Kansas Sentencing Commission
700 SW Jackson, Suite 501
Topeka, KS 66603
Phone: (785) 296-0923

Kansas Sentencing Commission

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
Representative Russ Jennings, Chairman

KANSAS SENTENCING COMMISSION
Scott M. Schultz, Executive Director
February 18, 2019

Proponent Testimony – HB 2048

Thank you for the opportunity to present testimony in favor of this legislation on behalf of the Kansas Sentencing Commission (KSSC). This bill was introduced by the Commission to address scoring of out-of-state prior convictions at sentencing.

The process for classifying out-of-state convictions is described in K.S.A. 2018 Supp. 21-6811(e). An out-of-state crime is "classified as either a felony or a misdemeanor according to the convicting jurisdiction." K.S.A. 2018 Supp. 21-6811(e)(2). The state of Kansas determines whether the crime should be classified as a person or nonperson crime. The sentencing guidelines provide: "In designating a crime as person or nonperson, comparable offenses under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to." K.S.A. 2018 Supp. 21-6811(e)(3). The Kansas Supreme Court in *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018), clarified the meaning of a "comparable offense" as used in K.S.A. 2018 Supp. 21-6811(e)(3). It held that when scoring criminal history of out-of-state prior convictions, to be comparable the elements of those offenses must be identical or narrower to that of its Kansas counterpart to be considered part of an offender's criminal history. Last year in 2018 H Sub for SB 374, the DUI law was amended to require a comparable offenses standard in lieu of the *Wetrich* criteria. Similar language for criminal offenses is now proposed in this bill by the KSSC.

Under this bill, the following is considered for the purposes of determining whether an out-of-state offense is comparable to a corresponding Kansas offense for criminal history purposes:

1. The name of the out-of-state offense;
2. the elements of the out-of-state offense; and
3. whether the out-of-state offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense.

The bill directly denotes legislative intent by including that the legislature intends for the provision in the bill to be liberally construed to allow comparable offenses, regardless of whether the elements are identical to or narrower than the corresponding Kansas offense, to be used in classifying the offender's criminal history.

In FY 2018, there were **536** out-of-state convictions recorded in the offenders' five most recent and severe felony convictions. Because the KSSC only captures data on the five most recent and severe offenses in an offender's criminal history, it is possible that some offenders had more out-of-state convictions, but fell

outside of the most recent five convictions collected by the KSSC. Out-of-state misdemeanor convictions are also not included in the KSSC data.

The Court in *Wetrich* reached its decision solely on statutory interpretation rather than constitutional grounds. The Commission believes the proposed language, like the DUI verbiage last year, will survive a statutory challenge for two reasons. First, the language is clear and unambiguous. The Kansas Supreme Court has placed great emphasis recently on the court's duty to give effect to the plain language of a statute. See, e.g., *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016) (explaining that absent an ambiguity, the plain meaning of the words chosen by the Legislature will control and courts will not add words to the law); *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 367, 361 P.3d 504 (2015) (finding "the court's duty to give effect to the plain language of an unambiguous statute is not diluted just because that effect renders the statute unconstitutional"). Second, the bill clearly denotes legislative intent to determine the methodology in which to score out-of-state priors. There is also hesitation to change the language from the DUI version in light of no current decision from the appellate courts striking it down.

Nevertheless, the *Wetrich* opinion hinted heavily as to 6th Amendment constitutional concerns, citing several federal cases. None of the subsequent Kansas cases citing *Wetrich* turn on the designation of the out-of-state prior being a felony or misdemeanor. All of the cases squarely affect whether the prior can be scored as a person or nonperson felony. This designation in Kansas becomes significant in the sentence a repeat offender receives. As previously indicated, *Wetrich* held that for an out-of-state conviction to be comparable to an offense within the meaning of K.S.A. 21-6811(e)(3) ... the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced. *Wetrich* at 307 Kan. 552, Syl. ¶ 3. The Court further indicated that, "[u]nder this approach, it is important to determine the *elements* of the out-of-state crime. Criminal statutes are often written in the alternative. Though the *Wetrich* court rested its decision on the basis of statutory interpretation and not on constitutional grounds, the court borrowed the distinction between elements and means stated in *Mathis v. United States*, 579 U.S. ——, 136 S.Ct. 2243, 2256, 195 L.Ed. 2d 604 (2016)(a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of). *State v. Walter*, 55 Kan. App. 2d 621, 624, 419 P.3d 651, 653 (2018) citing *Wetrich*, 307 Kan. at 558.

