

SESSION OF 2008

**SUPPLEMENTAL NOTE ON
SUBSTITUTE FOR SENATE BILL NO. 409**

As Amended by Senate Committee of the Whole

Brief*

Substitute for SB 409 would amend current law regarding third or subsequent felony convictions and sentence, substance abuse treatment for certain offenders, substance abuse treatment for violation of conditions of release, and driving under the influence (DUI). The bill also would create new law regarding the transfer of an inmate from county jail to a state correctional facility. The bill would enact the following measures:

DUI

- Maintain current law on a third conviction of DUI, except that the term of imprisonment would be served in the county jail and would be allowed the court to retain jurisdiction to modify the sentence to a less severe penalty upon completion of the mandatory minimum term of imprisonment;
- Maintain current law on a fourth conviction of DUI, except that the term of imprisonment would be served in the county jail and would be allowed the court to retain jurisdiction to modify the sentence to a less severe penalty upon completion of the mandatory minimum term of imprisonment;
- Provide for penalties on a fifth or subsequent conviction of DUI to be similar to the penalties for a fourth DUI conviction, except a court would be authorized to order

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

imprisonment for a fifth or subsequent conviction of DUI to be served in a state substance abuse facility established by the Kansas Department of Corrections (KDOC), if the term of imprisonment is 12 months or longer; or, if space is unavailable, in a facility designated by the Secretary for the provision of substance abuse treatment;

- Clarify that confinement in prison would only be while participating in the substance abuse treatment program, unless the offender refuses or fails to complete the substance abuse treatment program. If the offender refuses or fails the program, the offender would remain in prison until the expiration of the term of imprisonment;
- Authorize a court to retain jurisdiction to modify the sentence of an offender convicted of a fifth or subsequent DUI by directing that a less severe penalty be imposed upon successful completion of the substance abuse treatment program;
- Clarify that good time credit will not apply to the term of imprisonment ordered for a fifth or subsequent conviction of DUI;
- Clarify that the sheriff would be responsible for all transportation costs to and from the state correctional facility for an offender convicted of a fifth or subsequent DUI;
- Delete the requirement of the court to send a certified copy of the judgment form or journal entry to the law officer in charge of the defendant;
- Delete the requirement of the law enforcement agency maintaining custody and control of a defendant to send a certified copy of the judgment form or journal entry to the Secretary of Corrections within three business days and notify the Secretary when the term of imprisonment expires;

- Delete the requirement of the law enforcement agency maintaining custody and control of a defendant to deliver the defendant to a location designated by the Secretary upon the expiration of the term of imprisonment;
- Require that once the offender convicted of a fifth or subsequent DUI has completed the prison portion of the sentence, the offender would be supervised by community correctional services for a mandatory one-year period of supervision;
- Require inpatient or outpatient programming for alcohol and drug abuse, including aftercare or mental health counseling, during the mandatory one-year period of supervision as determined by the court;
- Provide that any violation of the conditions of the mandatory one-year period of supervision may subject the offender to revocation of the supervision;
- Grant retroactive jurisdiction for ordinance violations committed after July 1, 2006, to a municipal court for DUI violations over which the district court also has jurisdiction, as long as the elements of the ordinance violation are the same as the statute on DUI and the violation would constitute a felony (conflict reconciliation provision);
- Provide that the term of imprisonment for a fifth or subsequent violation of DUI may be served in a state substance abuse treatment facility designated by the Secretary, if resources and space are available, or in a facility designated by the Secretary for the provision of substance abuse treatment.

Theft and Burglary

- Delete from current law the special rule regarding burglaries and aggravated burglaries;

- Create a special rule in sentencing that would make a sentence for a third or subsequent conviction for felony theft a presumptive prison sentence;
- Create a special rule in sentencing that would make a sentence for a third or subsequent conviction for burglary a presumptive prison sentence. Additionally, the sentence for a defendant convicted of burglary, with a prior criminal history of a burglary and an aggravated burglary, also would be presumptive prison;
- Authorize the court to place the offender who is sentenced to prison pursuant to the special rule on a third or subsequent felony theft or burglary conviction in a state substance abuse treatment facility established by the KDOC, for at least four months, to participate in an intensive substance abuse treatment program, if the offender's underlying sentence is more than four months long and the court has made the findings that substance addiction is the underlying factor in the commission of the crime, the state substance abuse facility is likely to be more effective than prison in reducing the risk of offender recidivism, and such a sentence would serve the community and promote offender reformation;
- Authorize a court to retain jurisdiction to modify an offender's sentence to a less severe penalty after the successful completion of the intensive treatment program. If the offender's term of imprisonment expires, the offender would be placed on the applicable post-release supervision;
- Clarify the special rule would not be considered a departure and would not be subject to appeal.

