

**House Corrections and Juvenile Justice Committee
January 25, 2023**

**House Bill 2031
Testimony of the BIDS Legislative Committee
Presented by Jennifer Roth
Opponent**

Dear Chairman Owens and Members of the Committee:

Reducing armed violence is an important goal of our criminal justice system, which is why this Legislature has already equipped prosecutors and district courts with many tools to combat armed violence. We oppose HB 2031 because it (1) would replace judicial discretion with mandatory minimum sentences and (2) lumps drug crimes into the definition of a “violent felony,” triggering those mandatory minimum sentences. We also opposed this proposal when it was 2022 HB 2657 (heard in this Committee on February 15, 2022), which died on the House calendar.

What the law is now and what HB 2031 would do

Criminal possession of a weapon by a convicted felon, found at K.S.A. 21-6304, is a severity level 8, nonperson felony. A copy of the statute is attached. HB 2031 would create a special sentencing rule for this offense, which would be the 49th special rule to our Kansas Sentencing Guidelines. The special sentencing rule would be triggered when:

- a person is convicted of any subsection of K.S.A. 21-6304
- the weapon was a firearm
- the person possessed the firearm during the commission of a “violent felony”—including possession of drugs and any felony that includes a domestic violence designation (note: drug possession is a nonperson felony and crimes with a DV designation can also be nonperson offenses)

The proposed special rule would do two things: (1) for people who would have been presumed to get probation, the presumption would shift to them going to prison and (2) for people convicted of criminal possession of a weapon as well as a felony from the list in HB 2031, their sentences would be required to run consecutively.

Problems that HB 2031 would create

The first problem is that it would replace existing judicial discretion in sentencing with mandatory minimum sentences. Right now, when a person is sentenced for two (or more) felony convictions, the sentencing judge has discretion to decide whether to run those sentences concurrently or consecutively. See K.S.A.

21-6819. That means prosecutors are already able to request that a person receive consecutive sentences, and district courts can impose them when appropriate. HB 2031 would require consecutive sentences, thereby removing any discretion.

Having judicial discretion in sentencing is critically important because there is a massive range of culpability among people convicted of being a felon in possession of a firearm. Some people have significant criminal history, and were clearly on notice that they could not possess a firearm in Kansas. However, there are also people convicted of this crime who were not even aware that they were prohibited from having a firearm at the time.

For example, Kansas law has historically treated a Missouri suspended imposition of sentencing as a conviction, thus making it a crime to have a firearm pursuant to K.S.A. 21-6304. But Missouri doesn't consider that a conviction, so you can have a firearm there. This means people who are lawfully possessing their firearms in Missouri can unknowingly commit this crime just by crossing over State Line Road. Likewise, other technical distinctions create grounds for people to be convicted under K.S.A. 21-6304 without realizing they were prohibited from having a gun in Kansas, including whether prior convictions are classified as person or nonperson offenses, what counts as an expunged conviction, or when the statutory period prohibiting firearms possession technically begins or ends. (This is not surprising considering the intricacies of the statute, attached.) This is why it is critically important that judges have discretion to assess the person's culpability and impose the appropriate sentence, rather than be confined to mandatory consecutive sentencing.

For similar reasons, HB 2031 making all qualifying sentences presumptive imprisonment is also problematic. Most of the "violent felonies" listed in HB 2031 already require presumptive imprisonment, so any additional sentence for being a felon in possession of a firearm would also be imprisonment. See K.S.A. 21-6819(b)(6). Likewise, anyone in the A or B categories on our sentencing grid will already be in the presumptive imprisonment range. K.S.A. 21-6804; K.S.A. 21-6805. Furthermore, K.S.A. 21-6804(h) already makes any person felony committed with a firearm presumptive imprisonment (special rule #1). That means that the switch from presumptive probation to presumptive imprisonment in HB 2031 only really matters in the cases involving the lowest severity of qualifying offenses, committed by people who do not have significant criminal history. Those are the situations

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where Kansas law does deem an opportunity at probation appropriate, and it should remain that way. Moreover, when a sentence of probation would be inappropriate, the State is already equipped to request a departure sentence to a term of imprisonment. See K.S.A. 21-6815. In short, the changes HB 2031 makes to this process are unnecessary and will have the most impact on the least severe cases.

For all of these reasons, if HB 2031 does go forward, we would suggest that the Committee remove the language on pg. 10, lines 20-21 (i.e. “no other sentence shall be permitted”) so that it is possible for people to seek a dispositional departure to probation.

