AN ACT concerning crimes, punishment and criminal procedure; amending Section 9 of chapter 136 of the 2010 Session Laws, Section 34 of chapter 136 of the 2010 Session Laws, Section 37 of chapter 136 of the 2010 Session Laws, Section 61 of chapter 136 of the 2010 Session Laws, Section 68 of chapter 136 of the 2010 Session Laws, Section 71 of chapter 136 of the 2010 Session Laws, Section 81 of chapter 136 of the 2010 Session Laws, Section 92 of chapter 136 of the 2010 Session Laws, Section 93 of chapter 136 of the 2010 Session Laws, Section 129 of chapter 136 of the 2010 Session Laws, Section 130 of chapter 136 of the 2010 Session Laws, Section 132 of chapter 136 of the 2010 Session Laws, Section 136 of chapter 136 of the 2010 Session Laws, Section 165 of chapter 136 of the 2010 Session Laws, Section 197 of chapter 136 of the 2010 Session Laws, Section 223 of chapter 136 of the 2010 Session Laws, Section 224 of chapter 136 of the 2010 Session Laws, Section 300 of chapter 136 of the 2010 Session Laws and K.S.A. 21-36a01, 21-36a05, 21-36a09, 21-36a10, 21-36a13, 21-36a14, 21-4010 and 21-4012 and repealing the existing section; **also repealing K.S.A. 21-4006, 21-4211, 21-4216, and 21-4309**.

New Section 1. (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 section 188 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, criminal possession of a firearm by a convicted felon, as defined in section 189 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, criminal possession of a firearm by a juvenile, as defined in section 186 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, criminal discharge of a firearm, as defined in section 193 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, or unauthorized possession of a firearm on the grounds of or within certain state-owned or leased buildings, as defined in section 194 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto.

(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 or explosion or combustion.

Comment: This proposed armed criminal action statute is 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. Crimes involving the use of a firearm are especially dangerous and justify more severe punishment.

New Sec. 2. (a) Endangerment is recklessly exposing another person to a danger of great bodily harm or death.

(b) Endangerment is a Class A person misdemeanor.

Comment: This proposed general reckless endangerment offense is similar to several other jurisdictions. 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 preemption devices, etc. This general offense provides liability for acts of endangerment that do not fit within these several specific statutes.

Sec. 3. Section 9 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5109) is hereby amended to read as follows:

(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 paragraph (1) or (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: Subsection (e) should be added 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 offenses would not automatically demand imposition of the lesser punishment as the prosecutor may choose which offense to charge.

Sec. 4. Section 34 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5302) is hereby amended to read as follows:

(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.

~~(b)~~ *(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.

~~(c)~~ *(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 a severity level 10. The provisions of this subsection shall not apply to a violation of conspiracy to commit the crime of terrorism pursuant to section 56, and amendments thereto, or of illegal use of weapons of mass destruction pursuant to section 57, and amendments thereto.

~~(d)~~ *(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.

~~(e)~~ *(f)* A conspiracy to commit a misdemeanor is a class C misdemeanor.

Comment: Subsection (b) should be added to provide 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.

Sec. 5. Section 37 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5402) is hereby amended to read as follows:

(a) Murder in the first degree is the killing of a human being committed:

(1) Intentionally, 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) As used in this section, an ‘‘inherently dangerous felony’’ means:

(1) Any of the following felonies, whether 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 subsection (a) of section 43, and amendments thereto;

(B) aggravated kidnapping, as defined in subsection (b) of section 43, and amendments thereto;

(C) robbery, as defined in subsection (a) of section 55, and amendments thereto;

(D) aggravated robbery, as defined in subsection (b) of section 55, and amendments thereto;

(E) rape, as defined in section 67, and amendments thereto;

(F) aggravated criminal sodomy, as defined in subsection (b) of section 68, and amendments thereto;

(G) abuse of a child, as defined in section 79, and amendments thereto;

(H) felony theft of property as defined in subsection (a)(1) or (a)(3) of section 87, and amendments thereto;

(I) burglary, as defined in subsection (a) of section 93, and amendments thereto;

(J) aggravated burglary, as defined in subsection (b) of section 93, and amendments thereto;

(K) arson, as defined in subsection (a) of section 98, and amendments thereto;

(L) aggravated arson, as defined in subsection (b) of section 98, and amendments thereto;

(M) treason, as defined in section 126, and amendments thereto;

(N) any felony offense as provided in K.S.A. 2009 Supp. 21-36a03, 21-36a05 or 21-36a06, and amendments thereto;

(O) any felony offense as provided in subsection (a) or (b) of section 193, and amendments thereto;

(P) endangering the food supply, as defined in subsection (a) of section 202, and amendments thereto;

(Q) aggravated endangering the food supply, as defined in subsection (b) of section 202, 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 (b)(1) of section 78, and amendments thereto; ~~and~~

(T) abandonment of a child, as defined in section 82, and amendments thereto; and

(2) any of the following felonies, only when such felony is so distinct from the homicide alleged to be a violation of subsection (a)(2) as to not be an ingredient of the homicide alleged to be a violation of subsection (a)(2):

(A) Murder in the first degree, as defined in subsection (a)(1);

(B) murder in the second degree, as defined in subsection (a)(1) of section 38, and amendments thereto;

(C) voluntary manslaughter, as defined in subsection (a)(1) of section 39, and amendments thereto;

(D) aggravated assault, as defined in subsection (b) of section 47, and amendments thereto;

(E) aggravated assault of a law enforcement officer, as defined in subsection (d) of section 47, and amendments thereto;

(F) aggravated battery, as defined in subsection (b)(1) of section 48, and amendments thereto; or

(G) aggravated battery against a law enforcement officer, as defined in subsection (d) of section 48, and amendments thereto.

