

SESSION OF 2021

**CONFERENCE COMMITTEE REPORT BRIEF  
HOUSE BILL NO. 2026**

As Agreed to April 8, 2021

**Brief\***

HB 2026 would establish a certified drug abuse treatment program for certain persons who have entered into a diversion agreement pursuant to a memorandum of understanding and amend law related to supervision of offenders and the administration of certified drug abuse treatment programs. It also would amend law to change penalties for crimes involving riot in a correctional facility and unlawfully tampering with an electronic monitoring device.

***Certified Drug Abuse Treatment Program—Divertees***

The bill would establish a certified drug abuse treatment program (program) for certain persons who have entered into a diversion agreement (divertees) pursuant to a memorandum of understanding (MOU).

The bill would allow eligibility for participation in a program for offenders who have entered into a diversion agreement in lieu of further criminal proceedings on and after July 1, 2021, for persons who have been charged with felony possession of a controlled substance and whose criminal history score is C or lower with no prior felony drug convictions.

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\*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/kldr>

[*Note:* Under continuing law, Kansas' sentencing guidelines for drug crimes utilize a grid containing the crime severity level (1 to 5, 1 being the highest severity) and the offender's criminal history score (A to I, A being the highest criminal history score) to determine the presumptive sentence for an offense. Felony drug possession is currently classified as a drug severity level 5 felony. An offender is classified as criminal history C if the offender has one person and at least one nonperson felony.]

The bill would also provide that, as part of the consideration of whether to allow a person to enter into such a diversion agreement, a person who meets the criminal charge and history requirements shall be subject to:

- A drug abuse assessment that would be required to include a clinical interview with a mental health professional and a recommendation concerning drug abuse treatment for the diveree; and
- A standardized criminal risk-need assessment specified by the Kansas Sentencing Commission (Commission).

The bill would further require the diversion agreement to include provisions that require the diveree to comply with and participate in a program if the diveree meets the assessment criteria set by the Commission, with a term of treatment not to exceed 18 months.

### *Supervision*

The bill would provide that divertees who are committed to a program could be supervised by community correctional services or court services pursuant to an MOU. A diveree would be discharged from the program if the diveree:

- Is convicted of a new felony; or

- Has a pattern of intentional conduct that demonstrates the divertee's refusal to comply with or participate in the program, in the opinion of the county or district attorney.

If a divertee is discharged, such person would be subject to the revocation provisions of the respective diversion agreement.

### *Definitions*

The bill would define "mental health professional" for this purpose to include:

- Licensed social workers;
- Persons licensed to practice medicine and surgery;
- Licensed psychologists;
- Licensed professional counselors; or
- Registered alcohol and other drug abuse counselors licensed or certified as addiction counselors who have been certified by the Secretary of Corrections to treat persons pursuant to continuing law.

he bill would define "divertee" to mean a person who has entered into a diversion agreement pursuant to continuing law and amendments made by the bill.

### *Memorandum of Understanding*

The bill would amend law related to diversion agreements by adding provisions related to an MOU.

The bill would allow a county or district attorney to enter into an MOU with the chief judge of a judicial district or community correctional services to assist with the supervision and monitoring of persons who have entered into a diversion agreement. The county or district attorney would retain authority over whether a particular defendant may enter into a diversion agreement or whether such agreement would be revoked.

The bill would require an MOU to include provisions related to:

- Determining the level of supervision needed for a defendant;
- Use of a criminal-risk needs assessment;
- Payment of costs for supervision; and
- Waiver of the supervision fee established by the bill.

The bill would authorize the Office of Judicial Administration to adopt guidelines regarding the content of an MOU between a county or district attorney and the chief judge of a judicial district and the administration of a supervision program operating pursuant to such MOU.

The bill would amend law regarding the contents of diversion agreements to specify that such agreements may include provisions related to the MOU.

