

Kansas Criminal Code  
Recodification Commission

2010 Final Report to the  
Kansas Legislature

Volume II-Policy Recommendations

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Approved by the Commission  
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## EXECUTIVE SUMMARY

The Kansas Criminal Code Recodification Commission has completed its assigned task to recodify the Kansas criminal code and in this final report to the 2010 legislature submits its proposed criminal code. This Final Report is submitted in two volumes. Volume I, entitled Recodification, includes the proposed code where no changes are made to the substantive law. Volume II, entitled Policy Recommendations, includes proposed statutes that recommend revision of the substantive provisions of various statutes.

In K.S.A. 21-4801 the 2007 legislature created the Kansas Criminal Code Recodification Commission and provided the Commission with the mission and directive to recodify the Kansas criminal code. The Commission is composed of sixteen members appointed by the legislative, executive and judicial branches. The Commission members represent a broad spectrum of experience and interest in the criminal law. Professor Tom Stacy of the University of Kansas School of Law is chairman of the Commission and Ed Klumpp is vice chairman.

In 2004, the Legislature enacted K.S.A. 22-5101 establishing the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project. Included in the work the legislature assigned to the 3R's committee was the task of recodifying the Kansas criminal code. The 3R's recodification could not be completed before the provisions of K.S.A. 22-5101 expired March 31, 2007.

The 2007 Legislature created the Kansas Criminal Code Recodification Commission and assigned to it the mission of recodifying the Kansas criminal code (K.S.A. 21-4801). The 2007 legislative mandate to recodify the criminal code passed on to the Kansas Criminal Code Recodification Commission the task formerly undertaken by the Recodification Subcommittee of the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project.

The first meeting of the Kansas Criminal Code Recodification Commission (KCCRC), an organizational meeting, was held July 6, 2007. In its initial meeting, and in meetings thereafter, the KCCRC spent much time discussing the scope of its work and its mission to recodify the criminal code as described in the legislative mandate. With the guidance of the legislative members of the Commission, the Commission concluded that its mandate required a comprehensive recodification.

The Kansas criminal code is comprised of seventeen articles in Chapter 21 of the Kansas statutes that include more than 400 statutes. The Commission has considered and discussed each of those statutes section by section. Each proposed statute included with this report has been considered by the Reporter, the Commission's Recodification Subcommittee, and finally the Recodification Commission. This process necessarily has involved compromise. No section is a product of the thinking of any single individual.

The present criminal law of Kansas consists basically of statutes enacted by the 1969 Legislature made effective July 1, 1970. Many additions and amendments have been made since 1970, but often without regard for the relationship to or consistency with prior provisions.

In general, the substance of the Commission's work is divided into two proposals: (1) proposals regarding recodification of existing statutes, and (2) proposed recommendations for policy changes—a change to the substantive law. Some of the objectives in the proposed revisions are to state in clear, simple and understandable terms the elements of the prohibited acts; to organize the code provisions in a more user-friendly manner; to avoid drafting statutes in a manner that a question could be raised regarding the specific offense and general offense issue; to confine the provisions of the criminal code to those matters of substantive law which properly belong there; and to recommend repeal of statutes that no longer have applicability. Recommendations for policy changes to existing statutes include revisions to the substantive provisions of specific statutes, recommendations for repeal of statutes that no longer have application, and proposals for new statutes.

Many statutes which provide penal sanctions are found outside of the Chapter 21 criminal code. The Commission concluded that its work should not attempt to incorporate those statutes into the code as to do so would unduly burden the task of re-drafting the code. The Commission has recognized the existence of such statutes and has sought to avoid conflicts with the proposed code.

During the September, October, and November 2007 meetings much of the Commission's time was devoted to discussion of drug crimes. The Commission's work proposed that the legislature make the changes to present drug crimes statutes that included moving drug crimes from Chapter 65 to Chapter 21 of the Kansas Statutes, and grouping existing statutes into the core offenses of manufacture, distribution, and possession without revising existing Kansas law. The Commission's proposals were included in House Bill 2236 enacted in the 2009 legislature.

The Commission and Subcommittee devoted much time to an effort to clarify the Kansas culpability statute. The present code lacks standardized, consistent, culpability concepts. Culpability, or "criminal intent", is an element in virtually every crime although the intent required differs according to the specific crime. The required intent may involve purpose, intention, knowledge, recklessness, negligence, or other levels of culpability.

The Commission proposes adopting uniform culpability terms that will add clarity to the criminal code, will avoid unnecessary judicial interpretation of culpability terms, and will provide a guide or framework for the legislature in enacting future additions to the code.

## Foreword

The proposed criminal code submitted with this Report is the first comprehensive recodification of the Kansas criminal code in nearly 40 years. In 1963, the Kansas Judicial Council established an Advisory Committee on Criminal Law Revision to recodify the criminal code. The Advisory Committee began its work in 1963 and submitted its proposed code to the 1969 legislature. The proposed code was enacted and became effective July 1, 1970. The 1969 code enactment was the last major recodification of the Kansas criminal laws.

In 2004, the Legislature enacted K.S.A. 22-5101 establishing the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project (3R's Committee). Included in the work the legislature assigned to the 3R's committee was the task of recodifying the Kansas criminal code. The 3R's recodification could not be completed before the provisions of K.S.A. 22-5101 expired March 31, 2007.

The 2007 Legislature created the Kansas Criminal Code Recodification Commission and assigned to it the mission of recodifying the Kansas criminal code (K.S.A. 21-4801). The 2007 legislative mandate to recodify the criminal code passed on to the Kansas Criminal Code Recodification Commission (KCCRC) the task formerly undertaken by the Recodification Subcommittee of the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project (3R's Recodification Subcommittee).

In K.S.A. 21-4801 the legislature directs the Commission to prepare and submit interim reports to the legislature on or before February 1, 2008 and February 1, 2009. The final report is to be submitted to the legislature on or before January 11, 2010. The provisions of the statute expire July 1, 2010.

In compliance with the statutory directive the Kansas Criminal Code Recodification Commission has submitted interim reports to the 2008 and 2009 legislatures. The Commission has completed its assigned task to recodify the criminal law and in this final report to the 2010 legislature submits its proposed criminal code.

This Final Report is submitted in two volumes. The Kansas Criminal Code Recodification Commission divided its work into (1) recodification, without substantive changes to the criminal code, and (2) recommendations for policy changes to existing law. In reviewing the entire criminal code the Commission discovered several areas where some revision to the substantive law would improve the description of the offense or the code as a whole.

Volume I, entitled Recodification, includes the proposed code where no changes are made to the substantive law.

Volume II, entitled Policy Recommendations, includes proposed statutes that recommend revision of the substantive provisions of the statute. The statutory language and citations in these recommendations are based on the proposed recodification. Language to be removed is stricken and new language is in italics.

## I. Legislative Directive

In K.S.A. 21-4801 the 2007 legislature created the Kansas Criminal Code Recodification Commission and provided the Commission with the following mission and directive:

**“(b) The commission shall re-codify the Kansas criminal code by:**

**(1) Reviewing the American law institute model penal code, the criminal codes of other states, and other criminal law study resources, and making recommendations concerning proposed modifications, amendments and additions to the code.**

**(2) Analyzing and reviewing all criminal statutes and making recommendations for legislation that would ensure that the sentences are appropriate and proportionate to other sentences imposed for criminal offenses, with particular emphasis on the sentencing guidelines grid for drug crimes.**

**(3) Reviewing and determining the severity of the Kansas sentencing policies in relation to other states and review possible adjustments which may relieve or eliminate prison capacity issues in Kansas.**

**(4) Studying and making recommendations concerning the statutory definitions of crimes and criminal penalties and evaluate whether certain criminal conduct may be combined into one criminal statute, thus alleviating any potential problems of having two statutes prohibiting the same criminal conduct.**

**(5) Studying and making revisions to clarify the code to facilitate just and expedient resolution of criminal prosecutions and resolve or prevent statutory conflicts.”**

## II. Commission Membership

The Kansas Criminal Code Recodification Commission is composed of sixteen members appointed by the legislative, executive and judicial branches. The Commission members represent a broad spectrum of experience and interest in the criminal law.

The members of the KCCRC:

<u>Commission Member</u>	<u>Statutory Authority for Appointment</u>
Senator John Vratil	Senate Judiciary Committee, appointed by the President of the senate.
Senator David Haley	Senate Judiciary Committee, appointed by the Minority Leader of the Senate.
Representative Lance Kinzer	House of Representatives Judiciary Committee, appointed by the Speaker of the House of Representatives.
Representative Paul Davis (July 2007- April 2009)	House of Representatives Judiciary Committee, appointed by the Minority Leader of the House of Representatives.
Rep. Jan Pauls (May 2009-Present)	House of Representatives, Judiciary Committee, appointed by the Minority Leader of the House of Representatives.
Hon. Christel Marquardt	Judge, Court of Appeals, appointed by the Chief Justice of the Supreme Court.
Ed Klumpp	Chief of Police, Topeka, retired, appointed by the Attorney General.
Ed Collister	Defense attorney, appointed by the Governor.
Kim Parker	Deputy District Attorney, Sedgwick County, appointed by the Kansas County and District Attorneys Association.
Professor Tom Stacy	Professor of Law, appointed by the Dean of the University of Kansas School of Law.
Professor Michael Kaye	Professor of Law, appointed by the Dean of the Washburn University School of Law.
Steven L. Opat	County Attorney, Geary County, appointed by the Kansas Judicial Council Criminal Law Advisory Committee.

Debra Wilson	Appellate Defender, appointed by the Kansas Judicial Council Criminal Law Advisory Committee.
Hon. Richard Smith	District Judge, 6th Judicial District, appointed by the Kansas District Judges Association.
Hon. Larry Solomon (July 2007-December 2007) Rep. Jan Pauls (January 2008-April 2009) Tom Drees (May 2009-Present)	District Judge, 30 <sup>th</sup> Judicial District, appointed by the Kansas Sentencing Commission. House of Representatives, District 102, appointed by the Kansas Sentencing Commission. County Attorney, Ellis county, appointed by the Kansas Sentencing Commission.
Jacqie Spradling (July 2007-December 2008) Kristafer Ailslieger (January 2009-Present)	Assistant Attorney General, appointed by the Attorney General.  Assistant Solicitor General, appointed by the Attorney General.
Timothy Madden	Department of Corrections, appointed by the Secretary of Corrections.

