

Index of Balloon Amendments for HB 2318
proposed and drafted by Jennifer Roth - Proponent (with concerns)
Senate Judiciary Committee
March 9, 2012

Amendment #1:

- Would strike 1,000 ft. of a school language and replace it with distributing or possessing with intent to distribute “to a minor or on school property”
- Would apply that enhancement to offenders 18 years of age or older
- Would apply enhancement concerning violations of K.S.A. 21-5705(b) to offenders 18 years of age or older

Amendment #2:

- Would strike language denying a defendant the ability to raise two defenses (i.e. the quantity and/or substance at issue)

Amendment #3:

- Would strike 1,000 ft. of a school language and replace it with distributing drug paraphernalia “to a minor or on school property”
- Would apply that enhancement to offenders 18 years of age or older
- Would strike 1,000 ft. of a school language from K.S.A.21-5713(c)(1)(B) but leave in “on any school property”

Amendment #4:

- Would change the definition of “offender” to exclude people convicted of the lowest-amount distribution offenses (i.e. what would become SL 4 distribution offenses)

Senate Judiciary Committee
House Bill 2318 (drug code changes)
BALLOON AMENDMENT #1
by Jennifer Roth - Proponent (with concerns)
March 9, 2012

From PAGE 13 of Senate Substitute for Substitute for HB 2318:
(my proposed amendment is shown with italics and strikethrough marks)

(4) Violation of subsection (a) with respect to material containing any quantity of a controlled substance designated in K.S.A. 65-4105, 65-4107, 65-4109 or 65-4111, and amendments thereto, or an analog thereof, distributed by dosage unit, is a:

(A) Drug severity level 4 felony if the number of dosage units was fewer than 10;

(B) drug severity level 3 felony if the number of dosage units was at least 10 but less than 100;

(C) drug severity level 2 felony if the number of dosage units was at least 100 but less than 1,000; and

(D) drug severity level 1 felony if the number of dosage units was 1,000 or more.

(5) For any violation of subsection (a), the severity level of the offense shall be increased one level if the *trier of fact makes a finding that the offender is 18 or more years of age and the controlled substance or controlled substance analog was distributed or possessed with the intent to distribute to a minor or on or within 1,000 feet of any school property.*

(6) Violation of subsection (b) is a:

(A) Class A person misdemeanor, except as provided in subsection (d)(6)(B); and

(B) nondrug severity level 7, person felony if the *trier of fact makes a finding that the offender is 18 or more years of age and the substance was distributed to or possessed with the intent to distribute to a minor.*

RATIONALE:

This balloon concerns two policy considerations before this Committee: 1) whether juvenile offenders should be treated the same as adults when charged with distribution to another minor and 2) whether 1,000 ft. of a school language should still be in our code. My position (which is supported in part by the Recodification Commission's own findings) is the answer to both is NO.

Treating juveniles and adults the same on distribution or intent to distribute

According to the Recodification Committee's final report:

The Commission discovered that several prosecutors were in favor of the unintentional change. In retrospect, the Commission determines that there should be no offender age requirement because the purpose of the school property enhancement is meant to protect children from the dangers of controlled substances. In many cases, the offenders who bring controlled substances within such proximity to the schools are themselves under 18 years of age.

Kansas Criminal Code Recodification Commission, 2010 Final Report to the Kansas Legislature, Volume II, pg. 42.

The Legislature decided in the past that the 1,000 feet of a school enhancement would not apply to juveniles. Please do not undo that policy with HB 2318.

Perhaps you have seen this ad from Allstate Insurance:

Why do most 16-year-olds
drive like they're
missing a part of their brain?

— (Allstate Logo) —

BECAUSE THEY ARE.

16-YEAR-OLD BRAIN

EVEN BRIGHT, MATURE TEENAGERS SOMETIMES DO THINGS THAT ARE "STUPID." But when that happens, it's not really their fault. It's because their brain hasn't finished developing. The

crashes. These laws restrict the more dangerous kinds of driving teens do, such as nighttime driving and driving with teen passengers. Since North Carolina implemented one of the most comprehensive GDL laws in the country, it has seen a 95% decline in

The ad explains: "It's because their brain hasn't finished developing. The underdeveloped area is called the dorsal lateral prefrontal cortex. It plays a critical role in decisionmaking, problem solving and understanding future consequences of today's actions. Problem is, it won't be fully mature until they're in their 20s."

The ad ends with a plea for parents to advocate for or enforce graduated drivers licensing laws and with these words: "Let's help our teenagers not miss out on tomorrow just because they have something missing today."

