STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

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February 15, 2019

House Corrections and Juvenile Justice Committee
Attention: Russ Jennings, Chairman
Kansas State Capital, Room 152-S
Topeka, Kansas 66612

Re: House Bill 2048

Dear Chairman Jennings,

Thank you for the opportunity to submit our written response in support of HB 2048.

Background on Wetrich

To be convicted and punished for a crime in Kansas, the State is required to establish, beyond a reasonable doubt, certain facts (referred to as "elements" of an offense). For example, to convict John Doe of burglary, the State would be required to establish that Doe, (1) without authority, (2) entered or remained within any structure,[1] (3) with the intent to commit a felony, theft, or sexually motivated crime therein.[2]

What is an element?

Criminal offenses, and the elements that are required to be proven, are statutory creations. If the Kansas Legislature were to repeal the burglary statute, even if the Kansas courts thought that the decision was dangerous, it would not have the power to enact a crime for burglary.

Whether a fact is an element of the crime, however, is a constitutional question, and is answered by the courts. The United States Supreme Court, in *Apprendi v. New*

1 There are a number of structures applicable to the burglary statute.

Jersey, has found that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[3]

If John Doe is convicted of burglary of a structure, he would be facing a sentence between 11-34 months in prison (severity-level-seven crime).[4] But if the State proves an additional element - that a person was present in the dwelling - Doe would face a potential sentence of 38-172 months in prison. Because the presence of another person increased the potential sentence that Doe was facing (from 34 to 172 months), *Apprendi* mandates that it be considered an element of the offense.

Exception for prior criminal convictions

There is an exception to the *Apprendi* rule for a defendant's prior convictions.[5] The rationale behind this exception is that a finder of fact (judge or jury) has already found, beyond a reasonable doubt, the elements of the prior offense (which was required in order to convict the defendant). Apprendi does not require courts to, again, put those findings to a jury and have them proven beyond a reasonable doubt.

What is a person versus nonperson offense?

An essential aspect of the Kansas Sentencing Guidelines is the distinction between a "person" and "nonperson" crime. A "person" crime is, generally speaking, one in which the defendant has physically or emotionally hurt another person (e.g. rape, kidnapping, murder, battery, criminal threat). A nonperson crime is, generally speaking, one in which the injury is financial or the State is the victim (e.g. theft, forgery, drug possession).

Whether a prior crime is scored as a person or nonperson offense is essential to the

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2 K.S.A. 21-5807(a)(2).
3 *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002).
4 Robbery is a severity-level-five offense. Aggravated robbery is a severity-level-three offense.

determinate sentencing scheme in Kansas. That designation, alone, can mean a difference of more than thirty years in prison.[6]

Wetrich's Effect on Elements

How do we compare out-of-state convictions?

It is rather simple to designate in-state convictions as person or nonperson offenses, as the court simply looks to the criminal statute which defines the crime. That is not to say that there are no problems, but that the problem most often arises with out-of-state convictions.[7]

K.S.A. 21-6811(e)(3) was enacted to help determine whether an out-of-state conviction is comparable. For years, there was no dispute about what comparable meant. But in *Wetrich*, the Kansas Supreme Court found that the term "comparable offense" meant that the out-of-state crime could not be broader than the elements of the Kansas offense (identical-or-narrower rule). "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*, 307 Kan. at 561-62.

The *Wetrich* Court's interpretation of the term "comparable" is, no doubt, breathtaking. But courts are required, if at all possible, to base their decision on statutory, rather than constitutional, law. And the interpretation masks the underlying problem with K.S.A. 21-6811(e)(3), and the term "comparable." To construe the term "comparable" as anything other than identical or narrower would violate the Constitution. The *Wetrich* Court, in effect, lifted the term "comparable" to meet constitutional requirements.

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5 *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002).

6 A sentence for a severity-level-one offense when three out-of-state burglary convictions scored as nonperson would be 246 months in prison. If those same out-of-state burglaries were scored as person felonies, the maximum sentence would be 653 months in prison.

Identical to or narrower standard creates havoc on the Kansas Sentencing Guidelines

Unfortunately, *Wetrich* wreaks havoc on the determinate sentencing scheme in Kansas. This committee need look no further than *Wetrich*, and its analysis of the Missouri burglary statute, to understand the pitfalls of determinate sentencing. A review of the Missouri burglary statute reveals that it is broader in scope than the Kansas statute.

As an example, a person could be convicted of burglary in Missouri for entering a structure with the *intent to commit a misdemeanor battery*. But this same act in Kansas would not meet the elements of a person burglary conviction in Kansas, as the individual did not enter the structure with the *intent to commit a felony, theft, or sexually motivated crime*.

As another example, an individual could be convicted of a burglary in Missouri if he entered or remained within a structure *where people assemble*. But this same act in Kansas would not meet the elements of a person burglary, as entry or remaining within a structure *where people assemble* does not fit the crime.