### III. Policy Recommendations

#### Overview

The Kansas Criminal Code Recodification Commission (“the Commission”) divided its work into recodification, without substantive changes to the criminal code, and recommendations. In reviewing the entire criminal code the Commission discovered several areas where some substantive revision would improve the offense or the code as a whole.

Included in this volume are the Commission’s separate policy recommendations. The statutory language and citations in these recommendations are based on the proposed recodification. Language to be removed is stricken and new language is in italics.

#### **Current offenses and statutes recommended for revision**

##### **21-31-401 Multiple prosecutions for same act; lesser included crimes**

- (a) When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes. Each of such crimes may be alleged as a separate count in a single complaint, information or indictment.**
- (b) Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both. A lesser included crime is:**
  - (1) a lesser degree of the same crime;**
  - (2) a crime where all elements of the lesser crime are identical to some of the elements of the crime charged;**
  - (3) an attempt to commit the crime charged; or**
  - (4) an attempt to commit a crime defined under subsection (b)(1) or (b)(2).**
- (c) Whenever charges are filed against a person, accusing the person of a crime which includes another crime of which the person has been convicted, the conviction of the lesser included crime shall not bar prosecution or conviction of the crime charged if the crime charged was not consummated at the time of conviction of the lesser included crime, but the conviction of the lesser included crime shall be annulled upon the filing of such charges. Evidence of the**

person's plea or any admission or statement made by the person in connection therewith in any of the proceedings which resulted in the person's conviction of the lesser included crime shall not be admissible at the trial of the crime charged. If the person is convicted of the crime charged, or of a lesser included crime, the person so convicted shall receive credit against any prison sentence imposed or fine to be paid for the period of confinement actually served or the amount of any fine actually paid under the sentence imposed for the annulled conviction.

- (d) Unless otherwise provided by law, when crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct, the defendant:
  - (1) may not be convicted of the two crimes based upon the same conduct, and
  - (2) shall be sentenced according to the terms of the more specific crime.
- (e) *Defendant may not be convicted of identical offenses based upon the same conduct. The prosecution may choose which such offense to charge and, upon conviction, the defendant shall be sentenced according to the terms of that offense.*

#### Comment

The Commission recommends the additional language in subsection (e) in order to eliminate the identical offense doctrine of cases such as *State v. McAdam*, 277 Kan. 136 (2004). Under the proposed language, the existence of identical offense would not automatically demand imposition of the lesser punishment as the prosecution may choose which offense to charge.

#### 21-33-102 Conspiracy

- (a) A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime. No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a co-conspirator.
- (b) It is immaterial to the criminal liability of a person charged with conspiracy that any other person with whom the defendant conspired lacked the actual intent to commit the underlying crime provided that the defendant believed the other person did have the actual intent to commit the underlying crime.
- (c) It shall be a defense to a charge of conspiracy that the accused voluntarily and in good faith withdrew from the conspiracy, and communicated the fact of such withdrawal to one or more

of the accused person's co-conspirators, before any overt act in furtherance of the conspiracy was committed by the accused or by a co-conspirator.

- (d) **Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2. Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be level 10. The provisions of this subsection shall not apply to a violation of conspiracy to commit the crime of terrorism pursuant to section 1, and amendments thereto, or of illegal use of weapons of mass destruction pursuant to section 2, and 16 amendments thereto.**
- (e) **Conspiracy to commit a felony which prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.**
- (f) **A conspiracy to commit a misdemeanor is a class C misdemeanor.**

#### **Comment**

The Commission recommends this alternative version which provides for the unilateral theory of conspiracy. Under current law, an offender who intends to enter into a conspiracy is not guilty unless there was an additional guilty co-conspirator. Under the unilateral theory of conspiracy, an offender who mistakenly or falsely agreed to commit a crime would be guilty of conspiracy. This distinction is often important as many police investigations employ the use of an agent or under cover informant who is not a genuine co-conspirator. This proposal is consistent with the Model Penal Code and the law of many jurisdictions.

#### **21-34-102 Murder in the first degree**

- (a) **Murder in the first degree is the killing of a human being committed:**
  - (1) **Intentionally ~~or knowingly~~, and with premeditation; or**
  - (2) **in the commission of, attempt to commit, or flight from any inherently dangerous felony.**
- (b) **Murder in the first degree is an off-grid person felony.**
- (c) **An inherently dangerous felony is:**

- (1) any of the following felonies, whether or not such felony is so distinct from the homicide alleged to be a violation of subsection (a)(2) as not to be an ingredient of the homicide alleged to be a violation of subsection (a)(2):**
- (A) Kidnapping, as defined in K.S.A. 21-3420, and amendments thereto;**
  - (B) aggravated kidnapping, as defined in K.S.A. 21-3421, and amendments thereto;**
  - (C) robbery, as defined in K.S.A. 21-3426, and amendments thereto;**
  - (D) aggravated robbery, as defined in K.S.A. 21-3427, and amendments thereto;**
  - (E) rape, as defined in K.S.A. 21-3502, and amendments thereto;**
  - (F) aggravated criminal sodomy, as defined in K.S.A. 21-3506, and amendments thereto;**
  - (G) abuse of a child, as defined in K.S.A. 21-3609, and amendments thereto;**
  - (H) felony theft under subsection (a) or (c) of K.S.A. 21-3701, and amendments thereto;**
  - (I) burglary, as defined in K.S.A. 21-3715, and amendments thereto;**
  - (J) aggravated burglary, as defined in K.S.A. 21-3716, and amendments thereto;**
  - (K) arson, as defined in K.S.A. 21-3718, and amendments thereto;**
  - (L) aggravated arson, as defined in K.S.A. 21-3719, and amendments thereto;**
  - (M) treason, as defined in K.S.A. 21-3801, and amendments thereto;**
  - (N) any felony offense as provided in K.S.A. 65-4127a, 65-4127b or 65-4159 or 65-4160 through 65-4164, and amendments thereto;**
  - (O) any felony offense as provided in K.S.A. 21-4219, and amendments thereto;**
  - (P) endangering the food supply as defined in K.S.A. 21-4221, and amendments thereto;**

- (Q) aggravated endangering the food supply as defined in K.S.A. 21-4222, and amendments thereto;
  - (R) fleeing or attempting to elude a police officer, as defined in subsection (b) of K.S.A. 8-1568, and amendments thereto; or
  - (S) aggravated endangering a child, as defined in subsection (a)(1) of K.S.A. 21-3608a, and amendments thereto;
  - (T) *abandonment of a child, as defined in K.S.A. 21-36-203, and amendments thereto;*
- (2) any of the following felonies, only when such felony is so distinct from the homicide alleged to be a violation of subsection (b) of K.S.A. 21-3401, and amendments thereto, as to not be an ingredient of the homicide alleged to be a violation of subsection (b) of K.S.A. 21-3401, and amendments thereto:
- (A) Murder in the first degree, as defined in subsection (a) of K.S.A. 21-3401, and amendments thereto;
  - (B) murder in the second degree, as defined in subsection (a) of K.S.A. 21-3402, and amendments thereto;
  - (C) voluntary manslaughter, as defined in subsection (a) of K.S.A. 21-3403, and amendments thereto;
  - (D) aggravated assault, as defined in K.S.A. 21-3410, and amendments thereto;
  - (E) aggravated assault of a law enforcement officer, as defined in K.S.A. 21-3411, and amendments thereto;
  - (F) aggravated battery, as defined in subsection (a)(1) of K.S.A. 21-3414, and amendments thereto; or
  - (G) aggravated battery against a law enforcement officer, as defined in K.S.A. 21-3415, and amendments thereto.

#### Comment

The Commission recommends adding abandonment of a child, subsection (c)(1)(T), to the list of inherently dangerous felonies. The Commission reasons that abandonment of a child poses the same dangers as aggravated endangering of a child.

**21-34-508      Trafficking**

**(a)      Trafficking is:**

- (1)      Recruiting, harboring, transporting, providing or obtaining, by any means, another person with knowledge that force, fraud, threat or coercion will be used to cause the person to engage in forced labor or involuntary servitude;**
- (2)      benefitting financially or by receiving anything of value from participation in a venture that the person has reason to know has engaged in acts set forth in subsection (a)(1); or**

**(b)      Aggravated trafficking is trafficking, as described in subsection (a):**

- (1)      Involving the commission or attempted commission of kidnapping, as defined in K.S.A 21-3420, and amendments thereto;**
- (2)      committed in whole or in part for the purpose of the sexual gratification of the defendant or another; or**
- (3)      resulting in a death;**
- ~~**(4)      recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.**~~

**(c)      (1)      Trafficking is a severity level 2, person felony;**

- (2)      Except as provided further, aggravated trafficking is a severity level 1, person felony. When the offender is 18 years of age or older, aggravated trafficking, if the victim is less than 14 years of age, is an off-grid person felony.**

**Comment**

The Commission recommends eliminating subsection (b)(4) as it could criminalize trivial behavior, such as a young offender driving a date to a place where both intend to engage in sexual conduct. Crimes

involving sexual exploitation of a trafficked victim are adequately covered by (b)(2), which requires force, fraud, threat, or coercion.

**21-35-202 Criminal sodomy**

**(a) Criminal sodomy is:**

- ~~(1) Sodomy between persons who are 16 or more years of age and members of the same sex;~~
- (2) sodomy between a person and an animal;
- (3) sodomy with a child who is 14 or more years of age but less than 16 years of age; or
- (4) causing a child 14 or more years of age but less than 16 years of age to engage in sodomy with any person or animal.

**(b) Aggravated criminal sodomy is:**

- (1) Sodomy with a child who is under 14 years of age;
- (2) causing a child under 14 years of age to engage in sodomy with any person or an animal; or
- (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal under any of the following circumstances:
  - (A) When the victim is overcome by force or fear;
  - (B) when the victim is unconscious or physically powerless; or
  - (C) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by, or was reasonably apparent to, the offender.

- (c) (1) Criminal sodomy as defined in subsection (a)(1) and (a)(2) is a class B nonperson misdemeanor,

- (2) Criminal sodomy as defined in subsections (a)(4) and (a)(4) is a severity level 3, person felony,
- (3) Except as provided further, aggravated criminal sodomy is a severity level 1, person felony. Aggravated criminal sodomy as described in subsection (b)(1) or (b)(2), when the offender is 18 years of age or older, is an off-grid person felony.
- (d) It shall be a defense to a prosecution of criminal sodomy, as defined in subsection (a)(2), and aggravated criminal sodomy, as defined in subsection (b)(1), that the child was married to the accused at the time of the offense.
- (e) *Except as provided in subsection (a)(3)(C), it shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sodomy, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless.*

#### Comment

The Commission recommends eliminating subsection (a)(1) as it is unconstitutional in light of the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The Commission recognizes the danger that the State or some local government could be exposed to civil liability if this offense results in an arrest. The Commission also recognizes that the best practice is to remove from the code unconstitutional statutes.