Drug Possession

- Provide a presumptive prison sentence for a third felony conviction of possession of an opiate or narcotic drug, or possession of a depressant, a stimulant, or a

hallucinogenic drug, to be served in a state substance abuse treatment facility established by the KDOC, with the offender to participate in an intensive substance abuse treatment program for four months. Upon successful completion of the substance abuse treatment program, the offender would be returned to court for modification of the sentence to a less severe penalty. If the offender's term of imprisonment expires, the offender would be placed on the applicable post-release supervision;

- Provide that a court's sentence to a KDOC treatment facility for a third felony drug possession conviction would not be considered a departure sentence and would not be subject to appeal;
- Provide a presumptive prison sentence for a fourth or subsequent felony conviction of possession of an opiate or narcotic drug; or possession of a depressant, a stimulant, or a hallucinogenic drug to be served in prison if the defendant has previously participated in an intensive substance abuse treatment program;
- Require the presentence report for an offender being sentenced for a third felony conviction of possession of an opiate or narcotic drug; or possession of a depressant, a stimulant, or a hallucinogenic drug, committed on or after July 1, 1993, be limited to the drug abuse assessment for the offender being sentenced.

Violation for Conditions of Release

- Authorize a court, on a second or subsequent revocation, for an offender who violates conditions of release, assignment to a Community Correctional Services Program, or a nonprison sanction, to place the offender in a state substance abuse treatment facility established by the KDOC for at least four months for intensified substance abuse treatment if the court has made the findings that substance addiction is the underlying factor for revocation, the state substance abuse facility is likely

to be more effective than prison in reducing the risk of offender recidivism, and participation in an intensive substance abuse treatment program would serve the community and promote offender reformation.

Other

- Authorize a court to retain jurisdiction to modify an offender's sentence to a less severe penalty after the successful completion of the intensive treatment program. If the offender's term of imprisonment expires, the offender would be placed on the applicable post-release supervision;
- Authorize the Secretary to order the housing and confinement of any person sentenced to the Secretary's custody to a state substance abuse treatment facility for treatment if the Secretary determines that such person would benefit from such assignment;
- Clarify that offenders sentenced to a state substance abuse treatment facility established by the KDOC or to a facility designated by the Secretary for the provision of substance abuse treatment, or for whom the court has recommended intensive substance abuse treatment, would receive the presumption of minimum security status and would go directly to the state substance abuse treatment facility, unless otherwise directed by the Secretary; and
- Prohibit the transfer of offenders who have ten or fewer days remaining on their prison sentences from county correctional facilities to state correctional facilities; or, if the offender has ten or more days remaining on his or her prison sentence, authorize a sheriff to agree to keep custody of such offender.

Background

The Senate Committee of the Whole amended the bill to authorize a court to retain jurisdiction to modify the sentence on a third or fourth conviction of DUI. The court would be authorized to modify the sentence to a less severe penalty upon completion of the mandatory minimum term of imprisonment.

A subcommittee was created at the initiative of the Chairman of the Senate Committee on Judiciary to study the issues in SB 409, SB 482, SB 483, and SB 484. The Subcommittee recommended the adoption of a substitute bill which would combine SB 409, SB 482, SB 483, and SB 484, with amendments. Additionally, SB 495, as amended, was incorporated into Substitute for SB 409 by the Senate Committee on Judiciary.

Each bill, as introduced, will be reviewed separately for the reader's convenience:

SB 409—Third or subsequent felony conviction and sentence, as introduced, would:

- Clarify that the term of imprisonment for felony DUI *may* be served in a prison designated by the Secretary of Corrections if the Secretary determines there are substance abuse treatment resources and facility capacity is available. That decision would not be subject to review;
- Delete from current law the special rule regarding burglaries and aggravated burglaries;
- Provide that an offender convicted of a nonperson felony who has two or more prior convictions for any nonperson felonies would be sentenced to time in prison. The bill would preserve the court's discretion to order a downward durational departure and the sentence would not be subject to appeal; and

- Provide that an offender convicted of a drug felony who has two or more prior convictions for any felonies would be sentenced to time in prison. The bill would preserve the court's discretion to order a downward durational departure and the sentence would not be subject to appeal.

The proponents of the bill, as introduced, were Senator Derek Schmidt; Ed Klumpp, Kansas Association of Chiefs of Police and Kansas Peace Officers' Association; Tom Stanton, Kansas County and District Attorneys Association; and Kenny McGovern, Douglas County Sheriff. The opponents of the bill, as introduced, were Jennifer Roth, Legislative Committee Chair of the Kansas Association of Criminal Defense Lawyers; and Peter Ninemire, Families Against Mandatory Minimums.