Comment: Subsection (c)(1)(T) should be added to the list of inherently dangerous felonies. Abandonment of a child possesses the same dangers as aggravated endangering of a child.

Sec. 6. Section 61 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5426) is hereby amended to read as follows: (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; or

(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).

(b) Aggravated trafficking is:

~~(1)~~ Trafficking, as defined in subsection (a):

~~(A)~~ *(1)* Involving the commission or attempted commission of kidnapping, as defined in subsection (a) of section 43, and amendments thereto;

~~(B)~~ *(2)* committed in whole or in part for the purpose of the sexual gratification of the defendant or another; or

~~(C)~~ *(3)* resulting in a death; or

~~(2)~~ *(4) involving* 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) Aggravated trafficking is a:

(A) Severity level 1, person felony, except as provided in subsection (c)(2)(B); and

(B) off-grid person felony, when the offender is 18 years of age or older and the victim is less than 14 years of age.

Comment: Current law has subsection (b)(2) as a stand-alone provision which could lead to the criminalization of trivial behavior, such as a young person driving a date to a place where both intend to engage in sexual conduct. The correction is proposed to bring the statute in line with the perceived intent of the statute.

Sec. 7. Section 68 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5504) is hereby amended to read as follows: (a) Criminal sodomy is:

~~(1) Sodomy between persons who are 16 or more years of age and members of the same sex;~~

~~(2)~~ *(1)* sodomy between a person and an animal;

~~(3)~~ *(2)* sodomy with a child who is 14 or more years of age but less than 16 years of age; or

~~(4)~~ *(3)* 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 victim who does not consent to the sodomy or causing a victim, without the victim'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:

(A) Subsection (a)(1) ~~or (a)(2)~~ is a class B nonperson misdemeanor; and

(B) subsection (a)(3) or (a)(4) is a severity level 3, person felony.

(c) (2) Aggravated criminal sodomy as defined in:

(A) subsection (b)(3) is a severity level 1, person felony; and

(B) subsection (b)(1) or (b)(2) is a:

(i) Severity level 1, person felony, except as provided in subsection (c)(2)(B)(ii); and

(ii) off-grid person felony, when the offender is 18 years of age or older.

(d) It shall be a defense to a prosecution of criminal sodomy, as defined in subsection (a)~~(3)~~*(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 (b)(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: Subsection (a)(1) should be removed as it is unconstitutional in light of the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The State or local government could be exposed to civil liability if this offense is retained in statute and results in an arrest. The best practice is to remove unconstitutional statutes from the criminal code.

Sec. 8. Section 71 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5507) is hereby amended to read as follows:

(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 as defined in:

(1) Subsection (a)(1)(A) is a severity level 8, person felony;

(2) subsection (a)(1)(B) is a severity level 9, person felony; and

(3) subsection (a)(1)(C) is a severity level 10, person felony.

Comment: Subsection (a)(5) is unconstitutional in light of the Kansas Supreme Court decision in *State v. Limon*, 280 Kan. 275 (2005) and the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The State or local governments could be exposed to civil liability if this offense is retained in statute and results in an arrest. The best practice is to remove unconstitutional statutes from the criminal code.

Sec. 9. Section 81 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5604) is hereby amended to read as follows: (a) Incest is marriage to or engaging in otherwise lawful sexual intercourse or sodomy, as defined in section 65, 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 following acts 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 section 65, and amendments thereto; or
(B) any lewd fondling, as described in subsection (a)(1) of section 70, and amendments thereto.
(c) (1) Incest is a severity level l0, person felony.
(2) Aggravated incest as defined in:
(A) Subsection (b)(2)(A) is a severity level 3, person felony if the victim is a biological, step, or adoptive child;
~~(A)~~ *(B)* Subsection (b)(2)(A) is a severity level 5, person felony; and
~~(B)~~ *(C)* subsection (b)(1) or (b)(2)(B) is a severity level 7, person felony.

Comment: The addition of subsection (2)(A) as provided is recommended to increase the severity level of the violation when the victim and offender are in a parent/child relationship. A violation of the parental duty to care for a child deserves greater punishment than other forms of incest.

Sec. 10. Section 92 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5806) is hereby amended to read as follows:
(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 reasonable grounds to know that such article was produced in violation of law; ~~or~~
(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
~~(3)~~ *(4)* knowingly selling, renting, offering for sale or rental, or 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) Unlawful use of recordings:

(1) Is a severity level 9, nonperson felony, except as provided in *subsection (b)(3) and* (b)(2); ~~and~~

(2) as defined in subsection (a)(2) or (a)~~(3)~~*(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~~.~~*; and*

(3) as defined in subsection (a)(3), a class B nonperson misdemeanor.

(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 or to any article or device on which is exclusively recorded any such computer program.

(e) As used in 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; and

(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 this section 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 addition of subsection (a)(3) as proposed would 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. Possession alone should be sufficient to trigger criminal liability.

Sec. 11. Section 93 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5807) is hereby amended to read as follows:

(a) Burglary is, without authority, entering into or remaining within any:

(1) Dwelling, with intent to commit a felony, theft or ~~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 ~~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 ~~sexual battery~~ *sexually motivated crime* therein.

(b) Aggravated burglary is, without authority, entering into or remaining within any building, manufactured home, mobile home, tent or other structure, or any 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 ~~sexual battery~~ *sexually motivated crime* therein.