#### 21-35-303 Unlawful voluntary sexual relations

- (a) Unlawful voluntary sexual relations is:
  - (1) engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:
    - (A) Voluntary sexual intercourse;
    - (B) voluntary sodomy; or
    - (C) voluntary lewd fondling or touching;
  - (2) *when* the offender is less than 19 years of age;
  - (3) *when* the offender is less than four years of age older than the child; *and*

(4) *when the child and the offender are the only parties involved; and*

~~(5) *when the child and the offender are members of the opposite sex.*~~

(b) **Unlawful voluntary sexual relations:**

(1) **as provided in subsection (a)(1)(A) is a severity level 8, person felony.**

(2) **as provided in subsection (a)(1)(B) is a severity level 9, person felony.**

(3) **as provided in subsection (a)(1)(C) is a severity level 10, person felony.**

#### **Comment**

The Commission recommends eliminating subsection (a)(5) as it is unconstitutional in light of the Kansas Supreme Court decision in *State v. Limon*, 280 Kan. 275 (2005) and U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The Commission recognizes the danger that the State or some local government could be exposed to civil liability if this offense results in an arrest. The Commission also recognizes that the best practice is to remove from the code unconstitutional statutes.

#### **21-36-201 Aggravated Incest**

(a) **Incest is marriage to or engaging in otherwise lawful sexual intercourse or sodomy, as defined by K.S.A. 21-3501 and amendments thereto, with a person who is 18 or more years of age and who is known to the offender to be related to the offender as any of the following biological relatives: parent, child, grandparent of any degree, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.**

(b) **Aggravated incest is:**

(1) **Marriage to a person who is under 18 years of age and who is known to the offender to be related to the offender as any of the following biological, step or adoptive relatives: Child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece; or**

(2) **engaging in the acts set forth in subsection (b)(2)(A) and (b)(2)(B) with a person who is 16 or more years of age but under 18 years of age and who is known to the offender to be related to the offender as any of the following biological, step or adoptive**

relatives: Child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece:

- (A) **Otherwise lawful sexual intercourse or sodomy as defined by K.S.A. 21-3501 and amendments thereto; or**
  - (B) **any lewd fondling, as described in subsection (a)(1) of K.S.A. 21-3503 and amendments thereto,**
- (c) (1) **Incest is a severity level 10, person felony,**
- (2) ***Except as provided further, aggravated incest as defined in subsection (b)(2)(A) is a severity level 3, person felony if the victim is a biological, step, or adoptive child,***
- (3) **Aggravated incest as defined in subsection (b)(2)(A) is a severity level 5, person felony if the victim is a biological, step, or adoptive brother, sister, half-brother, half-sister, uncle, aunt, nephew, niece, or grand child of any degree**
- (4) **Aggravated incest as defined in subsection (b)(1) and (b)(2)(B) is a severity level 7.**

#### **Comment**

The Commission recommends the addition of subsection (c)(2) to increase the severity level when the victim and offender are in a parent/child relationship. The Commission concludes that a violation of the parental duty to care for a child deserves greater punishment than other forms of incest.

#### **21-37-107 Unlawful use of recordings**

- (a) **Unlawful use of recordings is:**
- (1) **knowingly, and without the consent of the owner, duplicating or causing to be duplicated any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, or recording or causing to be recorded any live performance, with the intent to sell, rent or cause to be sold or rented, any such duplicated sounds or any such recorded performance, or to give away such duplicated sounds or recorded performance as part of a promotion for any product or service;**

- (2) distributing, or possessing with the intent to distribute, any article produced in violation of subsection (a)(1) knowing or having reason to know that such article was produced in violation of law;
  - (3) *possessing any article produced in violation of subsection (a)(1) knowing or having reason to know that such article was produced in violation of law; or*
  - (4) *knowingly,*
    - (A) *selling, renting, offering for sale or rental; or*
    - (B) *either possessing, transporting or manufacturing with intent to sell or rent any phonograph record, audio or video disc, wire, audio or video tape, film or other article now known or later developed on which sounds, images, or both sounds and images are recorded or otherwise stored, unless the outside cover, box or jacket clearly and conspicuously discloses the name and address of the manufacturer of such recorded article.*
- (b)
  - (1) Unlawful use of recordings is a severity level 9, nonperson felony; except that
  - (2) A misdemeanor.
  - (3) a violation of subsection (a)(2) or (a)(4) is A class A nonperson misdemeanor if the offense involves fewer than seven audio visual recordings, or fewer than 100 sound recordings during a 180-day period.
- (c) The provisions of subsection (a)(1) shall not apply to:
  - (1) Any broadcaster who, in connection with or as part of a radio or television broadcast or cable transmission, or for the purpose of archival preservation, duplicates any such sounds recorded on a sound recording;
  - (2) any person who duplicates such sounds or such performance, for personal use, and without compensation for such duplication; or
  - (3) any sounds initially fixed in a tangible medium of expression after February 15, 1972.
- (d) The provisions of subsections (a)(1) and (a)(3) shall not apply to any computer program or any audio or visual recording that is part of any computer program.
- (e) For purposes of this section:

- (1) "owner" means the person who owns the original fixation of sounds embodied in the master phonograph record, master disc, master wire, master tape, master film or other device used for reproducing sounds on phonograph records, discs, wires, tapes, films or other articles now known or later developed upon which sound is recorded or otherwise stored, and from which the duplicated recorded sounds are directly or indirectly derived, or the person who owns the right to record such live performance;
  - (2) "computer program" means a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.
- (f) It shall be the duty of all law enforcement officers, upon discovery, to confiscate all recorded devices that do not conform to the provisions of section 21-37-107 and that are possessed for the purpose of selling or renting such recorded devices, and all equipment and components used or intended to be used to knowingly manufacture recorded devices that do not conform to the provisions of such section for the purpose of selling or renting such recorded devices. The nonconforming recorded devices that are possessed for the purpose of selling or renting such recorded devices are contraband and shall be delivered to the district attorney for the county in which the confiscation was made, by court order, and shall be destroyed or otherwise disposed of, if the court finds that the person claiming title to such recorded devices possessed such recorded devices for the purpose of selling or renting such recorded devices. The equipment and components confiscated shall be delivered to the district attorney for the county in which the confiscation was made, by court order upon conviction, and may be given to a charitable or educational organization.

**Comment**

The Commission recommends adding subsection (a)(3) to criminalize mere possession of recordings produced in violation of subsection (a)(1). Subsection (a)(3) does not require the further intent to sell or rent the recordings. The Commission concludes that possession alone is a sufficient act to trigger criminal liability.

**21-37-201 Burglary**

- (a) Burglary is entering into or remaining, without authority, within any:
  - (1) dwelling, with intent to commit a felony, theft or any ~~sexual battery~~ *sexually motivated crime* therein;

- (2) building, manufactured home, mobile home, tent or other structure which is not a dwelling, with intent to commit a felony, theft or any ~~sexual battery~~ *sexually motivated crime* therein; or
  - (3) vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony, theft or any ~~sexual battery~~ *sexually motivated crime* therein.
- (b) Aggravated burglary is entering into or remaining, without authority, within any building, manufactured home, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property in which there is a human being, with intent to commit a felony, theft or any ~~sexual battery~~ *sexually motivated crime* therein
- (c)
- (1) Burglary as described in subsection (a)(1) is a severity level 7, person felony,
  - (2) burglary as described in subsection (a)(2) is a severity level 7, nonperson felony,
  - (3) burglary as described in subsection (a)(3) is a severity level 9, nonperson felony.
  - (4) aggravated burglary is a severity 5, person felony.

#### Comment

The Commission recommends replacing the phrase “sexual battery” with “sexually motivate crime.” The revision expands the liability to sexually motivated crimes other than sexual battery. For example, an offender who enters a home with the intent to rummage through the victim’s underwear enters with the intent to commit a misdemeanor, i.e. criminal deprivation of property, which is not a theft. However, due to the sexually motivated nature of the offense, the Commission concludes such behavior should fall under the burglary statute.

#### **21-38-401      Escape from custody**

- (a) Escape from custody is escaping while held in custody:
- (1) upon a charge or conviction of *or arrest for* a misdemeanor;
  - (2) on a charge, adjudication, *or arrest* as a juvenile offender, as defined in K.S.A. 2007 Supp. 38-2302, and amendments thereto, where the act, if committed by an adult, would constitute a misdemeanor; or

- (3) on a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting a misdemeanor or by a person 18 years of age or over who is being held in custody on an adjudication of a misdemeanor.
- (b) Aggravated escape from custody is:
- (1) Escaping while held in custody:
- (A) upon a charge or conviction of *or arrest for* a felony;
- (B) upon a charge, adjudication, *or arrest* as a juvenile offender as defined in K.S.A. 2007 Supp. 38-2302, and amendments thereto, where the act, if committed by an adult, would constitute a felony;
- (C) prior to or upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto;
- (D) upon commitment to a treatment facility as a sexually violent predator as provided pursuant to K.S.A. 59-29a01 et seq. and amendments thereto;
- (E) upon a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting a felony;
- (F) by a person 18 years of age or over who is being held on an adjudication of a felony; or
- (G) upon incarceration at a state correctional institution as defined in K.S.A. 75-5202 and amendments thereto, while in the custody of the secretary of corrections.
- (2) Escaping effected or facilitated by the use of violence or the threat of violence against any person while held in custody:
- (A) on a charge or conviction of any crime;
- (B) on a charge or adjudication as a juvenile offender as defined in K.S.A. 2007 Supp. 38-2302, and amendments thereto, where the act, if committed by an adult, would constitute a felony;

- (C) prior to or upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto;
  - (D) upon commitment to a treatment facility as a sexually violent predator as provided in K.S.A. 59-29a01 et seq. and amendments thereto;
  - (E) upon a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting any crime;
  - (F) by a person 18 years of age or over who is being held on a charge or adjudication of a misdemeanor or felony;
  - (G) upon incarceration at a state correctional institution as defined in K.S.A. 75-5202 and amendments thereto, while in the custody of the secretary of corrections.
- (c)
- (1) Escape from custody is a class A nonperson misdemeanor.
  - (2) Aggravated escape from custody as described in subsection (b)(1)(A), (b)(1)(C), (b)(1)(D), (b)(1)(E) or (b)(1)(F) is a severity level 8, nonperson felony.
  - (3) Aggravated escape from custody as described in subsection (b)(1)(B) or (b)(1)(G) is a severity level 5, nonperson felony.
  - (4) Aggravated escape from custody as described in subsection (b)(2)(A), (b)(2)(C), (b)(2)(D), (b)(2)(E) or (b)(2)(F) is a severity level 8, nonperson felony.
  - (5) Aggravated escape from custody as described in subsection (b)(2)(B) or (b)(2)(G) is a severity level 5, nonperson felony.
- (d) As used in this section and K.S.A. 21-3810 and 21-3811, and amendments thereto:
- (1) "Custody" means arrest; detention in a facility for holding persons charged with or convicted of crimes or charged or adjudicated as a juvenile offender, as defined in K.S.A. 2007 Supp. 38-2302, and amendments thereto, detention for extradition or deportation; detention in a hospital or other facility pursuant to court order, imposed as a specific condition of probation or parole or imposed as a specific condition of assignment to a community correctional services program; commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto; or any other detention for law enforcement purposes. "Custody" does not include

general supervision of a person on probation or parole or constraint incidental to release on bail.