### *Supervision Fees*

The bill would provide that divertees who are supervised pursuant to an MOU would be required to pay a supervision fee in the amount established in continuing law for misdemeanor or felony post-conviction supervision, as appropriate for the crime charged. The bill would allow a

county or district attorney, in accordance with an MOU, to reduce or waive the supervision fee.

The bill would require the county or district attorney to collect supervision fees, with the moneys collected to be paid into the county general fund and used to fund the costs of diversion supervision performed pursuant to the MOU.

The bill would also require divertees who are supervised pursuant to an MOU to pay the actual costs of urinalysis testing required as a term of supervision. Payments for such testing would be required to be remitted to the county treasurer for deposit in the county general fund, and the cost of such testing could be reduced or waived by the county or district attorney.

The bill would further require county or district attorneys to determine the extent, if any, that a divertee is able to pay for assessment and treatment and the bill would require such payments to be used by the supervising agency to offset costs to the State or county. If such financial obligations are not met or cannot be met, the county or district attorney would be required to be notified for the purpose of collection or review and further action on the diversion agreement.

### ***Jurisdiction and Supervision for 2003 SB 123 Program***

The bill would amend law related to jurisdiction of, supervision of participants in, and eligibility for the nonprison sanction of placement in a certified drug abuse treatment program (2003 SB 123 Program).

### ***Jurisdiction and Supervision***

The bill would provide that, when a defendant is sentenced to the nonprison sanction of placement in a certified drug abuse treatment program, the district court from which the defendant is on parole, on probation, assigned to a

community correctional services program, or under a suspended sentence, may transfer jurisdiction of the defendant with the concurrence of the receiving district court and all parties.

The bill would specify that, if an offender is permitted to leave the judicial district of the sentencing court, the court may:

- Transfer supervision over the offender from that judicial district to another; and
- Either transfer or retain jurisdiction of the offender.

#### *Eligibility*

The bill would amend a provision related to the assignment of a risk status by a criminal risk-need assessment to remove a requirement that the assessment assign either a high or low risk status.

The bill would also remove a requirement that an offender be assigned a high risk status on the drug abuse assessment and a moderate or high risk status on the criminal risk-need assessment in order to participate in the 2003 SB 123 Program. The bill would require the Commission to determine the criteria for participation in the 2003 SB 123 Program.

#### ***Community Corrections Services Program***

Continuing law allows for assessment of certain felony offenders by a standardized risk assessment tool specified by the Commission, and for placement of certain felony offenders in a community corrections services program that provides supervision, treatment, and other services to offenders.

The bill would allow the Commission to determine an appropriate risk level for placement in the program, and would remove the requirement that offenders be assigned certain risk levels in order to participate.

### ***Riot and Incitement to Riot in a Correctional Facility***

The bill would increase the criminal penalties for riot and incitement to riot when the crime occurs in a correctional facility. The bill would define “correctional facility” for this purpose as a jail, or a correctional institution as defined by continuing law.

#### ***Riot***

Continuing law defines “riot” to mean five or more persons acting together and without lawful authority engaging in any:

- Use of force or violence that produces a breach of the public peace; or
- Threat to use such force or violence against any person or property if accompanied by power, or apparent power, of immediate execution.

Current law classifies the crime of riot as a class A person misdemeanor. The bill would increase the penalty for riot, when it occurs in a correctional facility, to a severity level 8 person felony.

#### ***Incitement to Riot***

Continuing law defines “incitement to riot” to mean, by words or conduct, knowingly urging others to engage in a riot, under circumstances that produce a clear and present danger

of injury to persons or property or a breach of the public peace.

Current law classifies the crime of incitement to riot as a severity level 8 person felony. The bill would increase the penalty for incitement to riot, when it occurs in a correctional facility, to a severity level 6 person felony.

### ***Unlawfully Tampering with Electronic Monitoring Equipment***

The bill would lower the criminal penalty for unlawfully tampering with electronic monitoring equipment. (The penalty contained in current law is a severity level 6 nonperson felony in all cases.)

The bill would lower the criminal penalty for unlawfully tampering with electronic monitoring equipment from a severity level 6 nonperson felony to a severity level 8 nonperson felony when the equipment is used for court-ordered supervision, postrelease supervision, or parole in relation to a felony.

