



Kansas County & District Attorneys Association

1200 SW 10th Avenue
Topeka, KS 66604
(785) 232-5822 Fax: (785) 234-2433
www.kcdaa.org

To: Chairman Jennings and Members of the House Corrections and Juvenile Justice Committee

From: Kim T Parker Kansas County and District Attorneys Association

Date: January 29th, 2019

Re: Neutral Testimony House Bill 2048

Good Afternoon Chairman Jennings and Committee Members,

Thank you for the opportunity to provide neutral testimony regarding HB2048. I am addressing you on behalf of the Kansas County and District Attorney's Association. This bill seeks to address a series of Kansas Appellate rulings that effect the Kansas Sentencing Guidelines for all criminal cases

The rules for classifying out- of -state convictions are contained primarily at K.S.A. 21-6811.

Kansas first classifies an out-of-state conviction, as either a felony or a misdemeanor according to the convicting jurisdiction. Kansas then classifies the out-of-state conviction as either a person or nonperson crime by comparing it to the relevant crime in Kansas.

If Kansas does not have a comparable offense, the out-of-state conviction is scored a nonperson felony. The facts required to classify out-of-state adult convictions and juvenile adjudications shall be established by the state by a preponderance of the evidence

In *State v. Wetrich*, 307 Kan. 552, 560, 412 P.3d 984 (2018), the Kansas Supreme Court found that the term “comparable” was ambiguous. The *Wetrich* Court interpreted “comparable offenses” to mean that the out-of-state crime cannot have broader elements than the Kansas reference offense, “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.

Wetrich has made a huge impact on the sentences of defendants who have prior out-of-state “person” convictions. It is of concern to our border counties. If our statute is not corrected individuals with out of state convictions will be scored lower in criminal history categories that individuals who have prior Kansas convictions for criminal acts that are substantially the same. We believe this problem is ripe for equal protections claims.

The elements of criminal statutes across the nation are similar among states, municipalities and the federal government, but rarely identical. It can be simply explained by comparing the elements of three Kansas and Missouri criminal statutes.

Kansas Murder in the first degree is the killing of a human being committed Intentionally, and with premeditation

Missouri Murder in the first degree; A person commits the offense of murder in the first degree if he or she knowingly causes the death of another person after deliberation upon the matter.

Kansas Murder in the second degree is the killing of a human being committed:

(1) Intentionally; or

(2) unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life.

Missouri Murder in the second degree ; knowingly causing the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person

Kansas Burglary; Aggravated Burglary; Burglary is, without authority, entering into or remaining within any:(1) Dwelling, with intent to commit a felony, theft or sexually motivated crime therein;(2) building, manufactured home, mobile home, tent or other structure which is not a dwelling, with intent to commit a felony, theft or sexually motivated crime therein; or (3) vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony, theft or sexually motivated crime therein.

(b) Aggravated burglary is, without authority, entering into or remaining within any building, manufactured home, mobile home, tent or other structure, or any vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property in which there is a human being with intent to commit a felony, theft or sexually motivated crime therein.

Missouri Burglary; A person commits the offense of burglary in the first degree if he or she knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing an offense therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, the person or another participant in the offense: (1) Is armed with explosives or a deadly weapon; or (2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or (3) There is present in the structure another person who is not a participant in the crime.

HB2048 seeks to define the term “comparable,” or replace “comparable” with an unambiguous word or phrase. We are concerned HB2048 does not go far enough to satisfy the concerns of our Kansas Supreme Court. Therefore, we urge you to adopt the more specific language included below. This expanded verbiage attempts to clarify the ambiguity of the term “comparable” by using descriptive words and phrases commonly used and understood in criminal laws across the nation and clearly distinguish between person and non-person offenses.

Amending 21-6811 at: (e) (1) Out-of-state convictions and juvenile adjudications shall be used in classifying the offender's criminal history.

(2) An out-of-state crime will be classified as either a felony or a misdemeanor according to the convicting jurisdiction:

(A) If a crime is a felony in another state, it will be counted as a felony in Kansas.

(B) If a crime is a misdemeanor in another state, the state of Kansas shall refer to the comparable offense in order to classify the out-of-state crime as a class A, B or C misdemeanor. If the comparable misdemeanor crime in the state of Kansas is a felony, the out-of-state crime shall be classified as a class A misdemeanor. If the state of Kansas does not have a comparable crime, the out-of-state crime shall not be used in classifying the offender's criminal history.

(3) The state of Kansas shall classify the crime as person or nonperson.

(A) In designating a *misdemeanor* 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. If the state of Kansas does not have a comparable *person* offense in effect on the date the current crime of conviction was committed, the out-of-state conviction shall be classified as a nonperson crime *unless the out-of-state conviction includes battery, assault, domestic battery, or domestic violence in its title, in which case it shall be classified as a person crime.*

(B) *In designating a felony crime as person or nonperson, the court shall determine whether the elements of the out-of-state conviction include any of the following in choate or inchoate form: (i) death or killing of a human being; (ii) death or killing of an animal; (iii) threatening harm or violence, causing fear or terror, intimidating, or harassing a person; (iv) bodily harm, injury, neglect, abuse, restraint, confinement, or touching of another person, without regard to degree; (v) the presence of a person other than defendant or an alleged accomplice; (vi) possessing, viewing, depicting, distributing, recording, or transmitting any image of a person; (vii) "sexually explicit conduct," as defined in 21-5510(d)(1), involving any person or animal; (viii) being armed with, using, displaying, or brandishing a firearm or other weapon, as defined in the jurisdiction of conviction; or (ix) entering or remaining within a structure, building, dwelling, or habitation. Without regard to any other element, mental state, or manner of liability, if the out-of-state felony conviction requires proof of one or more of the circumstances listed in this subsection it shall be classified as a person crime. If the out-of-state felony conviction does not require proof of any of the circumstances listed in this subsection, it shall be classified as a nonperson crime. As used in (v), presence of another person includes physical presence as well as presence by electronic or telephonic communication.*

(4) Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal or military courts are considered out-of-state convictions or adjudications.

(5) The facts *or circumstances* required to classify out-of-state adult convictions and juvenile adjudications shall be established by the state by a preponderance of the evidence.

Respectfully Submitted
Kim T Parker
Prosecutor Coordinator
Kansas County and District Attorney's Association
316-650-7267