(c) (1) Burglary as defined in:

(A) Subsection (a)(1) is a severity level 7, person felony;

(B) subsection (a)(2) is a severity level 7, nonperson felony; and

(C) subsection (a)(3) is a severity level 9, nonperson felony.

(2) Aggravated burglary is a severity level 5, person felony.

(c) As used in this section, "sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

Comment: The phrase "sexual battery" should be changed to "sexually motivated crime" to expand liability to other 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, such behavior should fall under the burglary statute. The definition of "sexually motivated" is identical to how it is defined in K.S.A. 21-4642, 22-3717, 22-4902 and 59-29a02.

Sec. 12. Section 129 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5904) is hereby amended to read as follows:

(a) Interference with law enforcement is:

(1) Falsely reporting to a law enforcement officer or state investigative agency*:* ~~that a crime has been committed, knowing that such information is false and intending that the officer or agency shall act in reliance upon such information;~~

(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

~~(2)~~ *(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) Interference with law enforcement as defined in subsection (a)(1) *and (a)(2)* is a class A *nonperson* misdemeanor;

(2) *Interference with a law enforcement involving a felony crime as defined in:*

(A) subsection (a)(1)(A) or (a)(2) is a severity level 8, nonperson felony; and

(B) subsection (a)(1)(B) is a severity level 9, nonperson felony.

(3) Interference with law enforcement as defined in subsection (a)~~(2)~~*(3)* is a:

(A) Severity level 9, nonperson felony in the case of a felony, or resulting from parole or any authorized disposition for a felony; and

(B) class A nonperson misdemeanor in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case.

Comment: The recommendation is to expand liability under this statute. Under current law it is a crime to falsely report a crime. Subsection (a)(1)(A) expands liability to cover persons who falsely report that a particular person committed an offense. 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 person that provides false information to law enforcement with the intent to obstruction 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. These acts are clearly prohibited under the current statute.

Sec. 13. Section 130 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5905) is hereby amended to read as follows:

(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 prosecutor on any matter then pending before the officer or prosecutor:

(A) Communicating in any manner a threat of violence to any judicial officer or any prosecutor;

(B) harassing a judicial officer or a prosecutor by repeated vituperative communication; or

(C) picketing, parading or demonstrating near such officer's or prosecutor's residence or place of abode;

(3) picketing, parading or demonstrating in or near a building housing a judicial officer or a prosecutor with intent to impede or obstruct the finding, decision, ruling, order, judgment or decree of such judicial officer or prosecutor on any matter then pending before the officer or prosecutor;

(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~~, or~~ destroy*, or materially alter* evidence of a crime; or

(5) concealing, destroying, or materially altering evidence with the intent to influence, impede, or obstruct any proceeding, civil or criminal;

~~(5)~~ *(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) Interference with the judicial process as defined in:

(1) Subsection (a)(1) is a severity level 9, nonperson felony;

(2) subsection (a)(2) and (a)(3) is a class A nonperson misdemeanor;

(3) subsection (a)(4) is a:

(A) Severity level 8, nonperson felony if the crime is a felony; or

(B) class A nonperson misdemeanor if the crime is a misdemeanor;

(4) subsection (a)(5) is a:

(A) class A nonperson misdemeanor; or

(B) severity level 8, nonperson felony if the proceeding is a felony prosecution;

~~(4)~~ *(5)* subsection ~~(a)(5)(A)~~ *(a)(6)(A)* is a severity level 7, nonperson felony; and

~~(5)~~ *(6)* subsection ~~(a)(5)(B)~~ *(a)(6)(B)* or ~~(a)(5)(C)~~ *(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.

Comment: The recommended changes to subsection (a)(4) and the addition of subsection (a)(5) is because there are 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 destruction of evidence of a crime, in the absence of consideration, should be a crime. For that reason subsection

(a)(5) is added and would apply to both criminal and civil cases because the offense deals with the judicial process generally, not just the criminal justice process.

Sec. 14. Section 132 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5907) is hereby amended to read as follows:

(a) Simulating legal process is:

(1) Distributing to another any document which simulates or purports to be, or is designed to cause others to believe it to be, a summons, petition, complaint or other ~~judicial~~ *legal* process, with ~~intent thereby to induce payment of a claim~~ *the intent to mislead the recipient and cause the recipient to take action in reliance thereon*; or

(2) printing or distributing any such document, knowing that it shall be so used.

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

(c) This section shall not apply to the printing or distribution of blank forms of legal documents intended for actual use in judicial proceedings.

Comment: The proposed change is recommended to avoid the unintended consequence of criminalizing innocent conduct intended to "induce payment of a claim." The revision would require the "intent to mislead the recipient and cause the recipient to take action in reliance thereon." This revision provides a superior culpability standard and adequately targets the kind of behavior the legislature originally intended to criminalize.

Sec. 15. Section 136 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5911) is hereby amended to read as follows:

(a) Escape from custody is escaping while held in custody on a: (1) Charge or conviction of *or arrest for* a misdemeanor;

(2) charge or adjudication *or arrest* as a juvenile offender where the act, if committed by an adult, would constitute a misdemeanor; or

(3) 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 a 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 or adjudication *or arrest* as a juvenile offender 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 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 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 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 of felony; or

(G) upon incarceration at a state correctional institution 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 defined in:

(A) Subsection (b)(1)(A), (b)(1)(C), (b)(1)(D), (b)(1)(E) or (b)(1)(F) is a severity level 8, nonperson felony;

(B) subsection (b)(1)(B), (b)(1)(G), (b)(2)(B) or (b)(2)(G) is a severity level 5, nonperson felony;

(C) subsection (b)(2)(A), (b)(2)(C), (b)(2)(D), (b)(2)(E) or (b)(2)(F) is a severity level 6, nonperson felony.