The bill also would lower the criminal penalty for unlawfully tampering with electronic monitoring equipment from a severity level 6 nonperson felony to a class A nonperson misdemeanor when the equipment is used for court-ordered supervision, postrelease supervision, or parole in relation to a misdemeanor or for court-ordered supervision in a civil case.

### ***Conforming and Technical Changes***

The bill would make conforming amendments to statutes regarding community correctional services, certified drug abuse treatment programs, and diversion agreements to allow for implementation of the bill's provisions.

The bill would make technical amendments to ensure consistency in statutory phrasing and to remove outdated language related to a previously allowed supervision of certain adult offenders in Johnson County by court services or community corrections, which expired on July 1, 2013.

### **Conference Committee Action**

The Conference Committee agreed to the provisions of HB 2026 as amended by the Senate Committee on Judiciary. It further agreed to add the contents of:

- HB 2128, as amended by the House Committee on Corrections and Juvenile Justice and passed by the House, regarding jurisdiction and supervision of offenders in the 2003 SB 123 Program;
- HB 2374, as passed by the House, regarding eligibility for the 2003 SB 123 Program and community corrections services programs;
- HB 2191, as passed by the House, regarding riot and incitement to riot in a correctional facility; and
- SB 4, as passed by the Senate, regarding penalties for tampering with electronic monitoring equipment.

### **Background**

#### ***HB 2026 (Certified Drug Abuse Treatment Program— Divertees)***

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

Commission (Commission). This bill (HB 2026) would establish a similar treatment program for divertees.

This bill was prefiled for introduction on December 31, 2020, at the request of the Joint Committee on Corrections and Juvenile Justice Oversight.

[*Note:* As introduced, 2021 HB 2026 contained provisions similar to 2020 HB 2708, as recommended by the House Committee on Corrections and Juvenile Justice.]

*House Committee on Corrections and Juvenile Justice*

In the House Committee hearing on January 20, 2021, **proponents** testifying in support of the bill included representatives of the Greater Kansas City Chamber of Commerce and the Commission. The proponents generally indicated the bill would expand the availability of drug abuse treatment options across the state for persons on diversion.

Written-only **proponent** testimony was provided by a representative of the Kansas Criminal Justice Reform Commission and by a representative of the Kansas Association of Chiefs of Police, the Kansas Peace Officers Association, and the Kansas Sheriffs Association.

Neutral testimony was provided by a representative of the Behavioral Health Association of Kansas, who expressed concern regarding the need for additional funding for drug abuse treatment programs, if the bill were enacted.

Written-only neutral testimony was provided by representatives of the American Civil Liberties Union of Kansas and the Kansas Department of Corrections (KDOC).

No other testimony was provided.

*Senate Committee on Judiciary*

In the Senate Committee hearing on January 2, 2021, **proponents** testifying in support of the bill included representatives of the American Civil Liberties Union of Kansas, Greater Kansas City Chamber of Commerce, and the Commission.

Written-only **proponent** testimony was provided by a representative of the Kansas Association of Chiefs of Police, the Kansas Peace Officers Association, and the Kansas Sheriffs Association.

Neutral testimony was provided by a representative of the Kansas Community Corrections Association, who suggested an amendment regarding proportional distribution of supervision fee funds across drug abuse treatment programs.

Written-only neutral testimony was provided by a representative of the KDOC.

No other testimony was provided.

On February 26, 2021, the Senate Committee adopted an amendment based on the suggestion by the Kansas Community Corrections Association.

***HB 2128 (Jurisdiction and Supervision for 2003 SB 123 Program)***

HB 2128 was introduced by the House Committee on Corrections and Juvenile Justice at the request of a representative of the Commission.

*House Committee on Corrections and Juvenile Justice*

In the House Committee hearing on February 1, 2021, a representative of the Commission testified as a **proponent** of the bill. A representative of the Kansas Community Corrections Association submitted written-only **proponent** testimony. No other testimony was provided.

