

**CONFERENCE COMMITTEE REPORT BRIEF
HOUSE BILL NO. 2508**

As Agreed to March 30, 2022

Brief*

HB 2508 would amend 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 would amend 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 would amend 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 would remove 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 would replace the current 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 would be 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);

*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kIRD>

- 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 would be 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 would be a severity level 4 person felony);
- Knowingly causing great bodily harm, abusive head trauma, permanent disability, or disfigurement (this conduct would be a severity level 3 person felony);
- Knowingly inflicting cruel and inhuman corporal punishment with a deadly weapon (this conduct would be 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 could be inflicted (this conduct would be a severity level 3 person felony).

Forfeiture of Appearance Bonds

The bill would require, 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 would require 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 would add the following to the circumstances under which a court would 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 would clarify that a court could impose conditions when it is required to direct that a forfeiture be set aside.

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

Witness Testimony at Preliminary Examination

The bill would allow, 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 would amend 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 would define “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 would 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 would replace 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 would replace 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 would reduce the minimum number of physicians or psychologists the court could appoint to examine the defendant from two to one and would clarify the qualifications of such physicians or psychologists.

The bill would clarify the procedure and time limitation for commitment of the defendant to an institution or facility for the examination, and would require, 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 would amend 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 would state 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 would allow 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 would allow 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 would allow 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 would be 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 would be 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 would be amended to reflect the new evaluation and treatment options provided by the bill. The bill would require 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 would expand the places the court could 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 would require 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 would require such proceedings to commence within 21 days of receipt of the certification, unless exceptional circumstances warrant delay. The bill would implement 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 would require, rather than allow, 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 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 would be required to provide a report to the court within ten days after outpatient treatment is terminated. The bill would provide 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 would require 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 would allow, 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 would outline requirements for the prescription, ordering, administration, and review of such medications.

The bill would prohibit 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 would require 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 would allow 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 could grant the defendant a reasonable continuance to allow the defendant to be better able to prepare for or participate in the hearing. The bill would require 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 would be required to order the hearing to proceed.

The bill would require, 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 would permit 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 would prohibit 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 would amend 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 would amend various procedural provisions to incorporate the licensed psychologist at or head of such appropriate secure facility. The bill would amend 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 would amend 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” would be changed to “prosecuting attorney,” and technical changes would be made to ensure consistency in statutory style, references, and phrasing.

Conference Committee Action

The Conference Committee agreed to remove the contents of HB 2508, concerning retention of fingerprints for participation in the federal Rap Back program and insert the contents of HB 2277, as amended by the House Committee on Corrections and Juvenile Justice, regarding the definition of “possession” in the Kansas Criminal Code, and removing a House Committee of the Whole amendment excluding fentanyl testing strips from the definition of drug paraphernalia. [*Note:* The Conference Committee on HB 2299 agreed to include the provisions of HB 2508, as it entered conference, in the conference committee report for that bill.]

The Conference Committee further agreed to add the contents of:

- HB 2362, as passed by the House, regarding the elements and severity levels for the crime of abuse of a child;
- HB 2674, as further amended by the House Committee on Judiciary, regarding forfeiture of appearance bonds;
- Sub. for HB 2447, as passed by the House, regarding witness testimony at preliminary examinations; and
- HB 2697, as amended by the House Committee on Judiciary, regarding competency proceedings and commitment of certain persons.

Background

As it entered conference, HB 2508 contained provisions concerning retention of fingerprints for participation in the federal Rap Back program; these provisions are included in the Conference Committee Report for HB 2299, and the background for those provisions can be found in that conference committee report.

HB 2277 (Definition of “Possession”)

HB 2277 was introduced by the House Committee on Corrections and Juvenile Justice at the request of a representative of the Kansas County and District Attorneys Association.

[*Note:* The bill, as introduced, contained provisions similar to those of 2020 HB 2456, as passed by the House.]

House Committee on Corrections and Juvenile Justice

In the House Committee hearing on February 18, 2021, **proponent** testimony was provided by a representative of the Kansas County and District Attorneys Association (KCDAA), who stated the bill would clarify the culpable mental state required to prove possession because current law describes two types of culpable mental states that could be applied.

Written-only proponent testimony was provided by a representative of the League of Kansas Municipalities. No other testimony was provided.

The House Committee amended the bill to remove the definition of “possession” in a Kansas Criminal Code definitions section pertaining specifically to drug crimes. [Note: The Conference Committee retained this amendment.]

House Committee of the Whole

The House Committee of the Whole amended the bill to exclude fentanyl testing strips from the definition of “drug paraphernalia”. [Note: The Conference Committee did not retain this amendment.]

Senate Committee on Judiciary

In the Senate Committee hearing on February 1, 2022, the same KCDAA representative who testified in the House Committee hearing provided **proponent** testimony. Written-only proponent testimony was provided by representatives of Kansas Recovery Network, the Reno County Health Department, and Mirror, Inc.; a professor of medicine; two registered nurses; a doctor of osteopathy; a medical doctor; two medical students; and one private citizen. No other testimony was provided.