(d) As used in this section and section 137, 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; 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;

(3) ‘‘juvenile offender’’ means the same as in K.S.A. 2009 Supp. 38-2302, and amendments thereto; and

(4) ‘‘state correctional institution’’ means the same as in K.S.A. 75-5202, and amendments thereto.

(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 recommendation is to add the phrase “or arrest” to subsections (a)(1), (a)(2), (b)(1)(A) and (b)(1)(B) and to add 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. It was determined that the legislature intended this offense to apply to offenders under arrest, without a formal written charge, and the proposed changes clarify that intent.

Sec. 16. Section 165 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6001) is hereby amended to read as follows:

(a) Bribery is:

(1) ~~Offering, giving or promising to give, directly or indirectly, to any person who is a public officer, candidate for public office or public employee any benefit, reward or consideration to which the person is not legally entitled with intent thereby to influence the person with respect to the performance of the person’s powers or duties as a public officer or employee~~ *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*; or

(2) ~~the act of a person who is a public officer, candidate for public office or public employee, in requesting, receiving or agreeing to receive, directly or indirectly, any benefit, reward or consideration given with intent that the person will be so influenced~~ *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 ~~officer~~ *official* ~~or public employee~~ shall forfeit the person's office or employment. Notwithstanding an expungement of the conviction pursuant to section 254, 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 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*, 271 Kan. 756 (1975). 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 to 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 offenses 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.

Sec. 17. Section 197 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6312) is hereby amended to read as follows:

(a) Criminal possession of explosives is the 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* distributing any explosive or detonating substance to a person:

(1) Under 21 years of age *regardless of whether the seller, donor or transferor knows the age of such person*;

(2) who is both addicted to and an unlawful user of a controlled substance; or

(3) 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~~ *A person* misdemeanor.

(e) As used in subsections (a) and (b), ''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: In light of the dangerous nature of explosives and the possibility for their misuse when concealed, a C misdemeanor seems inadequate. The recommendation is to increase the penalty to a class A person misdemeanor.

Sec. 18. Section 223 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6412) is hereby amended to read as follows:

(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;

(5) knowingly but not maliciously killing or injuring any animal; or

(6) administering any poison to any domestic animal.

(b) Cruelty to animals as defined in:

(1) Subsection (a)(1) or (a)(6) is a nonperson felony. Upon conviction of subsection (a)(1) or (a)(6), 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. Such conditions shall include, but not be limited to, the completion of an anger management program; and

(2) subsection (a)(2), (a)(3), (a)(4) or (a)(5) are a:

(A) Class A nonperson misdemeanor, except as provided in subsection (b)(2)(B); and

(B) nonperson felony upon the second or subsequent conviction of cruelty to animals as defined in subsection (a)(2), (a)(3), (a)(4) or (a)(5).

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, and amendments thereto;

(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) The provisions of subsection (a)(6) shall not apply to any person exposing poison upon their premises for the purpose of destroying wolves, coyotes or other predatory animals.

(e) 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.

(f) The owner or custodian of an animal placed for adoption or killed pursuant to subsection (e) 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.

(g) Expenses incurred for the care, treatment or boarding of any animal, taken into custody pursuant to subsection (e), 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.

~~(h) 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, 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.~~

~~(i)~~ *(h)* 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.

~~(j)~~ *(i)* As used in this section:

(1) ‘‘Equine’’ means a horse, pony, mule, jenny, donkey or hinny; and

(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.

Comment: Subsection (h) requires a county or district attorney to file charges of animal cruelty when a valid complaint is presented. This unnecessarily constrains the discretion of prosecutors and this kind of restriction on discretion is not employed in any other criminal statute. The recommendation is to strike subsection (h) because the better policy is to permit prosecutors to determine whether filing charges is justified on a case-by-case basis.

Sec. 19. Section 224 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6413) is hereby amended to read as follows:

(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) The provisions of this section shall not apply to a person giving such animals to minors for use in agricultural projects under the supervision of commonly recognized youth farm organizations.

Comment: The recommendation is to strike the phrase “or using as an advertising device or promotional display.” 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 committee agreed that the legislature did not likely intend to criminalize this conduct.

Sec. 20. Section 300 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6819) is hereby amended to read as follows:

(a) The provisions of subsections (a), (b), (c), (d), (e) and (h) of section 246, 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 section 246, and amendments thereto, 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 *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 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 shall 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 shall 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 shall 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 shall 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 shall not be aggregated.

(5) Nonbase sentences shall not have criminal history scores applied, as calculated in the criminal history I column of the grid, but base sentences shall 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 recommendation is to add new language to subsection (b) that will 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 with the result being that consecutive sentences are not often imposed. Allowing judicial discretion to impose a portion of a consecutive sentence allows for greater proportionality.

Sec. 21. K.S.A. 21-36a01 is hereby amended to read as follows: 21-36a01. **Definitions.** As used in K.S.A. 2009 Supp. 21-36a01 through 21-36a17, and amendments thereto:

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

(b) (1) "Controlled substance analog" means a substance that is intended for human consumption, and:

(A) The chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in or added to the schedules designated in K.S.A. 65-4105 or 65-4107, and amendments thereto;

(B) which has a stimulant, depressant or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance included in the schedules designated in K.S.A. 65-4105 or 65-4107, and amendments thereto; or

(C) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant or hallucinogenic effect on the central nervous

system of a controlled substance included in the schedules designated in K.S.A. 65-4105 or 65-4107, and amendments thereto.