The House Committee amended the bill to remove provisions related to participation in the certified drug abuse treatment program by nondrug offenders.

***HB 2374 (Eligibility for 2003 SB 123 Program and Community Corrections Supervision Programs)***

HB 2374 was introduced by the House Committee on Corrections and Juvenile Justice at the request of a representative of the Commission.

*House Committee on Corrections and Juvenile Justice*

In the House Committee hearing on February 23, 2021, a representative of the Commission provided **proponent** testimony, stating the Commission is in the process of implementing new probation assessments and the change would help facilitate implementation of the new assessments.

No other testimony was provided.

***HB 2191 (Riot and Incitement to Riot in a Correctional Facility)***

HB 2191 was introduced by the House Committee on Corrections and Juvenile Justice at the request of Representative Jennings on behalf of the Pawnee County Attorney.

*House Committee on Corrections and Juvenile Justice*

In the House Committee hearing on February 11, 2021, **proponent** testimony was presented by representatives of the Johnson County Sheriff's Office and the Kansas Sheriffs Association and by the Leavenworth County Attorney.

No other testimony was provided.

***SB 4 (Unlawful Tampering with Electronic Monitoring Equipment)***

SB 4 was prefiled for introduction by the Joint Committee on Corrections and Juvenile Justice Oversight on December 31, 2020.

[*Note:* As introduced, SB 4 contained provisions identical to 2021 HB 2027, as introduced, regarding unlawful tampering with electronic monitoring equipment.]

*Senate Committee on Judiciary*

In the Senate Committee hearing on January 27, 2021, a representative of the Commission testified as a **proponent** of the bill, indicating the bill is a proportionality measure to align the penalties with the underlying offense. Written-only **proponent** testimony was provided by a representative of the Kansas Association of Criminal Defense Lawyers.

Neutral testimony was provided by a representative of the Kansas Association of Chiefs of Police, the Kansas Sheriffs Association, and the Kansas Peace Officers Association (law enforcement organizations).

On February 3, 2021, the Senate Committee recommended the bill be placed on the Consent Calendar.

### *House Committee on Judiciary*

In the House Committee hearing on March 16, 2021, the same proponent and neutral conferees provided testimony.

On March 24, 2021, the House Committee amended the bill to:

- Include certain misdemeanor violations in the severity level 8 nonperson felony provision for unlawful tampering with electronic monitoring equipment (as suggested by the law enforcement organizations);
- Add the contents of HB 2192, regarding certification of identification for offenders on probation;
- Add the contents of HB 2191, regarding riot and incitement to riot in a correctional facility;
- Add the contents of HB 2128, regarding jurisdiction and supervision of offenders in the 2003 SB 123 Program; and
- Add the contents of HB 2374, regarding eligibility for the 2003 SB 123 Program and community corrections services programs.

[*Note:* Although the Conference Committee on HB 2026 agreed to add the contents of SB 4 as passed by the Senate, without the House Committee amendments, the Conference Committee also agreed to add to the conference committee report the contents of HB 2191, HB 2128, and HB 2374, similar to three of the amendments made by the House Committee to SB 4.]

SB 4 was stricken from the House Calendar on March 31, 2021.

## **Fiscal Information**

### ***HB 2026 (Certified Drug Abuse Treatment Program— Divertees)***

According to the fiscal note prepared by the Division of the Budget on HB 2026 as introduced, the Office of Judicial Administration (OJA) indicates enactment of the bill could have a fiscal effect on the Judicial Branch operations; however, OJA could not estimate how many district courts would enter into an MOU, or how many cases would occur. The Commission estimates enactment of the bill may result in additional prison admissions and beds; however, the Commission cannot determine the fiscal effect. The Commission further estimates, based on three different scenarios, enactment of the bill could increase the number of 2003 SB 123 Program drug abuse treatment cases by either 25, 50, or 75 cases in FY 2022.