I saw brain science of children successfully used by proponents of 2009 HB 2165, which strengthened the social hosting law in Kansas (primarily aimed at parents or other adults in whose homes underaged people are drinking). The proponents explained (and even had a brain diagram) that adolescence is a period of profound brain maturation, which is not complete until about 24 years of age.

All parents and science agree: minors do not have the same capacity for decisionmaking and understanding consequences that adults have – so please do not treat them the same in HB 2318.

1,000 feet of a school language

Both the Kansas Sentencing Commission Proportionality Subcommittee and the Kansas Criminal Code Recodification Commission considered realities that "much of the cities and towns of the state are within radius of school property" and that often controlled buys (i.e. arranged by law enforcement) are arranged within the radius to ensure the enhancement. (KCCRC mtg. minutes, 4/16/08, pg. 3).

Yet this language is part of HB 2318. If the concern is protecting minors, then the enhancement should apply to distribution or possession with intent to distribute to minors or acts occurring on school property. There is no need to sweep in distribution or possession with intent to distribute cases that happen to occur within 1,000 feet of a school but do not involve students or children.

My amendment would make the enhancements apply only to adults (not juveniles) *in offenses occurring to minors or on school property*. Furthermore, my language will solve the controlled-buys-arranged-within-the-radius problem. I foresee this problem getting worse with the introduction of severity-levels-by-weight laws – then controlled buys can be manipulated by weight as well as location.

In order to deal with the realities of where school properties are and how controlled buys often take place, the appropriate thing to do is make the enhancement apply to distribution or possession with intent to distribute to minors or acts on school property and remove the 1,000 ft. enhancement.

Senate Judiciary Committee
House Bill 2318 (drug code changes)
BALLOON AMENDMENT #2
by Jennifer Roth - Proponent (with concerns)
March 9, 2012

From PAGE 14 of Senate Substitute for Substitute for HB 2318:
(my proposed amendment is shown with strikethrough marks and italics)

(f) It shall not be a defense to charges arising under this section that the defendant:

(1) was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance or controlled substance analog;

(2) did not know the quantity of the controlled substance or controlled substance analog;

or

(3) did not know the specific controlled substance or controlled substance analog contained in the material that was distributed or possessed with the intent to distribute.

RATIONALE:

A defendant has a state and federal constitutional right to a fair trial. Integral to that right is a defendant being able to present the theory of his or her defense. The proposed language in HB 2318 is a complete ban on raising a defense to two things that define the severity level of an offense under the code.

In addition, this ban raises concerns for me that these offenses might be stepping into strict liability territory (since there would be no defense to knowing quantity or type of substance), which presents its own problems. See *Shelton v. Secretary, Department of Corrections*, Case No. 6:07-cv-839-Orl-35-KRS, decided 7/27/11 (Federal District Court, Middle District of Florida, Orlando Division)(finding Fla. Stat. 893.101 unconstitutional on its face for lack of mens rea); written about at <http://blogs.wsj.com/law/2011/07/27/florida-judge-declares-sates-drug-law-unconstitutional/>

Senate Judiciary Committee
House Bill 2318 (drug code changes)
BALLOON AMENDMENT #3
by Jennifer Roth - Proponent (with concerns)
March 9, 2012

From PAGE 21 of Senate Substitute for Substitute for HB 2318:
(my proposed amendment is shown with italics and bold/strikethrough marks)

(e) (1) Violation of subsection (a) is a drug severity level ~~2-3~~3 felony;

(2) violation of subsection (b) is a :

(A) Drug severity level ~~4-5~~5 felony, except ~~that violation of subsection (b) is a~~ as provided in subsection (e)(2)(B); and

(B) drug severity level ~~3-4~~4 felony if the trier of fact makes a finding that *the offender is 18 or more years of age and the offender is 18 or more years of age and the offender distributed or caused drug paraphernalia to be distributed to a minor or on* ~~or within 1,000 feet of~~ any school property;

(3) violation of subsection (c) is a :

(A) Nondrug severity level 9, nonperson felony, except ~~that violation of subsection (c) is~~ as provided in subsection (e)(3)(B); and

(B) drug severity level ~~4-5~~5 felony if the trier of fact makes a finding that *the offender is 18 or more years of age and the offender is 18 or more years of age and the offender distributed or caused drug paraphernalia to be distributed to a minor or on* ~~or within 1,000 feet of~~ any school property; and

(4) violation of subsection (d) is a :

(A) Class A nonperson misdemeanor, except ~~that violation of subsection (d) is a~~ as provided in subsection (e)(4)(B); and

(B) nondrug severity level 9, nonperson felony if the trier of fact makes a finding that *the offender is 18 or more years of age and* ~~the offender is 18 or more years of age and~~ the offender distributed or caused drug paraphernalia to be distributed to a minor or on ~~or within 1,000 feet~~ **of** any school property.