(2) "Controlled substance analog" does not include:

(A) A controlled substance;

(B) a substance for which there is an approved new drug application; or

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under section 505 of the federal food, drug, and cosmetic act (21 U.S.C. 355) to the extent conduct with respect to the substance is permitted by the exemption.

(c) "Cultivate" means the planting or promotion of growth of five or more plants which contain or can produce controlled substances.

(d) "Distribute" means the actual, constructive or attempted transfer from one person to another of some item whether or not there is an agency relationship. "Distribute" includes, but is not limited to, sale, offer for sale or any act that causes some item to be transferred from one person to another. "Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by the pharmacy act of the state of Kansas, the uniform controlled substances act, or otherwise authorized by law.

(e) "Drug" means:

(1) Substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States or official national formulary or any supplement to any of them;

(2) substances intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animals;

(3) substances, other than food, intended to affect the structure or any function of the body of man or animals; and

(4) substances intended for use as a component of any article specified in paragraph (1), (2) or (3). It does not include devices or their components, parts or accessories.

(f) "Drug paraphernalia" means all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance and in violation of this act. "Drug paraphernalia" shall include, but is not limited to:

(1) Kits used or intended for use in planting, propagating, cultivating, growing or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used or intended for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(3) isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled substance;

(4) testing equipment used or intended for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

(5) scales and balances used or intended for use in weighing or measuring controlled substances;

(6) diluents and adulterants, including, but not limited to, quinine hydrochloride, mannitol, mannite, dextrose and lactose, which are used or intended for use in cutting controlled substances;

(7) separation gins and sifters used or intended for use in removing twigs and seeds from or otherwise cleaning or refining marijuana;

(8) blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled substances;

(9) capsules, balloons, envelopes, bags and other containers used or intended for use in packaging small quantities of controlled substances;

(10) containers and other objects used or intended for use in storing or concealing controlled substances;

(11) hypodermic syringes, needles and other objects used or intended for use in parenterally injecting controlled substances into the human body;

(12) objects used or primarily intended or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish, hashish oil, phencyclidine (PCP), methamphetamine or amphetamine into the human body, such as:

(A) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;

(B) water pipes, bongs or smoking pipes designed to draw smoke through water or another cooling device;

(C) carburetion pipes, glass or other heat resistant tubes or any other device used or intended to be used, designed to be used to cause vaporization of a controlled substance for inhalation;

(D) smoking and carburetion masks;

(E) roach clips, objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(F) miniature cocaine spoons and cocaine vials;

(G) chamber smoking pipes;

(H) carburetor smoking pipes;

(I) electric smoking pipes;

(J) air-driven smoking pipes;

(K) chillums;

(L) bongs;

(M) ice pipes or chillers;

(N) any smoking pipe manufactured to disguise its intended purpose;

(O) wired cigarette papers; or

(P) cocaine freebase kits.

(g) "Immediate precursor" means a substance which the board of pharmacy has found to be and by rules and regulations designates as being the principal compound commonly used or produced primarily for use and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit manufacture.

(h) "Isomer" means all enantiomers and diastereomers.

(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~~. "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.

(2) the addition of diluents and adulterants, including but not limited to, quinine hydrochloride, mannitol, mannite, extrose and lactose which are intended for use in cutting controlled substance.

(j) "Marijuana" means all parts of all varieties of the plant Cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin. "Marijuana" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

(k) “Minor” means a person under 18 years of age.

(l) "Narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis:

(1) Opium and opiate and any salt, compound, derivative or preparation of opium or opiate;

(2) any salt, compound, isomer, derivative or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1) but not including the isoquinoline alkaloids of opium;

(3) opium poppy and poppy straw;

(4) coca leaves and any salt, compound, derivative or preparation of coca leaves and any salt, compound, isomer, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(m) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. "Opiate" does not include, unless specifically designated as controlled under K.S.A. 65-4102, and amendments thereto, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). "Opiate" does include its racemic and levorotatory forms.

(n) "Opium poppy" means the plant of the species Papaver somniferum l. except its seeds.

(o) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association or any other legal entity.

(p) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(q) "Possession" means having joint or exclusive control over an item with knowledge of and intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

(r) "School property" means property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12. This definition shall not be construed as requiring that school be in session or that classes are actually being held at the time of the offense or that children must be present within the structure or on the property during the time of any alleged criminal act. If the structure or property meets the above definition, the actual use of that structure or property at the time alleged shall not be a defense to the crime charged or the sentence imposed.

(s) "Simulated controlled substance" means any product which identifies itself by a common name or slang term associated with a controlled substance and which indicates on its label or accompanying promotional material that the product simulates the effect of a controlled substance.

Comment: The recommendation is to revise the definition of “manufacture” in the drug code. The proposed language excludes the actions of packaging, repackaging and cutting controlled substances. It was determined that packaging, repackaging and cutting are not properly part of criminal drug manufacturing, but rather, they are acts more closely associated with drug distribution.

Sec. 22. K.S.A. 21-36a05 is hereby amended to read as follows: 21-36a05. **Unlawful cultivation or distribution of controlled substances.** (a) It shall be unlawful for any person to ~~cultivate,~~ 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, subsection (g) of K.S.A. 65-4107 or 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 subsection (c), (d), (e), (f) or (g) of K.S.A. 65-4111, and amendments thereto; or

(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, and amendments thereto.