Perhaps a wait-and-see strategy is warranted based upon a recent development last summer. The Georgia Court of Appeals found *Mathis* inapplicable, stating, "[b]ut as discussed *supra*, in *Mathis*, the Supreme Court was specifically directing federal courts as to the manner in which to apply a federal law—the ACCA. And nothing in the opinion can be construed as the Supreme Court of the United States mandating that state courts similarly employ an "elements only" test when interpreting and applying state-specific sentence-enhancing statutes. *Nordahl v. State*, 344 Ga. App. 686, 693–94, 811 S.E.2d 465, 471 (2018), *cert. granted* (Aug. 27, 2018).

A Kansas decision on the newly amended DUI statute seems to be on the horizon. The most recent attempt was in the Court of Appeals where a defendant argued that "allowing the district court to consider evidence of his Texas conviction on remand would violate his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). That case held that a fact other than the existence of a previous conviction could not be used to increase a criminal defendant's sentence above the

statutory maximum unless first proved to a jury beyond a reasonable doubt. In *Descamps v. United States*, 570 U.S. 254, 269, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), the United States Supreme Court explained that when the prior crime of conviction is broader than the crime to which it is being compared, a court may not look beyond the mere fact of a conviction and examine the facts that gave rise to the conviction and use that fact to increase a defendant's sentence. *State v. Hernandez-Castanon*, 429 P.3d 628 (Kan. Ct. App. 2018). The *Hernandez-Castanon* court held, "[b]ut if a statute under which the defendant was previously convicted provides alternative ways of committing the crime—each with its own set of elements—a court can look at a limited set of documents to determine which set of statutory elements it should use for purposes of comparing that prior conviction with the elements of the current comparable offense. *Descamps*, 570 U.S. at 257-58; *Mathis v. United States*, 579 U.S. ——, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). This is known as the "modified categorical approach." See *Descamps*, 570 U.S. at 257-58. Here, the Texas Penal Code sets out two alternative sets of elements. To commit a DWI in Texas, the driver either (1) does not have normal use of mental or physical faculties by reason of drugs or alcohol or (2) has an alcohol concentration of .08 or more. Tex. Penal Code Ann. §§ 49.01(2), 49.04(a). Because the crime is divisible, the district court may consult a limited class of documents from the 2005 Texas conviction—charging documents, plea agreements, jury instructions, verdict forms, and transcripts from plea colloquies as well as findings of fact and conclusions of law from a bench trial—to determine which portion of the statute Hernandez-Castanon was convicted under." Id. While the court did not apply the new amended DUI statute retroactively, it remanded the matter for resentencing.

The state of Washington has adopted a two-prong approach to scoring out-of-state priors. Under the legal prong, courts compare the elements of the out-of-state conviction to the relevant Washington crime. If the foreign conviction is identical to or narrower than the Washington statute and thus contains all the most serious elements of the Washington statute, then the foreign conviction counts toward the offender score as if it were the Washington offense. If, however, the foreign statute is broader than the Washington statute, the court moves on to the factual prong—determining whether the defendant's conduct would have violated the comparable Washington statute. *State v. Olsen*, 180 Wash. 2d 468, 472–73, 325 P.3d 187, 189 (2014). This is a plausible solution for Kansas to adopt a legal prong, which is effectively *Wetrich*, and a factual prong in which the court may consider only facts that were admitted, stipulated to, or proved beyond a reasonable doubt. Id. at 478. Unfortunately, this case was decided prior to *Mathis*. While this may pass constitutional muster, it remains to be seen if any out-of-state crimes would be comparable under the factual prong.

This proposal is a difficult issue with many moving parts. The Commission asks that the committee adopt the current language as set forth in the bill. I appreciate your time and attention to the Kansas Sentencing Commission testimony, ask for your support, and would be happy to answer questions. Thank you.