(2) "Escape" means departure from custody without lawful authority or failure to return to custody following temporary leave lawfully granted pursuant to express authorization of law or order of a court.

(e) *The term "charge" shall not require that the offender was held on a written charge contained in a complaint, information or indictment, if such offender was arrested prior to such offender's escape from custody.*

#### Comment

The Commission recommends adding the phrase "or arrest for" to subsections (a)(1), (a)(2), (b)(1)(A), and (b)(1)(B). The Commission also recommends adding new subsection (e). Under current case law, an offender may not be charged with escape from custody unless there is a formal written charge, not when the offender is only under arrest without a written charge. Escape while under arrest without a written charge may still be charged under obstruction of legal process, but that offense is subject to a lesser penalty. The Commission determined that the legislature intended this offense to apply to offenders under arrest, without an formal written charge, and the proposed changes clarify that intent.

#### 21-38-208 Simulating legal process

(a) *Simulating legal process is:*

(1) *distributing or causing to be distributed, with the intent to mislead the recipient and cause the recipient to take action in reliance thereon:*

(A) *A request for the payment of money on behalf of any creditor that in form and substance simulates any legal process issued by any court; or*

(B) *Any purported summons, subpoena or other legal process knowing that the process was not issued or authorized by any court;*

(2) *printing or distributing any such document, knowing that it shall be used to simulate legal process.*

(b) *Simulating legal process is a class A nonperson misdemeanor.*

- (c) Subsection (a)(2) does not apply to the printing, or distribution of blank forms of legal documents intended for actual use in judicial proceedings.**

#### **Comment**

The Commission recommends revising this offense, using Missouri statute 575.130 as a model. The Commission determined that the current offense could criminalize innocent conduct intended to “induce payment of a claim.” The revision requires “intent to mislead the recipient and cause the recipient to take action in reliance thereon.” The Commission concludes that the revised version provides a superior culpability standard and adequately targets the kind of behavior the legislature originally intended to criminalize.

#### **21-38-202 Interference with law enforcement**

- (a) Interference with law enforcement is:**

- (1) Falsely reporting to a law enforcement officer or state investigative agency:**

**(A) That a particular person has committed a crime, knowing that such information is false and intending that the officer or agency shall act in reliance upon such information;**

**(B) any information, knowing that such information is false and intending to influence, impede, or obstruct such officer’s or agency’s duty;**

- (2) Concealing, destroying, or materially altering evidence with the intent to prevent or hinder the apprehension or prosecution of any person; or**

- (3) knowingly obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of a court, or in the discharge of any official duty.**

- (b) (1) (A) Interference with law enforcement as defined in (a)(1) is a class A misdemeanor, except that it is a severity level 8, nonperson felony if the crime reported is a felony.**

**(B) Interference with law enforcement as defined in (a)(1)(B) is a class A misdemeanor except that it is a severity level 9, nonperson felony if the information reported concerns a felony offense.**

- (2) *Interference with law enforcement as described in subsection (a)(2) is class A nonperson misdemeanor except that it is a severity level 8, nonperson felony if the crime under investigation or for which a person is sought is a felony.***
- (3) (A) Interference with law enforcement as defined in (a)(3) in the case of a felony, or resulting from parole or any authorized disposition for a felony, is a severity level 9, nonperson felony;**
- (B) Interference with law enforcement as defined in (a)(3) in a case of misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case is a class A nonperson misdemeanor.**

#### **Comment**

The Commission recommends expanding liability under this statute. Under current law it is a crime to falsely report a crime. Subsection (a)(1)(A) expands liability to cover offenders who falsely report that a particular person committed an offense. The Commission found that targeting an innocent person aggravates the offense and the severity level should be higher in such cases. Subsection (a)(1)(B) expands liability to any offender that provides false information to law enforcement with the intent to obstruct the officer's official duty. This revision goes beyond falsely reporting a crime and may cover instances where an offender misleads law enforcement to prevent detection of a crime or the proper investigation of a crime. Subsection (a)(2) expands liability to offenders who destroy, conceal, or alter evidence in order to prevent law enforcement from apprehending an offender. The Commission found that these acts are clearly prohibited under the current statute.

#### **21-38-203 Interference with the judicial process**

- (a) Interference with the judicial process is:**
- (1) communicating with any judicial officer in relation to any matter which is or may be brought before such judge, magistrate, master or juror with intent improperly to influence such officer;**
- (2) committing any of the following acts, with intent to influence, impede or obstruct the finding, decision, ruling, order, judgment or decree of such judicial officer or prosecuting attorney on any matter then pending before the officer or prosecuting attorney:**
- (A) communicating in any manner a threat of violence to any judicial officer or any prosecuting attorney;**

- (B) harassing a judicial officer or a prosecuting attorney by repeated vituperative communication; *or*
  - (C) picketing, parading or demonstrating near such officer's or prosecuting attorney's residence or place of abode,
- (3) picketing, parading or demonstrating in or near a building housing a judicial officer or a prosecuting attorney with intent to impede or obstruct the finding, decision, ruling, order, judgment or decree of such judicial officer or prosecuting attorney on any matter then pending before the officer or prosecuting attorney.
- (4) knowingly accepting or agreeing to accept anything of value as consideration for a promise:
- (A) Not to initiate or aid in the prosecution of a person who has committed a crime; or
  - (B) to conceal, destroy, *or materially alter* evidence of a crime.
- (5) *Concealing, destroying, or materially altering evidence with the intent to influence, impede, or obstruct any proceeding, civil or criminal.*
- (6) when performed by a person summoned or sworn as a juror in any case:
- (A) intentionally soliciting, accepting or agreeing to accept from another any benefit as consideration to wrongfully give a verdict for or against any party in any proceeding, civil or criminal;
  - (B) intentionally promising or agreeing to wrongfully give a verdict for or against any party in any proceeding, civil or criminal; or
  - (C) knowingly receiving any evidence or information from anyone in relation to any matter or cause for the trial of which such juror has been or will be sworn, without the authority of the court or officer before whom such juror has been summoned, and without immediately disclosing the same to such court or officer.
- (b) (1) Interference with the judicial process as described in subsection (a)(1) is a severity level 9, nonperson felony.

- (2) Interference with the judicial process as described in subsections (a)(2) and (a)(3) is a class A nonperson misdemeanor.
  - (3) Interference with the judicial process as described in subsection (a)(4) is:

    - (A) a severity level 8, nonperson felony if the crime is a felony; or
    - (B) a class A nonperson misdemeanor if the crime is a misdemeanor.
  - (4) *Interference with the judicial process as described in subsection (a)(5) is class A nonperson misdemeanor except that it is a severity level 8, nonperson felony if the judicial proceeding is a felony prosecution.*
  - (5) Interference with the judicial process as described in subsection (a)(6)(A) is a severity level 7, nonperson felony.
  - (6) Interference with the judicial process as described in subsection (a)(6)(B) or (a)(6)(C) is a severity level 9, nonperson felony.
- (c) Nothing in this section shall limit or prevent the exercise by any court of this state of its power to punish for contempt.
- (d) As used in this section, "prosecuting attorney" has the meaning ascribed thereto in K.S.A. 22-2202, and amendments thereto.

#### **Comment**

The Commission recommends changes to subsection (a)(4) and adding new subsection (a)(5). The Commission finds several troubling limitations on the crime included in subsection (a)(4). First, the crime only applies when an offender agrees to accept some consideration for a promise to destroy evidence, etc. The Commission concludes that the destruction of evidence of a crime, in the absence of consideration, should be a crime. For that reason subsection (a)(5) is added. [Because this offense deals with the judicial process generally, not just the criminal justice process, subsection (a)(5) applies to criminal and civil cases.]

Additionally, review of several similar statutes in other jurisdictions indicates that this crime often covers destruction or material alteration of evidence. When an offender material alters some evidence, whether the evidence is "destroyed" or "concealed" is ambiguous. The Commission recommends adding the phrase "materially alter" to clarify this point.

**21-39-101      Bribery**

**(a)      Bribery is:**

**(1)      *with the intent to improperly influence a public official, offering, giving or promising to give, directly or indirectly, to any public official any benefit, reward or consideration which the public official is not permitted by law to accept, in exchange for the performance or omission of performance of the public official's powers or duties or a promise to perform or omit performance of such powers or duties***

**(2)      *the act of a public official, intentionally requesting, receiving or agreeing to receive, directly or indirectly, any benefit, reward or consideration, which the public official is not permitted by law to accept, with the intent to improperly influence such public official and in exchange for the performance or omission of performance of the public official's powers or duties or a promise to perform or omit performance of such powers or duties.***

**(b)      *Bribery is a severity level 7, nonperson felony. Upon conviction of bribery, a public official shall forfeit the person's public office or public employment. Notwithstanding an expungement of the conviction pursuant to K.S.A. 21-4619, and amendments thereto, any person convicted of bribery under the provisions of this section shall be forever disqualified from holding public office or public employment in this state.***

**(c)      *As used in this section, "public official" means any person who is a public officer, candidate for public office or public employee.***

**Comment**

The Commission determined that the current bribery statute is flawed for several reasons. First, it lacks a quid pro quo requirement, i.e. a requirement that a bribe be offered in exchange for the improper performance of a public officer's duties. See, *State v. Campbell*, 217 Kan. 756 (1975). The Commission finds that this is uncommon compared to bribery statutes in other jurisdictions. Second, the statute does not apply to the omission of performance of a public duty. Third, the current offense may criminalize violations of state ethics laws as it prohibits a public official from accepting something to which they are not legally entitled.