(c) ~~(1) Violation of subsection (a) is a drug severity level 3 felony, except that:~~

~~(A) Violation of subsection (a) is a drug severity level 2 felony if the trier of fact makes a finding that the offender is 18 or more years of age and the substance was distributed to or possessed with intent to distribute to a minor or the violation occurs on or within 1,000 feet of any school property;~~

~~(B) violation of subsection (a)(1) is a drug severity level 2 felony if that person has one prior conviction under subsection (a)(1), under K.S.A. 65-4161 prior to its repeal, or under a substantially similar offense from another jurisdiction; and~~

~~(C) violation of subsection (a)(1) is a drug severity level 1 felony if that person has two prior convictions under subsection (a)(1), under K.S.A. 65-4161 prior to its repeal, or under a substantially similar offense from another jurisdiction.~~

~~(2) Violation of subsection (b) is a class A nonperson misdemeanor, except that, violation of subsection (b) is a drug severity level 4 felony if the substance was distributed to or possessed with the intent to distribute to a child under 18 years of age.~~

~~(d) It shall not be a defense to charges arising under this section that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance.~~ *It shall be unlawful for any person to cultivate any controlled substance or controlled substance analog listed in subsection (a).*

(d) Except as 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;

(B) a drug severity level 3 felony if the quantity of the material was at least 3.5 grams but less than 100 grams;

(C) a drug severity level 2 felony if the quantity of the material was at least 100 grams 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 at least 25 grams but less than 450 grams;

(C) a drug severity level 2 felony if the quantity of the material was at least 450 grams but less than 30 kilograms; 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 methamphetamine, or an analog thereof, shall be:

(A) a drug severity level 4 felony if the quantity of the material was less than 1 gram;

(B) a drug severity level 3 felony if the quantity of the material was at least 1 gram but less than 3.5 grams;

(C) a drug severity level 2 felony if the quantity of the material was at least 3.5 grams but less than 100 grams; 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, and amendments thereto, 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 severity level 3 felony if the number of dosage units was at least 10 but less than 100;

(C) a drug severity level 2 felony if the number of dosage units was at least 100 but less than 1000; or,

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

(5) For any violation of subsection (a), the severity level of the offense shall be increased one level if the controlled substance or controlled substance analog was distributed or possessed with the intent to distribute on or within 1,000 feet of any 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 minor 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 more than 4 but fewer than 50;

(B) a drug severity level 2 felony if the number of plants cultivated was at least 50 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 of more of heroin or methamphetamine;

(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 0.4 milligrams, including the liquid medium.

Comment: The Commission/Committee 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/Committee 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 units. Subsection (c)(1) creates a generic quantity threshold into which drugs such as cocaine and methamphetamine fall. There is a specific quantity threshold for heroin and methamphetamine, 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.

Subsection (e) contains a presumption of intent to distribute if 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.

Sec. 23. K.S.A. 21-36a09 is hereby amended to read as follows: 21-36a09. **Unlawful possession of certain drug precursors and drug paraphernalia.** (a) ~~It shall be unlawful for any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with an intent to use the product to manufacture a controlled substance.~~

~~(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to:~~

~~(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or~~

~~(2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.~~

~~(c) It shall be unlawful for any person to use or possess with intent to use anhydrous ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas department of agriculture.~~

~~(d) It shall be unlawful for any person to purchase, receive or otherwise acquire at retail any compound, mixture or preparation containing more than 3.6 grams of pseudoephedrine base or ephedrine base in any single transaction or any compound, mixture or preparation containing more than nine grams of pseudoephedrine base or ephedrine base within any 30-day period.~~

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

~~(2) violation of subsection (b)(1) is a drug severity level 4 felony, except that violation of subsection (b)(1) is a class A nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants;~~

~~(3) violation of subsection (b)(2) is a class A nonperson misdemeanor;~~

~~(4) violation of subsection (c) is a drug severity level 4 felony;~~

~~(5) violation of subsection (d) is a class A nonperson misdemeanor.~~

~~(f) For persons arrested and charged under subsection (a) or (c), bail shall be at least $50,000 cash or surety, unless the court determines, on the record, that the defendant is not likely to reoffend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program~~. *Possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to*

manufacture a controlled substance or controlled substance analog shall be an attempted violation of subsection (a) of K.S.A. 21-36a03, and amendments thereto.

(b) Possession of drug paraphernalia with the intent to manufacture a controlled substance or controlled substance analog shall be an attempted violation of subsection (a) of K.S.A. 21-36a03, and amendments thereto.

(c) Possession of any drug paraphernalia

(1) with the intent to distribute or cultivate a controlled substance designated in subsection (a) of K.S.A. 21-36a05, and amendments thereto, or a controlled substance analog thereof, shall be an attempted violation of subsection (a) of K.S.A. 21-36a05, and amendments thereto.

(2) with the intent to distribute a controlled substance or controlled substance analog designated in K.S.A. 65-4113, and amendments thereto, shall be an attempted violation of subsection (b) of K.S.A. 21-36a05, and amendments thereto.

(d) Possession of any drug paraphernalia with the intent to possess or have under one's control,

(1) any controlled substance designated in subsection (a) of K.S.A. 21-36a06, and amendments thereto, or a controlled substance analog thereof, shall be an attempted violation of subsection (a) of K.S.A. 21-36a06, and amendments thereto.

(2) any controlled substance designated in subsection (b) of K.S.A. 21-36a06, and amendments thereto, or a controlled substance analog thereof, shall be an attempted violation of subsection (b) of K.S.A. 21-36a06, and amendments thereto.

(e) 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 K.S.A. 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 determined that a method of clarifying the relationship between these offenses is to 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.