If the bill contributes to an increase in the inmate population sufficient to require additional facility capacity, one-time construction and equipment costs would be needed. In addition, annual costs to staff and operate the additional capacity would be required. If the bill does not contribute to the need for capacity expansion, additional annual costs of approximately \$2,000 per inmate for basic support, including food service, would be needed. Additional expenditures for health care also could be incurred, if the increase in the inmate population required adjustments in the medical contract. The health care contract provides that whenever the inmate count at a facility changes by more than a specified percentage, an adjustment in contract payments is made. The amount of any adjustment would depend on the specific facility involved. The Department of Corrections states that the current capacity for male inmates is 8,553. The Department also states that the projections provided by the Sentencing Commission estimate that this capacity will be exceeded by the end of FY 2017, when it is projected that the male inmate population will total 8,592 inmates.

The Kansas Sentencing Commission also states that SB 409, as introduced, would reduce the number of offenders being treated in the Alternative Drug Treatment Programs in

Lieu of Incarceration under 2003 SB 123. The passage of SB 409, as introduced, would reduce the number of SB 123 offenders by an estimated 232 in FY 2009, increasing to a reduction of 248 offenders by 2018. Therefore, this bill would result in a reduction in expenditures of approximately \$876,264 in FY 2009, increasing to a savings of \$936,696 by FY 2018.

The Board of Indigents' Defense Services states that the agency would experience an immediate fiscal effect with the passage of this bill, as introduced, due to the requirement of a mandatory prison sentence on a third felony conviction. The Board states that mandatory prison sentencing causes cases to go to trial because there is no reason for the accused to enter a plea agreement. The Board estimates that the passage of SB 409 would require increased expenditures from the State General Fund of \$2,563,213. In this estimate, the Board assumes the need for 15 new trial public defenders at an annual cost of \$60,000 each. The Board also assumes this bill would increase assigned counsel and appellate attorney costs by 15.0 percent and expert services by 2.0 percent. These figures are as follows:

Public Defenders	\$	900,000
Assigned Counsel		1,500,000
Expert Services		13,213
Appellate Attorneys		150,000
TOTAL	\$	<u>2,563,213</u>

Any fiscal effect resulting from the passage of SB 409, as introduced, has not been included in *The FY 2009 Governor's Budget Report*.

SB 482—Substance abuse treatment for certain offenders, as introduced, would:

- Provide a presumptive prison sentence for a third felony conviction of possession of an opiate or narcotic drug or possession of a depressant, a stimulant, or a

hallucinogenic drug be served in a state substance abuse treatment facility established by the Kansas Department of Corrections (KDOC);

- Require the offender to be placed in an intensified substance abuse treatment program for at least 120 days, in prison, if the offender has previously completed a certified drug abuse treatment program or has been discharged or refused to participate in a certified drug abuse treatment program;
- Provide that the sentence for a fourth or subsequent, rather than a third or subsequent, felony conviction of possession of an opiate or narcotic drug or possession of a depressant, a stimulant, or a hallucinogenic drug would be presumptive imprisonment;
- Require the presentence report for an offender being sentenced for one or more felonies committed on or after July 1, 1993, be limited to the drug abuse assessment for offenders being sentenced for a *first* felony conviction of possession of an opiate or narcotic drug or possession of a depressant, a stimulant, or a hallucinogenic drug;
- Require limiting the presentence report to the drug abuse assessment for an offender being sentenced for one or more felonies committed on or after July 1, 1993, if the sentence is a *first* or a *third* felony conviction of possession of an opiate or narcotic drug; or possession of a depressant, a stimulant, or a hallucinogenic drug;
- Provide that inmates sentenced to a state substance abuse treatment facility established by KDOC would have a presumption of minimum security status upon readmission into a correctional facility or into a state substance abuse treatment facility; and
- Provide that inmates sentenced to a state substance abuse treatment facility established by KDOC would be transferred directly to the state substance abuse treatment

facility, and would not be required to be transferred to the state reception and diagnostic center.

The proponents of the bill, as introduced, were Senator Derek Schmidt; Judy Moler, General Counsel for the Kansas Association of Counties; Craig Murphy, Butler County Sheriff; Ed Klumpp, Kansas Association of Chiefs of Police and Kansas Peace Officers' Association; and Tom Stanton, Kansas County and District Attorneys Association. Conferees who provided neutral testimony on the bill as introduced were Peter Ninemire, Families Against Mandatory Minimums; Helen Pedigo, Executive Director of the Kansas Sentencing Commission; and Roger Werholtz, Secretary of the Kansas Department of Corrections. There was no testimony in opposition of the bill.