HB 2362 (Elements and Severity Levels for Crime of Abuse of a Child)

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

House Committee on Judiciary

In the House Committee hearing on February 22, 2021, a representative of the KCDAA testified as a **proponent** of the bill, stating it would allow for more appropriate sentencing ranges for those who commit the offense. No other testimony was provided.

Senate Committee on Judiciary

In the Senate Committee hearing on January 25, 2022, the same KCDAA representative who testified in the House Committee hearing provided **proponent** testimony, and another representative of KCDAA testified as a proponent and requested amendments to include “burning” in the crime and to clarify the definition of “torture” as it relates to child abuse. No other testimony was provided.

HB 2674 (Forfeiture of Appearance Bonds)

The bill was introduced by the House Committee on Judiciary at the request of the Kansas Bail Agents Association.

House Committee on Corrections and Juvenile Justice

In the House Committee on Corrections and Juvenile Justice hearing on February 14, 2022, a representative of the Kansas Bail Agents Association testified as a **proponent** of the bill, stating the bill would address situations in some Kansas jurisdictions where an arrest warrant is not issued or is issued after delay when a defendant fails to appear on a surety bond. No other testimony was provided.

On February 16, 2022, the House Committee on Corrections and Juvenile Justice amended the bill to adjust the procedure by which the surety can request the warrant be entered into the index. [*Note: This amendment was further amended by the House Committee on Judiciary.*]

On February 23, 2022, the bill was referred to the House Committee on Appropriations. On March 1, 2022, the bill was referred to the House Committee on Judiciary.

House Committee on Judiciary

In the House Committee on Judiciary hearing on March 3, 2022, the same **proponent** testified as in the previous hearing. A representative of the Kansas Sheriffs Association testified as a neutral conferee, requesting amendments limiting entry of warrants into the NCIC index to felonies, requiring a sheriff to notice the court if entry is not made, and removing court order requirements from the warrant entry process.

On March 7, 2022, the House Committee on Judiciary amended the bill based upon the request of the Kansas Sheriffs Association. [*Note: These amendments were retained by the Conference Committee.*]

HB 2447 (Witness Testimony at Preliminary Examination)

As introduced, HB 2447 would have terminated certain transfers from the Securities Act Fee Fund. [*Note: SB 392, approved by the Governor on March 29, 2022, contains provisions identical to those of HB 2447, as introduced.*]

On March 15, 2022, the House Committee on Judiciary recommended a substitute bill for HB 2447 containing only a provision from HB 2538.

HB 2538

HB 2538 was introduced by the House Committee on Judiciary at the request of a representative of the KCDAA. As introduced, the bill would have amended the statute governing preliminary examinations (also called preliminary hearings) to change the timing requirement, make hearsay evidence admissible, and allow witness testimony through two-way electronic audio-video communication.

House Committee on Judiciary. In the House Committee hearing on February 3, 2022, a representative of the KCDAA testified as a **proponent**, stating the bill would make preliminary hearings more efficient. The Pottawatomie County Attorney and a representative of the Kansas Coalition Against Sexual and Domestic Violence submitted written-only proponent testimony.

Representatives of the ACLU of Kansas and the Kansas Association of Criminal Defense Lawyers testified as **opponents**, expressing concerns about possible constitutional issues and negative impacts the bill's provisions could have on defendants, prosecutors, victims, witnesses, and other participants in the criminal justice system.

On March 15, 2022, the House Committee recommended a substitute bill for HB 2447 containing only the provision from HB 2538 allowing witness testimony through two-way electronic audio-video communication.

HB 2697 (Competency Proceedings and Commitment of Certain Persons)

The bill was introduced by the House Committee on Judiciary at the request of a representative of the Kansas Department for Aging and Disability Services (KDADS).

House Committee on Judiciary

In the House Committee hearing on February 17, 2022, representatives of KDADS, ACLU of Kansas, and Wyandot Behavioral Health Network; the Wyandotte County District Attorney; and the Douglas County Sheriff testified as **proponents** of the bill, stating the bill would make important changes in the process and availability of services to conduct competency evaluations for criminal defendants, including expanding the locations and providers for such evaluations and permitting mobile competency evaluation and treatment. A representative of the Kansas Mental Health Coalition submitted written-only proponent testimony.

Representatives of the Association of Community Mental Health Centers of Kansas and the Kansas Sheriffs Association testified as neutral conferees. Representatives of the League of Kansas Municipalities and the Office of the Attorney General provided written-only neutral testimony.

Some proponent conferees and the neutral conferees requested amendments regarding several provisions.

A representative of the Disability Rights Center of Kansas provided **opponent** testimony, stating concerns regarding unintended consequences and constitutionality of various provisions.