Sec. 24. K.S.A. 21-36a10 is hereby amended to read as follows: 21-36a10. **Unlawful distribution of certain drug precursors and drug paraphernalia.** (a) It shall be unlawful for any person to advertise, market, label, distribute or possess with the intent to distribute:

(1) Any product containing ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine or their salts, isomers or salts of isomers if the person knows or reasonably should know that the purchaser will use the product to manufacture a controlled substance; or

(2) any product containing ephedrine, pseudoephedrine or phenylpropanolamine, or their salts, isomers or salts of isomers for indication of stimulation, mental alertness, weight loss, appetite control, energy or other indications not approved pursuant to the pertinent federal over-the-counter drug final monograph or tentative final monograph or approved new drug application.

(b) It shall be unlawful for any person to distribute, possess with the intent to distribute or manufacture with intent to distribute any drug paraphernalia, knowing or under circumstances where one reasonably should know that it will be used to manufacture or distribute a controlled substance in violation of K.S.A. 2009 Supp. 21-36a01 through 21-36a17, and amendments thereto.

(c) It shall be unlawful for any person to distribute, possess with intent to distribute or manufacture with intent to distribute any drug paraphernalia, knowing or under circumstances where one reasonably should know, that it will be used as such in violation of K.S.A. 2009 Supp. 21-36a01 through 21-36a17, and amendments thereto, except subsection (b) of K.S.A. 2009 Supp. 21-36a06, and amendments thereto.

(d) It shall be unlawful for any person to distribute, possess with intent to distribute or manufacture with intent to distribute any drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used as such in violation of subsection (b) of K.S.A. 2009 Supp. 21-36a06, and amendments thereto.

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

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

(3) violation of subsection (c) is a severity level 9, nonperson felony, except that violation of subsection (c) is a drug severity level 4 felony if the trier of fact makes a finding that the ~~offender is 18 or more years of age and the~~ offender distributed or caused drug paraphernalia to be distributed to a minor or on or within 1,000 feet of any school property;

(4) violation of subsection (d) is a class A nonperson misdemeanor, except that violation of subsection (d) is a severity level 9, nonperson felony if the trier of fact makes a finding that the ~~offender is 18 or more years of age and the~~ offender distributed or caused drug paraphernalia to be distributed to a minor or on or within 1,000 feet of any school property.

(f) For persons arrested and charged under subsection (a), bail shall be at least $50,000 cash or surety, unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.

(g) As used in this section, "or under circumstances where one reasonably should know" that an item will be used in violation of this section, shall include, but not be limited to, the following:

(1) Actual knowledge from prior experience or statements by customers;

(2) inappropriate or impractical design for alleged legitimate use;

(3) receipt of packaging material, advertising information or other manufacturer supplied information regarding the item's use as drug paraphernalia; or

(4) receipt of a written warning from a law enforcement or prosecutorial agency having jurisdiction that the item has been previously determined to have been designed specifically for use as drug paraphernalia.

Sec. 25. K.S.A. 21-36a13 is hereby amended to read as follows: 21-36a13. **Unlawful distribution or possession of a simulated controlled substance.** (a) It shall be unlawful for any person to distribute, possess with the intent to distribute, or manufacture with the intent to distribute any simulated controlled substance.

(b) It shall be unlawful for any person to use or possess with intent to use any simulated controlled substance.

(c) (1) Violation of subsection (a) is a nondrug severity level 9, nonperson felony, except that violation of subsection (a) is a nondrug severity level 7, nonperson felony if the trier of fact makes a finding that ~~the offender is 18 or more years of age and~~ the violation occurred on or within 1,000 feet of any school property; and

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

Comment to Sec 24 and Sec 25: After passage of the drug code recodification, the provisions of the 1,000 feet of school 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.

Legislation was submitted in 2010 to correct the error; however, the Commission has since discovered that several prosecutors are in favor of removing this offender age element and in retrospect; the Commission has determined that 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. Therefore, the

Commission now recommends removing each of the 18 year offender age requirements from the 1,000 feet of school property enhancements.

Sec. 26. K.S.A. 21-36a14 is hereby amended to read as follows: 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 the 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.

Sec. 27. K.S.A. 21-4010 is hereby amended to read as follows: 21-4010. (a) ~~No person shall~~ *It shall be unlawful, with no requirement of a culpable mental state, to* smoke in an enclosed area or at a public meeting including, but not limited to:

(1) Public places;

(2) taxicabs and limousines;

(3) restrooms, lobbies, hallways and other common areas in public and private buildings, condominiums and other multiple-residential facilities;

(4) restrooms, lobbies and other common areas in hotels and motels and in at least 80% of the sleeping quarters within a hotel or motel that may be rented to guests;

(5) access points of all buildings and facilities not exempted pursuant to subsection (d); and

(6) any place of employment.

(b) Each employer having a place of employment that is an enclosed area shall provide a smoke-free workplace for all employees. Such employer shall also adopt and maintain a written smoking policy which shall prohibit smoking without exception in all areas of the place of employment. Such policy shall be communicated to all current employees within one week of its adoption and shall be communicated to all new employees upon hiring. Each employer shall provide a written copy of the smoking policy upon request to any current or prospective employee.

(c) Notwithstanding any other provision of this section, K.S.A. 21-4011 or 21-4012, and amendments thereto, the proprietor or other person in charge of an adult care home, as defined in K.S.A. 39-923, and amendments thereto, or a medical care facility, may designate a portion of such adult care home, or the licensed long-term care unit of such medical care facility, as a smoking area, and smoking may be permitted within such designated smoking area.

