



Senate Judiciary Committee
February 6, 2024

Senate Bill 414
Testimony of the BIDS Legislative Committee
Presented by James Houston Bales and Lindsay Ford
Opposed

Dear Chair Warren and Members of the Committee:

SB414 adds fentanyl to a class of illegal substances that carry an enhanced penalty for their distribution, as well as an adjustment to the language that determines how marijuana triggers the distribution presumption. While Fentanyl is a dangerous substance and addiction to fentanyl is a serious problem in communities across Kansas, the BIDS Legislative Committee opposes this bill for several reasons outlined below.

At the outset, the distribution presumption scheme as it is currently designed is flawed. Today, Kansas law creates a “mandatory rebuttable presumption,” which as a legal concept relieves the State of their burden of proving the commission of a crime beyond a reasonable doubt in an unconstitutional manner. *Francis v. Franklin*, 471 U.S. 307, 314, n. 2, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). This is not a recent discovery, as our state’s legal community has known about this issue long enough for the Kansas Judicial Council to address the issue directly in their issuance of a pattern jury instruction that explicitly does not follow the law in an effort to create a legal solution to this problem. Since jury instructions are supposed to be accurate statements of the law upon which the legal community can rely, creating a statement of the law in disagreement with the state of the law is a drastic step. This bill asks the Kansas Legislature to double down on a poorly-constructed statute and add another substance to the problematic scheme.

We are also concerned about the arbitrariness of the weight threshold used to determine the distribution presumption. Setting the presumption at 3.5 grams is devoid of context or logic connecting that weight to distribution practices. Looking back at previous legislative history, this seems to have always been the case with the legislature offering much deference to the drafters of the original legislation to create these

thresholds, which seem to have been unmodified since their initial development in 2008. Since that time, behavior patterns of drug users have changed. The price of methamphetamine continually falling has made personal use purchases of amounts the legislature considers “medium” in size that trigger the presumption possible. The scheme was developed before fentanyl became a common adulterant in other controlled substances. We would urge this committee, and the legislature as a whole, to revisit these presumptive thresholds as they approach their fifteenth year since conception.

At this stage, it is important to note that the proposed bill parallels similar legislation, enacted certainly for the same purpose, regarding methamphetamine. And yet, despite the specific targeting of methamphetamine in the mechanism now proposed for fentanyl, Kansas’s methamphetamine problem has not abated in the least. In 2021, the Sedgwick County District Attorney’s Office commented that in the four years preceding, methamphetamine involvement appeared in 18.5% of their overall cases, up from 11% at the beginning of the four year period. Sheriff Jeff Easter of Sedgwick County also reported that 70% of drug crimes in Sedgwick County were for methamphetamine. Efforts to target methamphetamine by enhanced criminal penalties do not seem to be working, and there is little reason to expect that laws specifically targeting the distribution of fentanyl will have any different effect.

The bill also changes the criminalization of marijuana significantly by criminalizing the total weight of material that contains “any quantity of marijuana” instead of focusing on the weight of the marijuana itself. This is deeply troubling because all around Kansas and across the United States in states that have legalized, the marijuana industry is crafting products containing marijuana with a focus on dosage, not overall product weight. On average, a single gram of marijuana contains about 100mg of THC, the psychoactive component. This same ratio is not necessarily shared by products developed around marijuana. Industrially produced marijuana edibles have ratios that can vary wildly, but can add as much as ten to a hundred times the amount of carrying material required to get a similar dose of marijuana as one would get from smoking the leaves. Criminalizing the total weight of any product carrying marijuana loses the purpose of criminalization by creating greater penalties for industrial products than raw marijuana itself.

There is also the potential for this new legislation to have a chilling effect on Kansas’s own nascent CBD industry. As our own CBD producers and sellers struggle with quality control issues in creating products that remain legal for use in Kansas, this bill as proposed would change the penalties for possessing CBD products with questionable quality control in a radical way. Criminalizing marijuana at the “any

quantity” threshold could create felons of Kansans simply seeking to take advantage of the current allowances in Kansas law for the sale of CBD products who simply lack experience and skill in the refinement process, since under this proposed law, the threshold for mistakes would be nonexistent.

For the above reasons, we oppose this bill as it is currently written. Thank you for your time.

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