was introduced by the House Committee on Judiciary at the request of Representative Kuether. As introduced, the bill contained the provisions related to domestic battery. At the hearing before the House Committee, Representative Kuether testified in support of the bill and provided written testimony offered by a citizen supporting a similar bill during a previous session. The Kansas Coalition Against Sexual and Domestic Violence provided written-only testimony in support of the bill. No neutral or opponent testimony was presented.

At the hearing before the Senate Committee on Judiciary, the same proponents testified or offered written testimony. A representative of the Office of Judicial Administration testified as a neutral conferee.

The Senate Committee amended the bill to add the contents of HB 2302, as amended by House Committee, regarding the custody and disposition of cruelly treated animals. Further background information regarding HB 2302 is provided below.

According to the fiscal note prepared by the Division of the Budget on HB 2071, as introduced, the Office of Judicial Administration indicates enactment of the bill would increase Judicial Branch expenditures beginning in FY 2018 due to increased staff time incurred by Court Services Officers performing additional record checks required by the bill's provisions. The Kansas Sentencing Commission (Commission) indicates enactment of the bill would have no fiscal effect on prison admissions or bed space, or the workload of the Commission. Finally, the Department of Corrections indicates enactment of the bill would have no fiscal effect on its operations.

Fiscal note information for HB 2302 is provided below.

#### *HB 2302—Animal Cruelty and Dog Fighting*

HB 2302 was introduced by the House Committee on Judiciary at the request of the Humane Society of the United States. In the House Committee hearing, an attorney testified in support of the bill. The Great Plains SPCA, Humane Society of the United States, Kansas Animal Control Association, Kansas Association of Chiefs of Police, Kansas Peace Officers Association, Kansas Sheriffs' Association, and Lawrence Humane Society provided written-only testimony supporting the bill. No neutral or opponent testimony was provided.



The House Committee adopted an amendment changing the purpose of the petition from placing the animal for adoption or euthanization to transferring ownership of the animal.

In the Senate Committee on Judiciary hearing, the same proponents testified or submitted written testimony as in the House Committee hearing. No neutral or opponent testimony was provided.

According to the fiscal note prepared by the Division of the Budget on HB 2302, as introduced, the Kansas Association of Counties and Office of Judicial Administration indicate any fiscal effect would be negligible.

***HB 2085—Postrelease Supervision of Persons Convicted of Sexually Violent Crimes***

HB 2085 was introduced by the House Committee on Corrections and Juvenile Justice at the request of the Kansas Sentencing Commission. As introduced, the bill contained the provisions regarding postrelease supervision for persons convicted of sexually violent crimes.

In the House Committee hearing, representatives of the Kansas Sentencing Commission and the Department of Corrections (KDOC) testified in support of the bill, stating the bill was intended to establish a postrelease supervision period for juveniles convicted of a sexually violent offense, in light of the Kansas Supreme Court's decision in *State v. Dull*, 302 Kan. 32 (2015), which held mandatory lifetime postrelease supervision for juveniles to be unconstitutional. A representative of the Office of the Attorney General (AG's Office) also testified in support of the bill and offered a proposed amendment to clarify the application of a separate provision regarding postrelease supervision for persons convicted of sexually violent crimes, following the rationale of the Kansas Court of Appeals in *State v. Herrmann*, \_\_\_ Kan.

App. 2nd \_\_\_\_, 384 P.3d 1019 (2016). No other testimony was provided.

The House Committee adopted the amendment proposed by the AG's Office.

In the Senate Committee on Judiciary hearing, representatives of the Kansas Sentencing Commission and the KDOC testified in support of the bill. No other testimony was provided.

The Senate Committee amended the bill to add the provisions of HB 2035, regarding illegal sentences. Further background information regarding HB 2035 is provided below.

According to the fiscal note prepared by the Division of the Budget, the Office of Judicial Administration states HB 2035, as introduced, would not have a fiscal effect on the Judicial Branch, and the Sentencing Commission estimates the bill would not affect prison admissions or beds. Fiscal note information for HB 2035 is provided below.

#### *HB 2035—Illegal Sentences*

HB 2035 was introduced by the House Committee on Judiciary at the request of the Attorney General. In the House and Senate Committees on Judiciary hearings, a representative of the Attorney General testified in support of the bill, stating the changes proposed by the bill, with the exception of the provision regarding a change in the law, reflected case law established by the Kansas Supreme Court. No other testimony was provided.

According to the fiscal note prepared by the Division of the Budget on HB 2035, the Office of Judicial Administration indicates the bill could decrease expenditures by reducing the number of motions to correct illegal sentences, but a precise estimate cannot be provided.

Crimes and criminal procedure; aggravated domestic battery; strangulation; domestic battery; drug paraphernalia; burglary; cruelty to animals; dog fighting; Law Enforcement Protection Act; expungement; illegal sentences; postrelease supervision for persons convicted of sexually violent crimes; custodial interrogations

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