The revision requires some consideration be offered "in exchange for the performance or omission of performance of the public official's powers or duties." This kind of quid pro quo element is common in bribery offense in other jurisdictions. The revision limits the kind of property that can be offered or accepted to that which the public official "is not permitted by law to accept." The revised language clarifies that a public official may accept some gifts that are consistent with state ethics laws.

**21-40-202 Unlawful smoking in a prohibited place**

- (a) Unlawful smoking in a prohibited place is smoking in:
- (1) a public place or at a public meeting except in designated smoking areas;
  - (2) in a medical care facility except that a smoking area may be established within a licensed long-term care unit of a medical care facility if such smoking area is well-ventilated; or
  - (3) any place in the state capitol.
- (b) unlawful smoking in a prohibited place ~~an infraction-misdemeanor~~ punishable by a fine of not more than \$20 for each violation.
- (c) Nothing in this section shall prevent any city or county from regulating smoking within its boundaries, so long as such regulation is at least as stringent as that imposed by this section. In such cases the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this section.

**Comment**

The Commission recommends changing the penalty in subsection (c) from a misdemeanor to an infraction. The Commission finds that the seriousness of this offense does not rise to the level of a misdemeanor; therefore, an infraction is the appropriate punishment.

**21-41-301 Criminal desecration**

- (a) Criminal desecration is:
- (1) Knowingly obtaining or attempting to obtain unauthorized control of a dead body or remains of any human being or the coffin, urn or other article containing a dead body or remains of any human being; or
  - (2) recklessly, by means other than by fire or explosive:

- (A) Damaging, defacing or destroying the flag, ensign or other symbol of the United States or this state in which another has a property interest without the consent of such other person;
  - (B) damaging, defacing or destroying any public monument or structure;
  - (C) damaging, defacing or destroying any tomb, monument, memorial, marker, grave, vault, crypt gate, tree, shrub, plant or any other property in a cemetery; or
  - (D) damaging, defacing or destroying any place of worship.
- (b) (1) Criminal desecration as described in subsections (a)(2)(B), (a)(2)(C) and (a)(2)(D) is:
- (A) A severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more;
  - (B) a severity level 9, nonperson felony if the property is damaged to the extent of at least \$1,000 but less than \$25,000; and
  - (C) a class A nonperson misdemeanor if the property is damaged to the extent of less than \$1,000.
- (2) Criminal desecration as described in subsections (a)(1) and (a)(2)(A) is a class A nonperson misdemeanor.

#### **Comment**

The Commission recommends increasing the severity level for violations of subsection (a)(1) due to the highly offensive nature of this offense. The Commission recommends making the violation a felony, but it does not recommend a particular severity level.

#### **21-42-108 Criminal discharge of a firearm**

- (a) Criminal discharge of a firearm is:
- (1) the reckless and unauthorized discharge of any firearm:

- (A) at a dwelling, building, or structure in which there is a human being whether the person discharging the firearm knows or has reason to know that there is a human being present;
- (B) at a motor vehicle, aircraft, watercraft, train, locomotive, railroad car, caboose, rail-mounted work equipment or rolling stock or other means of conveyance of persons or property in which there is a human being whether the person discharging the firearm knows or has reason to know that there is a human being present; or
- (2) the reckless and unauthorized discharge of any firearm at a dwelling in which there is no human being.
- (3) the discharge of any firearm:
  - (A) Upon any land or nonnavigable body of water of another, without having obtained permission of the owner or person in possession of such land; or
  - (B) upon or from any public road, public road right-of-way or railroad right-of-way ~~that adjoins land of another without having first obtained permission of the owner or person in possession of such land~~ *except as otherwise authorized by law.*
- (b) (1) Criminal discharge of a firearm as described in subsection (a)(1) which results in great bodily harm to a person during the commission thereof is a severity level 3, person felony.
- (2) Criminal discharge of a firearm as described in subsection (a)(1) which results in bodily harm to a person during the commission thereof is a severity level 5, person felony.
- (3) Except as provided in subsection (b)(1) and (b)(2), Criminal discharge of a firearm as described in subsection (a)(1) is a severity level 7, person felony
- (4) ~~Except as provided in subsection (b)(1) and (b)(2),~~ Criminal discharge of a firearm as described in subsection (a)(2) is a severity level 8, person felony.
- (5) ~~Except as provided in subsection (b)(1) and (b)(2),~~ Criminal discharge of a firearm as described in subsection (a)(3) is a class C misdemeanor
- (c) Subsection (a)(1) shall not apply if the act is a violation of K.S.A. 21-3411.

- (d) Subsection (a)(3) shall not apply to any of the following:
- (1) Law enforcement officers, or any person summoned by any such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;
  - (2) wardens, superintendents, directors, security personnel and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime, while acting within the scope of their authority;
  - (3) members of the armed services or reserve forces of the United States or the national guard while in the performance of their official duty;
  - (4) watchmen, while actually engaged in the performance of the duties of their employment;
  - (5) private detectives licensed by the state to carry the firearm involved, while actually engaged in the duties of their employment;
  - (6) detectives or special agents regularly employed by railroad companies or other corporations to perform full-time security or investigative service, while actually engaged in the duties of their employment; or
  - (7) the state fire marshal, the state fire marshal's deputies or any member of a fire department authorized to carry a firearm pursuant to K.S.A. 31-157 and amendments thereto, while engaged in an investigation in which such fire marshal, deputy or member is authorized to carry a firearm pursuant to K.S.A. 31-157 and amendments thereto.; or
  - (8) the United States attorney for the district of Kansas, the attorney general, or any district attorney or county attorney, while actually engaged in the duties of their employment or any activities incidental to such duties; any assistant United States attorney if authorized by the United States attorney for the district of Kansas and while actually engaged in the duties of their employment or any activities incidental to such duties; any assistant attorney general if authorized by the attorney general and while actually engaged in the duties of their employment or any activities incidental to such duties; or any assistant district attorney or assistant county attorney if authorized by the district attorney or county attorney by whom such assistant is employed and while actually engaged in the duties of their employment or any activities incidental to such duties. The provisions of this paragraph shall not apply to any person not in compliance with section 4, and amendments thereto.

~~(e) Upon conviction of a violation or upon adjudication as a juvenile offender for a violation of subsection (a)(1) or (a)(2) K.S.A. 21-4201, 21-4202, 21-4204, 21-4204a or 21-4219, and~~

~~amendments thereto, any weapon seized in connection therewith shall remain in the custody of the trial court. Any weapon so seized and detained, when no longer needed for evidentiary purposes, shall be disposed of as provided in subsection (e) of 21-42-101.~~

#### Comment

The recommended change to subsection (a)(3)(B) clarifies that shooting from a roadway must otherwise be lawful regardless of whether permission of the adjoining landowner is obtained. Hunting regulations prohibit shooting from a roadway when done under specified circumstances.

#### 21-42-203 Criminal disposal of explosives

- (a) Criminal possession of explosives is the knowing possession of any explosive or detonating substance by a person who, within five years preceding such possession, has been convicted of a felony under the laws of this or any other jurisdiction or has been released from imprisonment for a felony.
- (b) Criminal disposal of explosives is knowingly *and without lawful authority* selling, giving or otherwise transferring any explosive or detonating substance to:
  - (1) A person under 21 years of age *regardless of whether the seller, donor, or transferor knows the age of such person*; or
  - (2) a person who is both addicted to and an unlawful user of a controlled substance; or
  - (3) a person who, within the preceding five years, has been convicted of a felony under the laws of this or any other jurisdiction or has been released from imprisonment for a felony.
- (c) Carrying concealed explosives is carrying any explosive or detonating substance on the person in a wholly or partly concealed manner.
- (d)
  - (1) Criminal possession of explosives is a severity level 7, person felony.
  - (2) Criminal disposal of explosives is a severity level 10, person felony.
  - (3) Carrying concealed explosives is a class C misdemeanor.
- (e) As used in this section "explosives" means any chemical compound, mixture or device, of which the primary purpose is to function by explosion, and includes but is not limited to

**dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord and igniters.**

### **Comment**

The Commission recommends increasing the severity level for carrying a concealed explosive. In light of the dangerous nature of explosives and the possibility for their misuse when concealed, a C misdemeanor seems inadequate. The Commission concludes that the offense should be a felony, but it makes no recommendation as to the specific severity level.

### **21-43-301 Cruelty to animals**

#### **(a) Cruelty to animals is:**

- (1) knowingly and maliciously killing, injuring, maiming, torturing, burning or mutilating any animal;**
- (2) knowingly abandoning any animal in any place without making provisions for its proper care;**
- (3) having physical custody of any animal and knowingly failing to provide such food, potable water, protection from the elements, opportunity for exercise and other care as is needed for the health or well-being of such kind of animal;**
- (4) intentionally using a wire, pole, stick, rope or any other object to cause an equine to lose its balance or fall, for the purpose of sport or entertainment; or**
- (5) knowingly but not maliciously killing or injuring any animal.**

- (b) (1) Cruelty to animals as described in subsection (a)(1) is a nonperson felony. Upon conviction of this subsection, a person shall be sentenced to not less than 30 days or more than one year's imprisonment and be fined not less than \$500 nor more than \$5,000. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the minimum mandatory sentence as provided herein. During the mandatory 30 days imprisonment, such offender shall have a psychological evaluation prepared for the court to assist the court in determining conditions of probation or parole. Such conditions shall include, but not be limited to, the completion of an anger management program.**

- (2) The first conviction of cruelty to animals as described in subsection (a)(2), (a)(3), (a)(4) and (a)(5) is a class A nonperson misdemeanor. The second or subsequent conviction of cruelty to animals as described in subsection (a)(2), (a)(3), (a)(4) and (a)(5) is a non-person felony. Upon such conviction, a person shall be sentenced to not less than five days or more than one year's imprisonment and be fined not less than \$500 nor more than \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the minimum mandatory sentence as provided herein.**
  