Because of the potential increase of 2003 SB 123 Program drug abuse treatment offenders, the Commission estimates additional State General Fund (SGF) expenditures of \$88,368, \$176,736, or \$265,104 in FY 2022, depending on which scenario occurs.

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

### ***HB 2128 (Jurisdiction and Supervision for 2003 SB 123 Program)***

According to the fiscal note prepared by the Division of the Budget on HB 2128 as introduced, OJA indicates enactment of the bill could affect the amount of time spent by court services officers in supervision of offenders, but would have a negligible fiscal effect.

The Commission indicates enactment of the bill may reduce prison admissions and beds, but an estimate could

not be determined. The Commission also estimates enactment of the bill could increase the number of 2003 SB 123 Program drug abuse treatment offenders by either 238, 476, or 713 persons for FY 2022. The Commission estimates additional SGF expenditures of \$748,034; \$1,492,925; or \$2,239,952 for FY 2022, depending on which scenario occurs. The Commission states the average cost of treatment in the 2003 SB 123 Program was \$3,143 per offender in FY 2019.

KDOC indicates enactment of the bill would have no fiscal effect.

Any fiscal effect associated with enactment of HB 2128 is not reflected in *The FY 2022 Governor's Budget Report*.

***HB 2374 (Eligibility for 2003 SB 123 Program and Community Corrections Supervision Programs)***

According to the fiscal note prepared by the Division of the Budget, the Commission indicates enactment of HB 2374 could impact prison admissions, prison beds, or the workload of the Commission, but a fiscal effect cannot be estimated.

OJA indicates enactment of the bill could change the number of people going to community corrections or court services. However, a fiscal effect cannot be estimated.

Any fiscal effect associated with HB 2374 is not reflected in *The FY 2022 Governor's Budget Report*.

***HB 2191 (Riot and Incitement to Riot in a Correctional Facility)***

According to the Prison Bed Impact Assessment prepared by the Commission, HB 2191 would result in zero to two additional prison admissions each year during the forecasting period, and an increase of zero to two adult prison

beds in FY 2022, and an increase of one to three adult prison beds in FY 2031. The Commission also estimates the bill would result in zero to three additional journal entries each year for the workload of the Commission.

According to the fiscal note prepared by the Division of the Budget on the bill, KDOC indicates the increase in prison population would have a detrimental effect on its ability to provide for social distancing among its offender population. KDOC indicates the increase could contribute to the spread of the coronavirus among residents of the facility, staff working at the facility, and offenders released into the community. KDOC indicates the bill would have no fiscal effect.

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

Any fiscal effect associated with HB 2191 is not reflected in *The FY 2022 Governor's Budget Report*.

***SB 4 (Unlawful Tampering with Electronic Monitoring Equipment)***

According to the fiscal note prepared by the Division of the Budget on SB 4 as introduced, OJA indicates enactment of the bill could result in additional offenders being supervised by court services officers, but the fiscal effect could be absorbed within existing resources.

The Commission estimates enactment of the bill would save nine prison beds in FY 2022 and ten prison beds in FY 2031. The Commission states the current estimated available bed capacity is 9,420 for males, and 948 for females. Based upon the Commission's most recent ten-year projection contained in its FY 2020 Adult Inmate Prison Population Projections report, it is estimated that the year-end population

for available male capacity will be under capacity by 1,287 inmates in FY 2021 and 1,241 inmates in FY 2022.

The KDOC indicates a reduction in the prison population is beneficial toward avoiding future costs, but is not sufficient to reduce current prison expenditures. The KDOC also indicates the reduction would improve the ability to socially distance inmates to help mitigate the spread of the coronavirus in the facility, staff working at the facility, and inmates released into the community.

Any fiscal effect associated with enactment of SB 4 is not reflected in the *The FY 2022 Governor's Budget Report*.

Crimes; diversion; supervision; parole; probation; community corrections; court services; sentencing; riot; incitement to riot; electronic monitoring equipment; tampering; drug abuse treatment program; 2003 SB 123 program; Kansas Sentencing Commission; risk level

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