From PAGE 22-23 of Senate Substitute for Substitute for HB 2318:

(c) (1) Violation of subsection (a) is a :

(A) Nondrug severity level 9, nonperson felony, except ~~that violation of subsection (a) is~~ ~~a~~ as provided in subsection (c)(1)(B); and

(B) nondrug severity level 7, nonperson felony if the trier of fact makes a finding that the offender is 18 or more years of age and the violation occurred on ~~or within 1,000 feet of~~ any school property; and

(2) violation of subsection (b) is a class A nonperson misdemeanor.

RATIONALE:

Same reasons as given in #1 above (the concerns with juveniles and school zones).

My amendment would make the enhancements apply only to adults (not juveniles) in offenses occurring to minors or on school property.

Senate Judiciary Committee
House Bill 2318 (drug code changes)
BALLOON AMENDMENT #4
by Jennifer Roth - Proponent (with concerns)
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K.S.A. 29-4202. Kansas Offender Registry Act.

(f) "Drug offender" means any person who has been convicted of:

(1) Unlawful manufacture or attempting such of any controlled substance or controlled substance analog as defined in K.S.A. 65-4159, prior to its repeal, or K.S.A. 2010 Supp. 21-36a03, and amendments thereto;

(2) possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to manufacture a controlled substance as defined in subsection (a) of K.S.A. 65-7006, prior to its repeal, or subsection (a) of K.S.A. 2010 Supp. 21-36a09, and amendments thereto;

(3) K.S.A. 65-4161, prior to its repeal, or subsection (a)(1) of K.S.A. 2010 Supp. 21-36a05, and amendments thereto *(i) if the quantity of the material was 100 grams or more, unless otherwise provided herein; (ii) if the controlled substance was heroin or methamphetamine, then if the quantity of the material was 1 gram or more; or (iii) if the controlled substance is distributed by dosage unit, then if the number of dosage units was 10 or more.* The provisions of this paragraph shall not apply to violations of subsections (a)(2) through (a)(6) or (b) of K.S.A. 2010 Supp. 21-36a05, and amendments thereto, which occurred on or after July 1, 2009, through April 15, 2010;

(4) an offense in effect at any time prior to July 1, 2011, that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection; or

(5) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2011 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

RATIONALE:

Years of work by the Recodification Commission, followed by the work of the Judicial Council, produced a lot of valuable information. Surrounding states use the weight system in classifying drug crimes. Not all people who distribute drugs or possess with intent to distribute should be treated the same. There are people who "distribute" drugs to their friends, there are people who sell drugs to support their own addictions and there are people who are drug dealers in the true sense.¹

Current law provides that anyone convicted of distribution/possession with intent to distribute opiates, opium or narcotic drugs, or any stimulant – regardless of the amount of drug involved – must register under the Kansas Offender Registration Act (KORA). The addition of these offenders to the registry occurred in 2007. The drug crimes did not specify an effective date and, after much confusion, were applied retroactively. The current minimum time period to register is 15 years. Failure to comply with the registration requirements is a severity level 6, 5 or 3 person felony (depending on priors and/or length of noncompliance period). An offender convicted of distribution with intent to sell/distribution cannot petition for an expungement until his/her registration period is over (whereas it used to be five years after sentence or probation/postrelease supervision ended).² Obviously, being a registered offender presents challenges to people's rehabilitation.

Last session, the fiscal note for HB 2322 said changes to KORA would add 2,150 offenders to the offender registry *per year*. Testimony last year from the KBI indicated our registry already has about 4,000 non-sex offenders. While I do not know how many of these are drug offenders, it seems almost certain a majority of them are – and a big portion of that 2,150 people/year will also be drug offenders. Requiring already-overburdened law enforcement agencies to register low-amount distributors is not a good use of limited resources.

HB 2318 tells us it is time to stop treating alike all people who distribute/possess with intent to distribute drugs – and start considering the amount of drugs involved. Under the same reasoning, it is time to stop treating them all alike for registry purposes as well.

¹ When reading through the minutes of the Recodification Committee, it is clear that members recognized a distinction between “small-time dealers” and “big-time dealers.” (Sample comment: it is easier to catch small-time dealers than big-time dealers because they are often caught holding drugs, not selling them – see 9/26/07 meeting minutes). Even the KBI thought small-time dealers should be treated differently. (1/9/08 meeting minutes). That was the reason the Committee went to great lengths to come up with justifiable amounts/severity levels, so that proportionality could result. The minutes reflect that [one member, a prosecutor] commented that “everyone who habitually used drugs becomes a dealer at some point as a means to support their habit or help make drugs available to others.” (12/3/08 meeting minutes, p. 3).