Finally, HB 2031 is problematic because subsection (z)(3)(U) includes drug crimes, including simple possession. Kansas law treats drug crimes as nonperson offenses, and provides numerous special sentencing rules for addressing drug crimes, including sentence enhancements for carrying a firearm while distributing drugs. See K.S.A. 21-6805(g). Another mandatory minimum sentence scheme is unnecessary. Particularly, in the most significant cases impacted by HB 2031, we will see people convicted of felony possession of marijuana and criminal possession of a firearm—when they were unaware that they were prohibited from having a firearm—who will be required to serve a mandatory prison term of at least 17 months imprisonment (at an average cost of \$37,302 per year). That is a situation where discretion in sentencing, rather than mandatory sentencing rules, is highly important. As such, even if this bill does go forward, this Committee should consider removing drug crimes, especially drug possession pursuant to K.S.A. 21-5706, or at least felony possession of marijuana, from the list of “violent felonies” contained in HB 2031.

Thank you for your time.

Jennifer Roth
Deputy Appellate Defender
for the BIDS Legislative Committee
jroth@sbids.org
785.296.5484

21-6304. Criminal possession of a firearm by a convicted felon. (a) Criminal possession of a weapon by a convicted felon is possession of any weapon by a person who:

(1) Has been convicted of a person felony or a violation of article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, K.S.A. 2010 Supp. 21-36a01 through 21-36a17, prior to their transfer, or any violation of any provision of the uniform controlled substances act prior to July 1, 2009, or a crime under a law of another jurisdiction that is substantially the same as such felony or violation, or was adjudicated a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a person felony or a violation of article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, K.S.A. 2010 Supp. 21-36a01 through 21-36a17, prior to their transfer, or any violation of any provision of the uniform controlled substances act prior to July 1, 2009, and was found by the convicting court to have used a firearm in the commission of the crime;

(2) (A) (i) Has been convicted of a person felony, other than those specified in subsection (a)(3)(A)(i), under the laws of Kansas or a crime under the law of another jurisdiction which is substantially the same as such person felony; or

(ii) was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a person felony;

(B) was not found by the convicting court to have used a firearm in the commission of such crime; and

(C) less than three years have elapsed since such person satisfied the sentence imposed or the terms of any diversion agreement for such crime, or was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence;

(3) (A) (i) has been convicted of a felony under:

(a) K.S.A. 2022 Supp. 21-5402, 21-5403, 21-5404, 21-5405, 21-5408, 21-5412 (b) or (d), 21-5413 (b) or (d), 21-5415 (a), 21-5420 (b), 21-5503, 21-5504 (b), 21-5505 (b), and 21-5807 (b), and amendments thereto;

(b) article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto;

(c) K.S.A. 2010 Supp. 21-36a01 through 21-36a17, prior to their transfer;

(d) K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3442, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a, 65-4127b, 65-4159 through 65-4165 or 65-7006, prior to their repeal;

(e) an attempt, conspiracy or criminal solicitation as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2022 Supp. 21-5301, 21-5302 or 21-5303, and amendments thereto, of any such felony; or

(f) a crime under a law of another jurisdiction that is substantially the same as such felony; or

(ii) has been released from imprisonment for such felony, or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of such felony; and

(B) less than eight years have elapsed since such person satisfied the sentence imposed or the terms of any diversion agreement for such crime, or was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence; or

(4) (A) (i) has been convicted of any other nonperson felony, other than those specified in subsections (a)(1) through (a)(3), under the laws of Kansas or a crime under the law of another jurisdiction which is substantially the same as such nonperson felony; or

(ii) was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a nonperson felony; and

(B) less than three months have elapsed since such person satisfied the sentence imposed or the terms of any diversion agreement for such crime, or was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence.

(b) Criminal possession of a weapon by a convicted felon is a severity level 8, nonperson felony.

(c) The provisions of subsections (a)(1), (a)(2) and (a)(4) shall not apply to a person who has been convicted of a crime and has had the conviction of such crime expunged or has been pardoned for such crime.

(d) As used in this section:

(1) "Knife" means a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character; and

(2) "weapon" means a firearm or a knife.

History: L. 2010, ch. 136, § 189; L. 2011, ch. 91, § 34; L. 2013, ch. 36, § 2; L. 2014, ch. 97, § 12; L. 2021, ch. 94, § 4; July 1.