On March 16, 2022, the House Committee adopted an amendment developed by KDADS, in consultation with other stakeholders, to address concerns raised by proponent, neutral, and opponent conferees. The amendment included:

- Defining “appropriate state, county, or private institution or facility”;
- Prohibiting evaluation or restorative treatment in a jail without the agreement of the person in charge of the jail;

- Requiring time committed to be credited to a defendant who is later sentenced for the crime charged;
- Providing additional procedures and required findings prior to administering psychotropic medication over a defendant's objection; and
- Standardizing terms and phrases used throughout the bill.

[*Note:* These amendments were retained by the Conference Committee.]

Fiscal Information

HB 2277 (Definition of "Possession")

According to the fiscal note prepared by the Division of the Budget on HB 2277 as introduced, the Office of Judicial Administration states enactment of the bill would have a negligible fiscal effect on the operations of the Judicial Branch. The Kansas Association of Counties states enactment of the bill could affect charging decisions and may have an effect on individuals held on possession charges.

According to the prison bed impact assessment prepared by the Kansas Sentencing Commission on the bill as introduced, enactment of HB 2277 would have no impact on prison admissions or the journal entries workload of the Commission.

HB 2362 (Elements and Severity Levels for Crime of Abuse of a Child)

According to the fiscal note prepared by the Division of the Budget on HB 2362, the Office of Judicial Administration indicates enactment of the bill could increase the number of cases filed in district courts, and could require more time spent by court employees and judges processing and hearing cases, but a fiscal effect cannot be estimated until the Judicial Branch has operated under the bill's provisions. Additional revenues could result from docket fees in any additional cases filed.

The Kansas Sentencing Commission estimates enactment of the bill would result in an increase of three prison admissions in FY 2022 and four prison admissions by FY 2031, as well as an increase of three prison beds needed in FY 2022 and 25 prison beds needed by FY 2031.

The Department of Corrections states enactment of the bill would not have a fiscal effect on the agency.

Any fiscal effect associated with the enactment of HB 2362 is not reflected in *The FY 2022 Governor's Budget Report*.

HB 2674 (Forfeiture of Appearance Bonds)

According to the fiscal note prepared by the Division of the Budget on HB 2674 as introduced, the Office of Judicial Administration indicates enactment of the bill would have a negligible fiscal effect on Judicial Branch operations.

The Kansas Association of Counties indicates any fiscal effect on counties would be negligible.

HB 2538 (Witness Testimony at Preliminary Examination)

According to the fiscal note prepared by the Division of the Budget on HB 2538, the Office of Judicial Administration (Office) states enactment of the bill would have a negligible fiscal effect on Judicial Branch operations. The Office states the use of two-way electronic audio-video communication could result in some savings to the Judicial Branch and county governments, but the Office cannot estimate what the savings would be. Any fiscal effect associated with enactment of HB 2538 is not reflected in *The FY 2023 Governor's Budget Report*.

HB 2697 (Competency Proceedings and Commitment of Certain Persons)

According to the fiscal note prepared by the Division of the Budget on HB 2697 as introduced, the Judicial Branch indicates enactment of the bill could have a fiscal effect on expenditures of the Judicial Branch and could lead to fewer delays in trials being held in the district courts. Nevertheless, until the courts have had an opportunity to operate under the bill's provisions, an accurate estimate of the fiscal effect on expenditures by the Judicial Branch cannot be given. Any fiscal effect on the Judicial Branch associated with enactment of the bill is not reflected in *The FY 2023 Governor's Budget Report*.

KDADS requested \$2.8 million from the State General Fund in its FY 2023 budget submission to fund HB 2697 and the full amount is included in the Governor's Budget Recommendation for FY 2023. During October 2021, there were a total of 50 defendants waiting for forensic competency evaluation for an average of 140 days to be admitted to Larned State Hospital (LSH). There were 124 defendants waiting 179 days for competency restoration treatment. Using the current per evaluation costs under the mobile evaluation contract, the cost to conduct all the evaluations would be \$90,450. For this grant program, KDADS assumes the community mental health centers would have slightly higher costs in some areas of the state due to the volume of cases and the need to recruit additional staff. Research published in the Journal of the American Academy Psychiatry and Law in 2019 indicates cost for forensic competency restoration in jails was between \$42 and \$222 per day. For this estimate, KDADS assumes a \$200 daily cost for 90 days to complete the restoration. That would make the unit cost \$20,250 per restoration ordered. The mobile competency contract also allows \$100 per hour for travel and court time which is added to the estimate for a total cost of \$2.8 million. Any fiscal effect on KDADS associated with enactment of HB 2697 is reflected in *The FY 2023 Governor's Budget Report*.

Drug paraphernalia; Kansas Criminal Code; possession; criminal procedure; preliminary examination; two-way electronic audio-video communication; forfeiture of appearance bonds; set aside; arrest; warrants; abuse of a child; elements; penalties; competency to stand trial; evaluation; location; treatment; medications

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