It is irrelevant whether John Doe's Missouri conviction actually involved an intent to commit a misdemeanor battery, or that the place burglarized was a structure *where people assembled*. The fact that the elements of the Missouri burglary statute are broader than Kansas is sufficient to prevent the burglary conviction from being scored as a person felony. John Doe could, thus, commit the exact same prior crime in Kansas and Missouri (breaking into someone's home), yet receive a vastly different sentence.

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7 See, e.g. *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015) (Pre-1993 burglary convictions scored nonperson because "dwelling" was not, at the time, an element of the offense. The State is also now seeing attacks on scoring in-state convictions as person felonies.

Impact on sentencing in Kansas

Not only does *Wetrich* have a major impact on the length of sentences, that impact disproportionately benefits those individuals who are charged in their present case with a serious offense. For example, if John Doe was convicted of theft, he would only receive a potential six-month reduction in his sentence (seventeen to eleven months), depending upon whether his prior burglary was scored a person or nonperson offense.

If, however, John Doe was being sentenced for rape, and his prior burglary was from Missouri, he would receive a potential sixty-four-month (267 to 203 months) reduction in his sentence. And individuals who commit burglaries often have multiple prior convictions. If John Doe had three Missouri convictions for burglary, he would receive a potential thirty-year (653 to 246 months) reduction in his sentence for no other than the fact that he committed his prior burglaries in Kansas City, Missouri, rather than Kansas City, Kansas.

Goals of Wetrich fix

In fixing the *Wetrich* problem, the legislature should keep in mind the original intent of the guidelines:

1) Prison space should be reserved for serious/violent offenders who present a threat to society;
2) the degree of sanctions imposed should be based on the harm inflicted;
3) sanctions should be uniform and not related to socioeconomic factors, race, or geographic location;
4) penalties should be clear so everyone can understand exactly what has occurred once sentence is imposed;
5) the State has an obligation to rehabilitate those incarcerated, but persons should not be sent to prison solely to gain education or job skills, as these programs should be available in the community; and
6) the system must be rational to allow policy makers to allocate resources.

Coates, *Summary of the Recommendations of the Sentencing Commission*, p. 6 (Report to

Senate Committee on Judiciary, January 14, 1992). See also Kansas Sentencing Guidelines Implementation Manual, p. i-1-2 (1992). *Wetrich*, 307 Kan. at 560-61.[8]

The KCDAA is not asking for tougher penalties than what were originally proscribed. A *Wetrich* fix would simply return the most dangerous defendants to their pre-*Wetrich* sentencing level.[9]

Because complexity is the enemy of reliability, the second goal would be to create a sentencing scheme that is both legally simple (i.e. the simplicity of implementing the changes and the chances of satisfying constitutional requirements) and, at the same time, efficient (i.e. limiting the amount of state resources necessary to sentence a defendant).

House Bill 2048

HB2048 proposes the following *Wetrich* fix:

> (1) For the purposes of determining whether an offense is comparable, the following shall be considered:
>
> (A) The name of the out-of-state offense;
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> (B) the elements of the out-of-state offense; and
>
> (C) whether the out-of-state offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense.
>
> (2) The legislature intends that this provision related to comparability of an out-of-state offense to a Kansas offense shall 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.

HB2048 attempts to broaden the definition of the term "comparable" which, as stated above, does not address the underlying issue in *Wetrich*: that anything less than identical or narrower is unconstitutional.

Name of the out-of-state offense

HB2048 proposes that the district court should be allowed to, in determining whether a crime is a person or nonperson felony, consider the name of the out-of-state

8 Evidently, the first policy reason was not that important.

offense.[10] In most, if not all, states, the title of a statute is created by the revisor's office, not the legislature, and, thus, "forms no part of the statute itself."[11] The constitutional problem with this suggestion begins, but does not end, with the separation of powers clause.[12]

The elements of the out-of-state offense

HB2048 proposes that the district court should consider the elements of the out-of-state offense. This would simply be a codification of *Wetrich*, which does nothing to advance a *Wetrich* fix.

Out-of-state offense prohibits similar conduct

HB2048 proposes that the district court should consider whether the out-of-state offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense. In a technical sense, this would make clear the intent of the legislature to broaden the definition of "comparable." But this misses the underlying current in *Wetrich*: that anything less than identical or narrower will not meet constitutional muster.

Liberally construed provision

Finally, HB2048 requires that district courts liberally construe the statute "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." Again, the legislature cannot legislate-away a constitutional requirement that each element of an offense must be put to a jury and proven beyond a reasonable doubt.

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9 This would include out-of-state convictions and pre-1993 burglary convictions.
10 K.S.A. 21-6811(j)(1)(A).
11 State v. Martens, 274 Kan. 459, 54 P.3d 960 (2002)

KCDAA Proposal

It appears that a *Wetrich* fix may not be viable this year. But while an overhaul of the sentencing system takes place, the KCDAA's proposal would be a significant improvement on the scoring of out-of-state convictions,.