- (c) The provisions of this section shall not apply to:**

  - (1) Normal or accepted veterinary practices;**
  - (2) bona fide experiments carried on by commonly recognized research facilities;**
  - (3) killing, attempting to kill, trapping, catching or taking of any animal in accordance with the provisions of chapter 32 or chapter 47 of the Kansas Statutes Annotated;**
  - (4) rodeo practices accepted by the rodeo cowboys' association;**
  - (5) the humane killing of an animal which is diseased or disabled beyond recovery for any useful purpose, or the humane killing of animals for population control, by the owner thereof or the agent of such owner residing outside of a city or the owner thereof within a city if no animal shelter, pound or licensed veterinarian is within the city, or by a licensed veterinarian at the request of the owner thereof, or by any officer or agent of an incorporated humane society, the operator of an animal shelter or pound, a local or state health officer or a licensed veterinarian three business days following the receipt of any such animal at such society, shelter or pound;**
  - (6) with respect to farm animals, normal or accepted practices of animal husbandry, including the normal and accepted practices for the slaughter of such animals for food or by-products and the careful or thrifty management of one's herd or animals, including animal care practices common in the industry or region;**
  - (7) the killing of any animal by any person at any time which may be found outside of the owned or rented property of the owner or custodian of such animal and which is found injuring or posing a threat to any person, farm animal or property;**
  - (8) an animal control officer trained by a licensed veterinarian in the use of a tranquilizer gun, using such gun with the appropriate dosage for the size of the**

animal, when such animal is vicious or could not be captured after reasonable attempts using other methods;

- (9) laying an equine down for medical or identification purposes;
  - (10) normal or accepted practices of pest control, as defined in subsection (x) of K.S.A. 2-2438a, and amendments thereto; or
  - (11) accepted practices of animal husbandry pursuant to regulations promulgated by the United States department of agriculture for domestic pet animals under the animal welfare act, public law 89-544, as amended and in effect on July 1, 2006.
- (d) Any public health officer, law enforcement officer, licensed veterinarian or officer or agent of any incorporated humane society, animal shelter or other appropriate facility may take into custody any animal, upon either private or public property, which clearly shows evidence of cruelty to animals, as defined in this section. Such officer, agent or veterinarian may inspect, care for or treat such animal or place such animal in the care of a duly incorporated humane society or licensed veterinarian for treatment, boarding or other care or, if an officer of such humane society or such veterinarian determines that the animal appears to be diseased or disabled beyond recovery for any useful purpose, for humane killing. If the animal is placed in the care of an animal shelter, the animal shelter shall notify the owner or custodian, if known or reasonably ascertainable. If the owner or custodian is charged with a violation of this section, the board of county commissioners in the county where the animal was taken into custody shall establish and approve procedures whereby the animal shelter may petition the district court to be allowed to place the animal for adoption or euthanize the animal at any time after 20 days after the owner or custodian is notified or, if the owner or custodian is not known or reasonably ascertainable after 20 days after the animal is taken into custody, unless the owner or custodian of the animal files a renewable cash or performance bond with the county clerk of the county where the animal is being held, in an amount equal to not less than the cost of care and treatment of the animal for 30 days. Upon receiving such petition, the court shall determine whether the animal may be placed for adoption or euthanized. The board of county commissioners in the county where the animal was taken into custody shall review the cost of care and treatment being charged by the animal shelter maintaining the animal.
- (e) The owner or custodian of an animal placed for adoption or killed pursuant to subsection (d) shall not be entitled to recover damages for the placement or killing of such animal unless the owner proves that such placement or killing was unwarranted.
- (f) Expenses incurred for the care, treatment or boarding of any animal, taken into custody pursuant to subsection (d), pending prosecution of the owner or custodian of such animal

for the crime of cruelty to animals, shall be assessed to the owner or custodian as a cost of the case if the owner or custodian is adjudicated guilty of such crime.

~~(g) Upon the filing of a sworn complaint by any public health officer, law enforcement officer, licensed veterinarian or officer or agent of any incorporated humane society, animal shelter or other appropriate facility alleging the commission of cruelty to animals, as defined in K.S.A. 21-4310 and amendments thereto, the county or district attorney shall determine the validity of the complaint and shall forthwith file charges for the crime if the complaint appears to be valid.~~

(g) If a person is adjudicated guilty of the crime of cruelty to animals, and the court having jurisdiction is satisfied that an animal owned or possessed by such person would be in the future subjected to such crime, such animal shall not be returned to or remain with such person. Such animal may be turned over to a duly incorporated humane society or licensed veterinarian for sale or other disposition.

(h) As used in this section:

(1) "Equine" means a horse, pony, mule, jenny, donkey or hinny.

(2) "Maliciously" means a state of mind characterized by actual evil-mindedness or specific intent to do a harmful act without a reasonable justification or excuse.

(3) "Animal" shall have the meaning ascribed to it in K.S.A. 21-4313, and amendments thereto.

#### Comment

The Commission recommends striking subsection (g). That provision requires a county or district attorney to file charges of animal cruelty when a valid complaint is presented. The Commission finds that the subsection unnecessarily constrains the discretion of prosecutors and this kind of restriction on charging discretion is not employed in any other criminal statute. The Commission recommends that the better policy is to permit prosecutors to determine whether filing charges is justified on a case by case basis.

#### 21-43-303 Unlawful disposition of animals

(a) Unlawful disposition of animals is knowingly raffling, or giving as a prize or premium or using as an advertising device or promotional display living rabbits or chickens, ducklings or goslings.

- (b) Unlawful disposition of animals is a class C misdemeanor.
- (c) Unlawful disposition of animals as defined in subsection (a) shall not include the giving of such animals to minors for use in agricultural projects under the supervision of commonly recognized youth farm organizations.

**Comment**

The Commission recommends striking the phrase “or using as an advertising device or promotional display” from subsection (a). Several legitimate businesses use these animals as part of a promotional display, especially during holidays such as Easter. Prohibiting use of these animals as part of an “advertising device” could possibly criminalize their use in producing commercial advertisements. The Commission finds that the legislature did not likely intend to criminalize this conduct.

**21-47-120 Sentencing in multiple conviction cases**

- (a) The provisions of subsections (a), (b), (c), (d), (e) and (h) of K.S.A. 21-4608 and amendments thereto regarding multiple sentences shall apply to the sentencing of offenders pursuant to the sentencing guidelines. The mandatory consecutive sentence requirements contained in subsections (c), (d) and (e) of K.S.A. 21-4608 shall not apply if such application would result in a manifest injustice.
- (b) The sentencing judge shall otherwise have discretion to impose concurrent or consecutive sentences in multiple conviction cases. The sentencing judge ~~shall~~ *may consider the need to impose an overall sentence that is proportionate to harm and culpability and shall state on the record if the sentence is to be served concurrently or consecutively. In cases where consecutive sentences may be imposed by the sentencing judge, the following shall apply:*
  - (1) When the sentencing judge imposes multiple sentences consecutively, the consecutive sentences shall consist of an imprisonment term which ~~is~~ *may not exceed* the sum of the consecutive imprisonment terms, and a supervision term. *The sentencing judge shall have the discretion to impose a consecutive term of imprisonment for a crime other than the primary crime of any term of months not to exceed the nonbase sentence as determined under paragraph (5).* The postrelease supervision term will be based on the longest supervision term imposed for any of the crimes.
  - (2) The sentencing judge must establish a base sentence for the primary crime. The primary crime is the crime with the highest crime severity ranking. An off-grid crime shall not be used as the primary crime in determining the base sentence when

imposing multiple sentences. If sentences for off-grid and on-grid convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease supervision term will be based on the off-grid crime. If more than one crime of conviction is classified in the same crime category, the sentencing judge must designate which crime will serve as the primary crime. In the instance of sentencing with both the drug grid and the nondrug grid and simultaneously having a presumption of imprisonment and probation, the sentencing judge will use the crime which presumes imprisonment as the primary crime. In the instance of sentencing with both the drug grid and the nondrug grid and simultaneously having a presumption of either both probation or both imprisonment, the sentencing judge will use the crime with the longest sentence term as the primary crime.

- (3) The base sentence is set using the total criminal history score assigned.
- (4) The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence. This limit shall apply only to the total sentence, and it shall not be necessary to reduce the duration of any of the nonbase sentences imposed to be served consecutively to the base sentence. The postrelease supervision term will reflect only the longest such term assigned to any of the crimes for which consecutive sentences are imposed. Supervision periods will not be aggregated.
- (5) Nonbase sentences will not have criminal history scores applied, as calculated in the criminal history I column of the grid, but base sentences will have the full criminal history score assigned. In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case the court shall follow all of the provisions of this section concerning the sentencing of multiple conviction cases.
- (6) If the sentence for the primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison.
- (7) If the sentence for the consecutive sentences is a prison term, the postrelease supervision term is a term of postrelease supervision as established for the primary crime.
- (8) If the sentence for the primary crime is a nonprison sentence, a nonprison term will be imposed for each crime conviction, but the nonprison terms shall not be aggregated or served consecutively even though the underlying prison sentences have been ordered to be served consecutively. Upon revocation of the nonprison

sentence, the offender shall serve the prison sentences consecutively as provided in this section.

- (c) **The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:**
- (1) **The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively.**
  - (2) **When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime.**
  - (3) **The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation.**

#### **Comment**

The Commission recommends adding new language to subsection (b). The phrase, “may consider the need to impose an overall sentence that is proportionate to harm and culpability” is added to provide guidance to district courts regarding when and how concurrent and consecutive sentences should be imposed. The new language in subsection (b)(1) provides judicial discretion to impose an entire consecutive sentence or any part of such a sentence. Under current law, a consecutive sentence may only be imposed if the entire sentence is imposed. The Commission finds that the result of this provision is that consecutive sentences are often not imposed. Allowing judicial discretion to impose a portion of a consecutive sentence allows for greater proportionality.

#### **1,000 feet of school property recommendations**

#### **Comment**

After passage of the drug code recodification, the provisions of the 1,000 feet of school property enhancement in K.S.A. 21-36a05, K.S.A. 21-36a09, and K.S.A. 21-36a10 were unintentionally changed. The previous version of the school property enhancement required the offender to be 18 or more years of age.

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.

Legislation will be submitted to the legislature to correct the error in the drug recodification bill; however, the Commission now recommends removing each of the 18 year offender age requirements from the 1,000 of school property enhancements.