The Kansas Sentencing Commission estimates that passage of SB 482, as introduced, would require an additional 15 adult prison beds in FY 2009, increasing to an additional 16 adult prison beds by FY 2018. If the bill contributes to an increase in the inmate population sufficient to require additional facility capacity, one-time construction and equipment costs would be needed. In addition, annual costs to staff and operate the additional capacity would be required.

If SB 482, as introduced, does not contribute to the need for capacity expansion, additional annual costs of approximately \$2,400 per inmate for basic support, including food service, would be needed. Additional expenditures for health care also could be incurred, if the increase in the inmate population required adjustments in the medical contract. The health care contract provides that whenever the inmate count at a facility changes by more than a specified percentage, an adjustment in contract payments is made. The amount of any adjustment would depend on the specific facility involved. Any fiscal effect resulting from this bill has not been included in *The FY 2009 Governor's Budget Report*.

SB 483—Substance abuse treatment for violations of conditions of release, as introduced, would:

- Authorize a court to require an offender who violates conditions of release or assignment or nonprison sanction because of drug or alcohol use while on parole or probation be placed in a state substance abuse treatment facility established by the KDOC for intensified substance abuse treatment for at least 120 days;
- Require that upon completion of the intensified substance abuse treatment program or expiration of the term of probation, the offender would be returned to the court;
- Provide that inmates sentenced to a state substance abuse treatment facility established by KDOC would have a presumption of minimum security status upon readmission into a correctional facility or into a state substance abuse treatment facility; and
- Provide that inmates sentenced to a state substance abuse treatment facility established by KDOC would be transferred directly to the state substance abuse treatment facility and would not be required to be transferred to the state reception and diagnostic center.

The proponents of the bill, as introduced, were Ed Klumpp, Kansas Association of Chiefs of Police and Kansas Peace Officers' Association; Captain Bob Keller, Johnson County Sheriff's Office; Tom Stanton, Kansas County and District Attorneys Association; and Judy Moler, General Counsel for the Kansas Association of Counties. Conferees who provided neutral testimony on the bill as introduced were Jennifer Roth, Legislative Committee Chair of the Kansas Association of Criminal Defense Lawyers; Roger Werholtz, Secretary of the Kansas Department of Corrections; and Peter Ninemire, Families Against Mandatory Minimums. There was no testimony in opposition to the bill.

The Kansas Sentencing Commission estimates that passage of SB 483, as introduced, would require an additional 309 to 462 adult prison beds in FY 2009, increasing to an additional 331 to 494 adult prison beds by FY 2018. The Division of the Budget estimates that if the bill contributes to an increase in the inmate population sufficient to require additional facility capacity, one-time construction and equipment costs would be needed. In addition, annual costs to staff and operate the additional capacity would be required. However, the prison construction costs could be paid from a portion of the \$39.5 million bond package that was approved by the 2007 Legislature and authorized by the State Finance Council in 2007 to increase prison capacity at El Dorado Correctional Facility, Ellsworth Correctional Facility, Yates Center, and Stockton.

If the bill, as introduced, does not contribute to the need for capacity expansion, additional annual costs of approximately \$2,400 per inmate for basic support, including food service, would be needed. Additional expenditures for health care could also be incurred, if the increase in the inmate population required adjustments in the medical contract. The health care contract provides that whenever the inmate count at a facility changes by more than a specified percentage, an adjustment in contract payments is made. The amount of any adjustment would depend on the specific facility involved. A request for information was sent to the Department of Corrections; however, the agency had not provided a response at the time this fiscal note was prepared. Any fiscal effect resulting from enactment of this bill has not been included in *The FY 2009 Governor's Budget Report*.