(d) The provisions of this section shall not apply to:

(1) The outdoor areas of any building or facility beyond the access points of such building or facility;

(2) private homes or residences, except when such home or residence is used as a day care home, as defined in K.S.A. 65-530, and amendments thereto;

(3) a hotel or motel room rented to one or more guests if the total percentage of such hotel or motel rooms in such hotel or motel does not exceed 20%;

(4) the gaming floor of a lottery gaming facility or racetrack gaming facility, as those terms are defined in K.S.A. 74-8702, and amendments thereto;

(5) that portion of an adult care home, as defined in K.S.A. 39-923, and amendments thereto, that is expressly designated as a smoking area by the proprietor or other person in charge of such adult care home pursuant to subsection (c) and that is fully enclosed and ventilated;

(6) that portion of a licensed long-term care unit of a medical care facility that is expressly designated as a smoking area by the proprietor or other person in charge of such medical care facility pursuant to subsection (c) and that is fully enclosed and ventilated and to which access is restricted to the residents and their guests;

(7) tobacco shops;

(8) a class A or class B club defined in K.S.A. 41-2601, and amendments thereto, which (A) held a license pursuant to K.S.A. 41-2606 et seq., and amendments thereto, as of January 1, 2009; and (B) notifies the secretary of health and environment in writing, not later than 90 days after the effective date of this act, that it wishes to continue to allow smoking on its premises; and

(9) a private club in designated areas where minors are prohibited.

Comment: Respecting the infractions established in this statute, the recommendation is to insert language indicating whether and what degree of culpability is required. Neither K.S.A. 21-4010, which defines infractions, nor K.S.A. 21-4012, which specifies penalties, addresses this matter. Under the recodification (section 13(d) & (e) of House Bill No. 2668), recklessness would be required because the definition of the crime does not "plainly dispense with any mental element." Our judgment is that the Legislature intended for the infractions established in K.S.A. 21-4010 to be strict liability. Whereas K.S.A. 21-4010 does not say anything about culpability, K.S.A. 21-4012(b), which makes those who own or run public places liable for smoking infractions committed by those on the premises, does explicitly require culpability. This leads us to conclude that, in contrast with K.S.A. 21-4012(b), the infractions defined in K.S.A. 21-4010 are not meant to require culpability. When the Legislature has intended to establish a strict liability offense, the recodification expressly provides that there is "no requirement of a culpable mental state". See, e.g., House Bill No. 2668 §§ 184, 194. We recommend insertion of the same language.

It is unclear whether this language should be inserted in K.S.A. 21-4010 or K.S.A. 21-4012. The recodification defines offenses and prescribes the penalty in the same statute. The provisions here depart from that arrangement and put the penalties in a different statute, K.S.A. 21-4012. Ideally, the provisions would be revised to conform with the general scheme of the recodification.

Sec. 28. K.S.A. 21-4012 is hereby amended to read as follows: 21-4012. (a) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any public place, or other area where smoking is prohibited, to fail to comply with all or any of the provisions of K.S.A. 21-4009 through 21-4014, and amendments thereto.

(b) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any public place, or other area where smoking is prohibited, to allow smoking to occur where prohibited by law. Any such person shall be deemed to allow smoking to occur under this subsection if such person: (1) Has knowledge that smoking is occurring; and (2) ~~acquiesces~~ *recklessly permits* to the smoking under the totality of the circumstances.

(c) It shall be unlawful for any person*, with no requirement of a culpable mental state,* to smoke in any area where smoking is prohibited by the provisions of K.S.A. 21-4010, and amendments thereto.

(d) Any person who violates any provision of K.S.A. 21-4009 through 21-4014, and amendments thereto, shall be guilty of a cigarette or tobacco infraction punishable by a fine:

(1) Not exceeding $100 for the first violation;

(2) not exceeding $200 for a second violation within a one year period after the first violation; or

(3) not exceeding $500 for a third or subsequent violation within a one year period after the first violation.

For purposes of this subsection, the number of violations within a year shall be measured by the date the smoking violations occur.

(e) Each individual allowed to smoke by a person who owns, manages, operates or otherwise controls the use of any public place, or other area where smoking is prohibited, in violation of subsection (b) shall be considered a separate violation for purposes of determining the number of violations under subsection (d).

(f) No employer shall discharge, refuse to hire or *take any other adverse action* ~~in any manner retaliate~~ against an employee, applicant for employment or customer *with the intent to retaliate against* ~~because~~ that employee, applicant or customer *for* report~~s~~*ing* or attempt~~s~~*ing* to prosecute a violation of any of the provisions of K.S.A. 21-4009 through 21-4014, and amendments thereto.

Comment: We recommend changing some language in K.S.A. 21-4012(b) to make it consistent with the recodification’s culpability provisions. K.S.A. 21-4012(b) makes one who, e.g., owns or controls a public place liable for allowing smoking to occur if that person knows of and acquiesces in the smoking. The recodification does use and define "knowledge" as a culpability term. See House Bill No. 2668 § 13. However, the recodification neither uses nor defines the term “acquiesce”. We recommend that the term “acquiesce” be replaced with the phrase “recklessly permits”. The recodification does define recklessness. In our judgment, recklessness captures the Legislature’s intent regarding the culpability required by K.S.A. 21-4012(b).

We also recommend changing language in K.S.A. 21-4012(f) to make it consistent with the recodification’s culpability provisions. This provision makes it an infraction for an employer to take adverse action against an employee, applicant, or customer “because” the employee, applicant, or customer has reported or attempted to prosecute a smoking violation. The infraction will be committed only when the employer’s subjective purpose is to retaliate. As defined in the recodification, “intent” is the applicable culpability term. We recommend wording K.S.A. 21-4012(f) accordingly.