**K.S.A. 21-36a01            Definitions**

- (i) **"Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly or by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis. ~~and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include~~ "Manufacture" does not include:**
- (1) the preparation or compounding of a controlled substance by an individual for the individual's own lawful use or the preparation, compounding, packaging or labeling of a controlled substance:**
- ~~(1)~~ (A) By a practitioner or the practitioner's agent pursuant to a lawful order of a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or**
- ~~(2)~~ (B) by a practitioner or by the practitioner's authorized agent under such practitioner's supervision for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance- ; or**
- (2) the addition of diluents and adulterants such as, including but not limited to, quinine hydrochloride, mannitol, mannite, extrose and lactose, which are intended for use in cutting controlled substances.**

**Comment**

The Commission recommends revising the definition of "manufacture" in the drug code. The proposed language excludes the actions of packaging, repackaging, and cutting controlled substances.

The Commission determines that packaging, repackaging, and cutting are not properly part of criminal drug manufacturing, but rather, they are acts more closely associated with drug distribution.

**21-36a05      Unlawful cultivation or distribution of controlled substances**

- (a)      It shall be unlawful for any person to distribute, or possess with the intent to distribute any of the following controlled substances or controlled substance analogs thereof:**
  - (1)      Opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto.**
  - (2)      any depressant designated in subsection (e) of K.S.A. 65-4105, subsection (e) of K.S.A. 65-4107, subsection (b) or (c) of K.S.A. 65-4109 or subsection (b) of K.S.A. 65-4111, and amendments thereto;**
  - (3)      any stimulant designated in subsection (f) of K.S.A. 65-4105, subsection (d)(2), (d)(4) or (f)(2) of K.S.A. 65-4107 or subsection (e) of K.S.A. 65-4109, and amendments thereto;**
  - (4)      any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105, and amendments thereto or designated in subsection (g) of K.S.A. 65-4107 and amendments thereto or designated in subsection (g) of K.S.A. 65-4109 and amendments thereto;**
  - (5)      any substance designated in subsection (g) of K.S.A. 65-4105, and amendments thereto, and designated in subsection (c), (d), (e), (f) or (g) of K.S.A. 65-4111, and amendments thereto;**
  - (6)      any anabolic steroids as defined in subsection (f) of K.S.A. 65-4109, and amendments thereto.**
- (b)      It shall be unlawful for any person to distribute or possess with the intent to distribute a controlled substance or a controlled substance analog designated in K.S.A. 65-4113.**
- (c)      It shall be unlawful for any person to cultivate any controlled substance or controlled substance analog listed in subsection (a).**
- (d)      Except as further provided by any part of this subsection:**
  - (1)      Violation of subsection (a) shall be:**

- (a) a drug severity level 4 felony if the quantity of the material was less than 3.5 grams or less;
  - (b) a drug severity level 3 felony if the quantity of the material was 3.5 grams or more but less than 100 grams;
  - (c) a drug severity level 2 felony if the quantity of the material was 100 grams or more but less than 1 kilogram; or
  - (d) a drug severity level 1 felony if the quantity of the material was 1 kilogram or more.
- (2) Violation of subsection (a) with respect to material containing any quantity of marijuana, or an analog thereof, shall be:
  - (a) a drug severity level 4 felony if the quantity of the material was less than 25 grams;
  - (b) a drug severity level 3 felony if the quantity of the material was 25 grams or more but less than 450 grams;
  - (c) a drug severity level 2 felony if the quantity of the material was 450 grams or more but less than 30 kilogram; or
  - (d) a drug severity level 1 felony if the quantity of the material was 30 kilograms or more.
- (3) Violation of subsection (a) with respect to material containing any quantity of heroin, or an analog thereof, shall be:
  - (a) a drug severity level 4 felony if the quantity of the material was 1 gram or less;
  - (b) a drug severity level 3 felony if the quantity of the material was more than 1 gram but less than 3.5 grams;
  - (c) a drug severity level 2 felony if the quantity of the material was 3.5 grams or more but less than 100; or
  - (d) a drug severity level 1 felony if the quantity of the material was 100 grams or more.

- (4) Violation of subsection (a) with respect to material containing any quantity of a controlled substance, designated in K.S.A. 65-4105, K.S.A. 65-4107, K.S.A. 65-4109 or K.S.A. 65-4111, distributed by dosage unit, shall be:
- (a) a drug severity level 4 felony if the number of dosage units was fewer than 10;
  - (b) a drug 3 person felony if the number of dosage units was 10 or more but fewer than 100;
  - (c) a drug severity level 2 felony if the number of dosage units was 100 or more but fewer than 1000; or
  - (d) a drug severity level 1 felony if the number of dosage units was 1000 or more.
- (5) For any violation of subsection (a), the severity level of the offense shall be increased one level if the offender was 18 or more years of age and the controlled substance or controlled substance analog was distributed or possessed with the intent to distribute within 1,000 of school property.
- (6) Violation of subsection (b) shall be a class A person misdemeanor except that it shall be a severity level 7 person felony if the substance was distributed to or possessed with the intent to distribute to a child under 18 years of age.
- (7) Violation of subsection (c) shall be:
- (a) a drug severity level 3 felony if the number of plants cultivated was greater than 4 but fewer than 50;
  - (b) a drug severity level 2 felony if the number of plants cultivated was 50 or more but fewer than 100;
  - (c) a drug severity level 1 felony if the number of plants cultivated was 100 or more.
- (e) In any prosecution under this section, there shall be a rebuttable presumption of an intent to distribute if any person possesses these quantities of the following controlled substances or analogs thereof:
- (1) 450 grams or more of marijuana;

- (2) 3.5 grams or more of heroin;
  - (3) 100 dosage units or more containing a controlled substance; or
  - (4) 100 grams or more of any other controlled substance.
- (f) It shall not be a defense to charges arising under this section that:
- (1) the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance;
  - (2) the defendant did not know the quantity of the controlled substance; or
  - (3) the defendant did not know the specific controlled substance contained in the material that was distributed or possessed with the intent of distribution.
- (g) As used in this section:
- (1) “material” means the total amount of any substance, including a compound or a mixture, which contains any quantity of a controlled substance.
  - (2) “dosage unit” means a controlled substance distributed or possessed with the intent to distribute as a discrete unit, including, but not limited to, one pill, one capsule, or one microdot, and not distributed by weight.
    - (a) For steroids, or controlled substances in liquid solution legally manufactured for prescription use, “dosage unit” means the smallest medically-approved dosage unit, as determined by the label, materials provided by the manufacturer, a prescribing authority, licensed health care professional or other qualified health authority.
    - (b) Except as otherwise provided below, illegally manufactured controlled substances in liquid solution, or controlled substances in liquid products not intended for ingestion by human beings, “dosage unit” means 10 milligrams, including the liquid carrier medium.
    - (c) For lysergic acid diethylamide (LSD) in liquid form, a dosage unit is defined as .4 milligrams, including the liquid carrier medium.

#### Comment

The Commission recommends ranking the severity of drug distribution by the quantity of the drug. The idea for using quantity originated at the Kansas Sentencing Commission Proportionality Subcommittee.

The Commission agreed with the Proportionality Subcommittee that quantity levels should be used and the two groups agreed to let the Commission determine the proper quantity levels.

Currently, the severity level for distribution is based on recidivism of the offender. However, the recidivism enhancement was created before the sentencing guidelines. Since the guidelines account for an offender's criminal history, drug quantity is a preferable alternative method of determining the severity level of the offense. Of the four states that border Kansas, each ranks the severity of its drug distribution offense by quantity in some way.

The Commission conducted a substantial amount of research and carefully considered the proposed language. In 2008, staff members consulted with the KBI, the DEA, Kansas law enforcement officers along with Kansas prosecutors and district court judges regarding the proposal. The Commission also employed Kyle Smith, formerly of the KBI, as a staff attorney to work on this proposal.

The quantity thresholds are based on four classifications: small, medium, large, and super large. The quantity thresholds are based on quantities that represent distribution unit. Subsection (b)(1) creates a generic quantity threshold into which drugs such as cocaine and methamphetamine fall. There is a specific quantity threshold for heroin, due to its smaller distribution unit, and drugs sold by dosage unit such as LSD or prescription drugs. Subsection (g)(2) defines a dosage unit similarly to the definition used in the Drug Tax Stamp Act.

(Note: this proposal was presented to the Joint Corrections and Juvenile Justice Oversight Committee in early 2009. At that hearing, Tom Stanton, a prosecutor from Reno County, suggested that the quantity threshold used for heroin should also apply to methamphetamine. The Commission discussed this possibility the chemists at the KBI and determined that methamphetamine could be added to the heroin quantity threshold.)

Subsection (e) contains a presumption of intent to distribute is certain quantities are possessed. A defendant may rebut the presumption; however, it allows a jury to infer, from the quantity alone, that a defendant intended to distribute.

#### **21-36a09      Unlawful possession of drug paraphernalia and certain precursors**

***(a)      Any person who possesses 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 or controlled substance analog is guilty of attempted violation of subsection (a) of section 3, and amendments thereto.***

- (b) Any person who possesses drug paraphernalia with the intent to manufacture a controlled substance or a controlled substance analog shall be guilty of attempted violation of subsection (a) of section 3, and amendments thereto.**
- (c) Any person who possesses any drug paraphernalia with the intent to distribute or cultivate a controlled substance designated in subsection (a) of section 5, and amendments thereto, or a controlled substance analog thereof is guilty of attempted violation of subsection (a) of section 5, and amendments thereto.**
- (d) Any person who possesses any drug paraphernalia with the intent to distribute a controlled substance or controlled substance analog designated in K.S.A. 65-4113, and amendments thereto, shall be guilty of attempted violation of subsection (b) of section 5, and amendments thereto.**
- (e) Any person who possesses any drug paraphernalia with the intent to possess or have under such person's control any controlled substance designated in subsection (a) of section 6, and amendments thereto, or a controlled substance analog thereof is guilty of attempted violation of subsection (a) of section 6, and amendments thereto.**
- (f) Any person who possesses any drug paraphernalia with the intent to possess or have under such person's control any controlled substance designated in subsection (b) of section 6, and amendments thereto, or a controlled substance analog thereof is guilty of attempted violation of subsection (b) of section 6, and amendments thereto.**
- (g) This section does not preclude a person from conviction of attempted manufacture, distribution, or possession of a controlled substance or a controlled substance analog based upon overt acts other than those herein mentioned.**

#### **Comment**

The Commission recommends adopting this statute in lieu of 21-36a09. The relationship between the possession of paraphernalia and precursors offense and the general possession, distribution, and manufacturing offenses has caused much confusion and litigation in cases such as *State v. Campbell* and *State v. McAdam*. The Commission determines that a method of clarifying the relationship between these offenses is eliminate the possession of paraphernalia and precursors as a separate offense and define such possession as a sufficient overt act toward the attempted violation of the possession, distribution, and manufacturing offenses.