SB 484—Driving under the influence, substance abuse treatment facility, as introduced, would:

- Authorize a court to order imprisonment for a third conviction of DUI to be served in a state substance abuse treatment facility established by the KDOC, if space is

available, or in a facility designated by the Secretary for the provision of substance abuse treatment;

- Authorize a court to order imprisonment for a fourth or subsequent conviction of DUI to be served in a state substance abuse treatment facility established by the KDOC, if space is available, or in a facility designated by the Secretary for the provision of substance abuse treatment;
- Delete the requirement of the court to send a certified copy of the judgment form, or journal entry of it, to the law officer in charge of the defendant;
- Delete the requirement of the law enforcement agency maintaining custody and control of a defendant to send a certified copy of the judgment form, or journal entry of it, to the Secretary of Corrections within three business days and notify the Secretary when the term of imprisonment expires;
- Delete the requirement of the law enforcement agency maintaining custody and control of a defendant to deliver the defendant to a location designated by the Secretary upon the expiration of the term of imprisonment;
- Require that once the offender has completed the prison portion of the sentence, the offender would be supervised by Community Correctional Services for a mandatory one-year post-release supervision;
- Require inpatient or outpatient programming for alcohol and drug abuse, including aftercare or mental health counseling, during the mandatory one-year post-release supervision as determined by the court;
- Provide that any violation of the conditions of the mandatory one-year post-release supervision may subject the offender to revocation of the supervision;

- Grant retroactive jurisdiction for ordinance violations committed after July 1, 2006, to a municipal court for DUI violations over which the district court also has jurisdiction, as long as the elements of the ordinance violation are the same as the statute on DUI and the violation would constitute a felony (conflict reconciliation provision);
- Provide that the term of imprisonment for any felony violation of DUI would be served in a state substance abuse treatment facility established by the KDOC, if space is available, or in a facility designated by the Secretary for the provision of substance abuse treatment;
- Provide that the Secretary's determination regarding the availability of treatment resources and facility capacity would not be subject to review;
- Authorize the Secretary to order the housing and confinement of any person sentenced to the Secretary's custody to a state substance abuse treatment facility for treatment if the Secretary determines that such person would benefit from such assignment;
- Provide that inmates sentenced to a state substance abuse treatment facility established by KDOC would have a presumption of minimum security status upon readmission into a correctional facility or into a state substance abuse treatment facility; and
- Provide that inmates sentenced to a state substance abuse treatment facility established by KDOC would be transferred directly to the state substance abuse treatment facility and would not be required to be transferred to the state reception and diagnostic center.

The proponents of the bill as introduced were Ed Klumpp, Kansas Association of Chiefs of Police and Kansas Peace Officers' Association; Gerald Gilkey, Sumner County Sheriff; Tom Stanton, Kansas County and District Attorneys Association; and Judy Moler, General Counsel for the Kansas

Association of Counties. Doug Wells, Attorney, provided testimony in opposition to the bill as introduced. Conferees who provided neutral testimony on the bill as introduced were Jennifer Roth, Legislative Committee Chair of the Kansas Association of Criminal Defense Lawyers; Roger Werholtz, Secretary of the Kansas Department of Corrections; and Peter Ninemire, Families Against Mandatory Minimums.

The Kansas Sentencing Commission estimates that passage of SB 484, as introduced, would require an additional 496 to 741 adult prison beds in FY 2009, increasing to an additional 531 to 793 adult prison beds by FY 2018. The Division of the Budget estimates that if the bill contributes to an increase in the inmate population sufficient to require additional facility capacity, one-time construction and equipment costs would be needed. In addition, annual costs to staff and operate the additional capacity would be required. However, the prison construction costs could be paid from a portion of the \$39.5 million bond package that was approved by the 2007 Legislature and authorized by the State Finance Council in October of 2007 to increase prison capacity at El Dorado Correctional Facility, Ellsworth Correctional Facility, Yates Center, and Stockton.

If the bill does not contribute to the need for capacity expansion, additional annual costs of approximately \$2,400 per inmate for basic support, including food service, would be needed. Additional expenditures for health care also could be incurred, if the increase in the inmate population required adjustments in the medical contract. The health care contract provides that whenever the inmate count at a facility changes by more than a specified percentage, an adjustment in contract payments is made. The amount of any adjustment would depend on the specific facility involved. A request for information was sent to the Department of Corrections; however, the agency had not provided a response at the time this fiscal note was prepared. Any fiscal effect resulting from enactment of this bill has not been included in *The FY 2009 Governor's Budget Report*

SB 495—Restricting transfer of offenders to KDOC with 10 or less days remaining on a sentence: The bill, as introduced, would prohibit the transfer of offenders who have ten or fewer days remaining on their prison sentences from county correctional facilities to state correctional facilities. The proponent of the bill, as introduced, was Roger Werholtz, Secretary of the Kansas Department of Corrections. There was no testimony in opposition to the bill.

The Department of Corrections estimates that passage of SB 495, as introduced, could reduce agency costs as a result of not having to transport and process inmates who have ten or fewer days remaining on their prison sentences; however, because the agency is unable to predict how many inmates would be affected, the fiscal effect is unknown. As these inmates remain in county custody, county costs to house them would be higher. Again, the fiscal effect is unknown.