Instead of focusing on the entire crime, like in *Wetrich*, the KCDAA proposal focuses on specific elements of a crime. For example, an out-of-state conviction will be designated as a person felony if it has, as an element of the offense, the death or killing of a human being or animal, the presence of a person other than defendant or accomplice at the crime, or if it involves images of people. This should cover many of the out-of-state crimes that are now being scored person felonies.

Proposed Long-Term Fix of *Wetrich*

Long-term, the Kansas Legislature should consider adopting a system that focuses on incarcerating the most dangerous in society, and is both legally simple to implement, and efficiently utilizes state resources. The idea underlying this proposal is to separate the prior criminal history (potential for recidivism), from the nature of those crimes.

Characteristics of proposed guidelines

This proposed grid no longer takes into account whether a prior crime is a person or nonperson felony. It only considers recidivism in its purest sense (i.e. the likelihood that a defendant will continue to commit crimes).

The sentencing ranges, although not identical, are comparable to the ranges found on the present sentencing grid. For example, a defendant who commits a severity-level-one crime and has a criminal history score of "A" would be subject to a sentence of 200-650 months in prison. These numbers were taken from the aggravated sentence in the

12 Even if some legislatures do create the title, the requirement that the State (and defense) now have to determine this on a

current "1-A" box (3 or more person felonies) and the mitigated sentence in the current "1-E" box (3 or more nonperson felonies).

Category →	A	B	C	D	E
Severity Level ▼	3 + Felonies	2 Felonies	1 Felony	2 + Misdemeanors	Misdemeanor No Record
I	650 475 200	600 400 200	300 250 175	200 175 150	175 150 125
II	500 325 150	475 300 150	225 175 125	150 125 100	125 100 75
III	250 150 75	225 150 100	125 100 75	80 70 60	70 60 50
IV	175 100 50	150 100 50	75 60 50	50 45 40	45 40 35
V	150 100 50	125 75 50	70 60 50	40 35 30	35 30 25
VI	50 40 30	45 40 35	40 30 20	25 20 15	20 15 10
VII	35 30 25	35 25 15	30 25 15	20 15 10	15 10 5
VIII	25 20 15	20 15 10	20 15 10	15 10 5	15 10 5
IX	20 15 10	15 10 5	15 10 5	15 10 5	15 10 5
X	20 15 5	20 10 5	15 10 5	15 10 5	15 10 5

Probation Terms are:
36 months recommended for felonies classified in Severity Levels 1-5
24 months recommended for felonies classified in Severity Levels 6-7
18 months (up to) for felonies classified in Severity Level 8
12 months (up to) for felonies classified in Severity Levels 9-10

Postrelease Supervision Terms are:
36 months for felonies classified in Severity Levels 1-4
24 months for felonies classified in Severity Levels 5-6

Postrelease for felonies committed before 4/20/95 are:
24 months for felonies classified in Severity Levels 1-6
12 months for felonies classified in Severity Level 7-10

The range for a 1-B sentence was taken from the current aggravated "1-B" box (2 or more person felonies) and the mitigated sentence in the current "1-F" box (2 or more nonperson felonies). The range for a 1-C sentence were taken from the aggravated "1-C"

case-by-cases is untenable.

box (one person and one nonperson) and the mitigated sentence in the current "1-G" box (one nonperson felony).

Under this proposed grid, the judge would then have the discretion to consider the nature of the prior crimes (i.e. person or nonperson characteristics) along with any other factors unique to the individual defendant (i.e. mitigators and aggravators), in order to impose a sentence within the grid-box.

For example, if John Doe has three prior felonies for theft, he can be sentenced to what would currently be a "1-E" sentence. But if he has three prior person felonies, he can be sentenced to what would currently be a "1-A" sentence.

Drug crimes

Category →	A	B	C	D	E
Severity Level ▼	3 + Felonies	2 Felonies	1 Felony	2 + Misdemeanors	Misdemeanor No Record
I	200 175 150	200 175 150	190 165 140	160 150 140	155 145 135
II	150 125 100	140 120 100	130 115 100	110 100 90	100 90 80
III	90 80 70	80 65 50	75 60 45	55 50 45	50 45 40
IV	50 40 30	45 35 25	40 30 20	20 15 10	15 10 5
V	40 30 20	35 25 15	30 20 10	15 10 5	15 10 5

LEGEND
Presumptive Probation
Border Box
Presumptive imprisonment

EFFECT ON PRISON POPULATIONS

When it comes to incarceration, financial impact is always a consideration. As the first two goals of the sentencing guidelines point out, prison space should be reserved for serious/violent offenders who present a threat to society, and the degree of sanctions

imposed should be based on the harm inflicted. Focusing incarceration on the violent and recidivistic criminals meets this goal.

The proposed grid removes presumptive prison sentences for those individuals who commit severity-level-seven to severity-level-ten crimes. The Kansas Sentencing Commission's statistics on inmate population suggest that this, without major alterations, would likely cause a reduction in the prison population.

In addition, because the numbers within the grid box are proposed numbers, this proposal would give the legislature the opportunity to adjust the numbers in order to address the prison overpopulation issue.

Respectfully Submitted,

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