**K.S.A. 21-36a14 Unlawful representation that noncontrolled substance is controlled substance**

- (a) It shall be unlawful for any person to distribute or possess with the intent to distribute any substance which is not a controlled substance:**
  - (1) Upon an express representation that the substance is a controlled substance or that the substance is of such nature or appearance that the recipient will be able to distribute the substance as a controlled substance; or**
  - (2) under circumstances which would give a reasonable person reason to believe that the substance is a controlled substance.**
  
- (b) Violation of subsection (a) is a class A nonperson misdemeanor, except that violation of subsection (a) is a nondrug severity level 9, nonperson felony if the distributor is 18 or more years of age, distributing to a person under 18 years of age and at least three years older than the person under 18 years of age to whom the distribution is made.**
  
- (c) If any one of the following factors is established, there shall be a presumption that distribution of a substance was under circumstances which would give a reasonable person reason to believe that a substance is a controlled substance:**
  - (1) The substance was packaged in a manner normally used for the illegal distribution of controlled substances;**
  - (2) the distribution of the substance included an exchange of or demand for money or other consideration for distribution of the substance and the amount of the consideration was substantially in excess of the reasonable value of the substance; or**
  - (3) the physical appearance of the capsule or other material containing the substance is substantially identical to a specific controlled substance.**
  
- (d) *A person who commits this crime also may be prosecuted for, convicted of, and punished for theft by deception.***

**Comment**

The Commission recommends adding subsection (d) in order to permit dual prosecution for this offense and theft by deception.

## Recommended new criminal offenses

### Armed criminal action

- (a) **Armed criminal action is committing or attempting to commit any felony under the laws of this state by use of a firearm.**
- (b) **Armed criminal action is a nonperson felony. Upon conviction, a person shall be sentenced to a term of 12 months imprisonment. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the mandatory 12 months imprisonment, unless application of such a mandatory sentence would result in a manifest injustice.**
- (c) **The crime of armed criminal action shall be treated as a separate and distinct offense from the crime or crimes committed, and the sentence imposed under this section shall be consecutive to any other sentence imposed.**
- (d) **This section shall not apply when the felony committed is criminal distribution of a firearm to a felon, as defined in 21-42-103, criminal possession of a firearm by a convicted felon, as defined in 21-42-103, criminal possession of a firearm by a juvenile, as defined in 21-42-106, criminal discharge of a firearm, as defined in 21-42-108, or unauthorized possession of a firearm on the grounds of or within certain state-owned or leased buildings, as defined in 21-42-110.**
- (e) **As used in this section:**
  - (1) **"Use of a firearm" includes the discharge, employment, or visible display of any part of a firearm during, immediately prior to, or immediately after the commission of a felony or communication to another indicating the presence of a firearm during, immediately prior to, or immediately after the commission of a felony, regardless of whether such firearm was discharged, actively employed, or displayed.**
  - (2) **"Firearm" means any weapon designed or having the capacity to propel a projectile by force of an explosion or combustion.**

### Comment

The Commission recommends creation of an armed criminal action statute, similar to the armed criminal action statute in Missouri. It penalizes use of a firearm in the commission of a felony, unless the underlying felony is one where use of a firearm is a necessary element. The Commission recognizes that crimes involving the use of a firearm are especially dangerous and justify more severe punishment.

## Reckless Endangerment

- (a) Endangerment is recklessly exposing another person to a danger of great bodily harm or death.
- (b) Endangerment is Class A person misdemeanor.

### Comment

The Commission recommends creation a general reckless endangerment offense. Several other jurisdictions have such an offense. The Kansas code contains numerous offenses that are based on the principle of criminalizing recklessly exposing someone to danger when no injury or death occurs, such as endangerment of a child, casting rocks onto a public road or street, hazing, use or possession of traffic control signal preemption devices, etc. The general offense provides liability for acts of endangerment that do not fit within these several specific statutes.

## Criminal offenses and statutes recommended for repeal

### 21-40-107 Unjustifiably exposing a convicted or charged paroled or discharged person

~~(a) Unjustifiably exposing a convicted or charged person is unjustifiably communicating or threatening to communicate to another any oral or written statement that any person has been charged with or convicted of a felony, with intent to interfere with the employment or business of the person so charged or convicted.~~

~~(b) Unjustifiably exposing a convicted or charged person is a class B nonperson misdemeanor.~~

~~(c) This section shall not apply to any person or organization who furnishes information about a person to another person or organization requesting the same.~~

### Comment

The Commission recommends elimination of this offense. This offense was created sometime before the 1969 recodification and is inconsistent with current law and policy. The offense criminalizes (truthfully) communicating the fact that a person was charged or convicted of a felony. The Commission finds that there are some instances where a person may be obliged to provide

information regarding a convict's felony history intending that it will interfere with the convict's future employment. In light of the Kansas Department of Corrections offender website and other such sources of information, the offense is no longer needed or desirable.

**21-42-405 Selling beverage containers with detachable tabs**

~~(a) — Selling beverage containers with detachable tabs is knowingly selling or offering for sale at retail in this state any metal beverage container so designed and constructed that a part of the container is detachable in opening the container.~~

~~(b) — Selling beverage containers with detachable tabs is a class C misdemeanor.~~

~~(c) — As used in this section:~~

~~—~~

~~(1) — "Beverage container" means any sealed can containing beer, cereal malt beverages, mineral waters, soda water and similar soft drinks so designated by the director of alcoholic beverage control, in liquid form and intended for human consumption.~~

~~—~~

~~(2) — "In this state" means within the exterior limits of the state of Kansas and includes all territory within these limits owned by or ceded to the United States of America.~~

**Comment**

The Commission recommends eliminating this offense as it is technologically obsolete.

**21-42-408 Refusal to yield a telephone party line**

~~(a) — Refusal to yield a telephone party line is intentionally refusing to immediately yield or surrender the use of a party line when informed that the line is needed for an emergency call to a fire department or police department or for medical aid or ambulance service.~~

~~—~~

~~(b) — No person shall request the use of a party line on the pretext that an emergency exists, knowing that no emergency in fact exists.~~

~~—~~

~~(c) — Every telephone directory published for distribution to members of the general public shall contain a notice setting forth a summary of the provisions of this section. Such notice shall be printed in type which is no smaller than any other type on the same page and shall be preceded by the word "WARNING." The provisions of this subsection shall not apply to those~~

~~directories distributed solely for business advertising services, commonly known as classified directories.~~

—

~~(d) Violation of any subsection of this section is a class C misdemeanor.~~

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~~(e) As used in this section:~~

~~(1) "Party line" means a subscriber's line telephone circuit, consisting of two (2) or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.~~

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~~(2) "Emergency" means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential.~~

#### Comment

The Commission recommends eliminating this offense as it is technologically obsolete.

#### 21-43-209 False membership claim

~~(a) A false membership claim is falsely representing oneself to be a member of a fraternal or veteran's organization.~~

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~~(b) False membership claim is a class C misdemeanor.~~

#### Comment

The Commission recommends eliminating this offense as making a false claim of membership in such an organization does not seem to be a substantial or widespread problem in Kansas.

## IV. Sentencing Proportionality

### Background

In 2004 the Vera Institute of Justice report on sentencing proportionality under the Kansas Sentencing Guidelines concluded that there were inconsistencies between the drug and non-drug sentencing grids, and that sentencing severity levels for certain offenses were disproportionate. In K.S.A. 21-4801, the Legislature directed the Commission to make recommendations ensuring that sentences are “appropriate and proportionate to other sentences imposed for criminal offenses.” It also directed the Commission to work with the Kansas Sentencing Commission (KSC) on issues concerning proportionality in sentencing.

In 2008, the KSC Proportionality Subcommittee published a report that proposed many revisions to the criminal code relevant to sentencing proportionality. With consideration of the Vera Report, the Commission and the KSC both found several areas of the criminal code where the sentencing severity level of the offense was disproportionate compared to the severity levels for other criminal offenses. The Commission refined the proposals in the Proportionality Subcommittee report into a set of recommendations approved by both the Commission and the KSC.

### Commission Activities

The Commission devoted a substantial amount of time to sentencing proportionality issues in 2008. It worked closely with the KSC; it sought comments from judges, prosecutors, defense attorneys, law enforcement officials, and other agencies on sentencing proportionality recommendations.

In October 2007, Commission co-chairman Ed Klumpp was invited to sit on the Proportionality Subcommittee, to assist in coordinating work of the subcommittee and the Commission. He attended their monthly meetings until the Proportionality Subcommittee report was completed.

From January to November of 2008, the Commission devoted time at each monthly meeting to consideration of sentencing proportionality issues. Every Commission meeting was attended by a representative of the KSC. Tom Drees, the Ellis County Attorney and chairperson of the KSC Proportionality Subcommittee, participated in the Commission’s meetings when sentencing proportionality was considered.

From June to August 2008 the Commission employed Kyle Smith, formerly of the KBI, as a staff attorney. He provided assistance with the sentencing proportionality recommendations regarding drug crimes. Ed Klumpp, Kyle Smith, and Brett Watson met with law enforcement officials including those with the KBI, the Topeka Police Department, and the Drug Enforcement Agency. Staff also met with chemists from the KBI, Johnson County, and Sedgwick County forensic laboratories to refine a proposal to link the severity of drug distribution with drug quantities.

The Commission made several contacts with practitioners including judges, prosecutors and defense attorneys. Staff circulated a survey on drug manufacturing to all district courts and county and district attorneys in Kansas.

In the summer of 2008 Prof. Tom Stacy, Judge John White, and Brett Watson were invited to the Kansas County & District Attorneys Association convention where they explained the Commission's work including the sentencing proportionality recommendations. In 2008, Tom Drees attended their fall convention and presented the final versions of the sentencing proportionality recommendations to prosecutors. In October 2009 Judge John White and Steve Opat provided the KCDA a further update on sentencing proportionality and the Commission's recodification work. The Commission also provided drafts of its work to the Kansas Association of Criminal Defense Attorneys.

The Commission's work was included in HB2332 submitted to the 2009 legislature.