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Neutral Testimony on House Bill 2048
Clarifying the definition of comparable offense under the Kansas criminal code

Presented to the House Corrections and Juvenile Justice Committee
By Assistant Solicitor General Natalie Chalmers

February 18, 2019

Chairman Jennings and Members of the Committee:

Thank you for the opportunity to provide neutral testimony on behalf of Attorney General Derek Schmidt regarding House Bill 2048. While the Office of the Attorney General supports fixing *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018), which has seriously undermined the ability of the State to score most out-of-state convictions as person felonies, the current proposal may only lead to more limbo in the finality of sentences.

For years, scoring out-of-state crimes only required that the out-of-state crime be comparable to a Kansas crime. But that rule changed when the Kansas Supreme Court decided *Wetrich*. Instead of using a common interpretation of comparable, the Kansas Supreme Court decided the Legislature would have meant comparable required the out-of-state crime's elements to be identical to or narrower than Kansas's elements.

In doing so, the Kansas Supreme Court avoided determining whether an identical or narrower requirement is constitutionally required in comparing offenses defined by various jurisdictions. But it seemed to imply that such a requirement was constitutionally required. This belief appears to be based on language in *Mathis v. U.S.*, 579 U.S. ___, 136 S. Ct. 2243 (2016). There, the United States Supreme Court stated that permitting a judge to go beyond identifying the crime of conviction would cause "serious Sixth Amendment" concerns. 136 S. Ct. 2252. More specifically, the Court stated to be consistent with the Sixth amendment, a judge can do no more "than determine what crime, with what elements, the defendant was convicted of." *Id.* This prohibition is based on a constitutional rule that only a jury, not a judge, may find facts that increase a maximum penalty.

Subsection (j)(1)(C) of the current proposal, arguably contradicts *Mathis*, by allowing a judge to "go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.*

If the Kansas Supreme Court views the proposed language as merely adopting a pure legal analysis, there would be no constitutional issue since no unconstitutional fact-finding would have occurred. But it is possible that the Kansas Supreme Court's peculiar definition of comparable in *Wetrich* establishes a belief that *Mathis* does not permit using "comparable" or "similar" offenses to score out-of-state crimes.

Thus, this proposal will unquestionably lead (to likely years) of litigation about whether the identical or narrower approach is constitutionally required. If the proposal is not upheld, then the State will be in the same, or worse, position than it is now.

Additionally, by limiting what can be considered in scoring an offense, it is debatable whether the proposal ends the use of the modified categorical approach. The categorical approach allows a sentencing court to look to "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 579 U.S. at 2249. Then, the court can use anything proven beyond a reasonable doubt in the comparison of the out-of-state crime to the Kansas crime. While the categorical approach is not permissible in many cases, it does still have value in determining if an out-of-state crime can be scored as a person felony. Thus, it may not be ideal to statutorily bar such an approach.

Because of the above concerns, the Office of the Attorney General would encourage this Committee to consider alternative approaches, such as the proposed amendment by the Kansas County and District Attorneys Association, to determine if a better solution can be found. Thank you for your time.

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