House Corrections and Juvenile Justice Committee

February 18, 2019

House Bill 2048

Testimony of the

Kansas Association of Criminal Defense Lawyers

Opponent

Dear Chairman Jennings and Members of the Committee:

My name is Clayton Perkins. I am an attorney in Kansas practicing in the field of criminal defense appeals. Today, I appear on behalf of the Kansas Association of Criminal Defense Lawyers. We oppose HB 2048 because it injects unnecessary language into K.S.A. 21-6811 that is unconstitutional and would only create more confusion.

Overview of the sentencing guidelines in Kansas

In 1989, the Kansas Legislature established the Kansas Sentencing Commission to develop a sentencing guidelines model or grid, based on fairness and equity. The purpose of the sentencing guidelines model was to establish rational and consistent sentencing standards which reduced sentence disparity, including, but not limited to, racial and regional biases that existed under then current sentencing practices.[1]

The commission relied upon the sentencing guidelines of Washington, Minnesota, and Oregon,[2] ultimately resulting in our legislature enacting the Kansas Sentencing Guidelines Act (KSGA), which became effective on July 1, 1993,[3] which would be revised with the recodification (rKSGA) in 2010.[4] The guidelines were applicable to most felonies, and created two grids, one for drug crimes and one for nondrug crimes, providing a template for sentencing.

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[1] See *State v. Murdock*, 299 Kan. 312, 320, 323 P.3d 846 (2014), as modified (Sept. 19, 2014), and overruled by *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).

[2] See *State v. Richardson*, 20 Kan.App.2d 932, 935, 901 P.2d 1 (1995).

[3] A copy of each grid is attached as Appendix A.

[4] A copy of each grid is attached as Appendix B.

The vertical axis of each grid lists crime severity levels in decreasing order of severity, from 1 to 10 on the nondrug grid under both the KSGA and rKSGA, and from 1 to 4 under the KSGA drug grid and 1 to 5 under the rKSGA. The horizontal axis lists different criminal history classifications, also in decreasing order. Ignoring special rules, the intersection of the severity level of the crime and the offender's criminal history provides a sentencing range for a conviction.

HB 2048 is relevant to the horizontal axis of the grids, which begin with the most severe criminal history, "A", reflecting three or more person felonies, and goes to "I", reflecting either one misdemeanor or no record at all. Criminal history classification is straightforward when a prior conviction resulted under a Kansas statute. That is because the grid boxes are set up to reflect the way Kansas categorizes crimes using the classifications of felony or misdemeanor offenses, the class A, B, or C if the offense was a misdemeanor, and whether Kansas labels the crime person or nonperson. All of those classifications can vary even within a particular statute as offenses are often classified either person or nonperson depending on variations of the offense.

However, while the Kansas criminal code uses Kansas' labels, other states do not. The difficulty comes when a prior conviction occurred in another jurisdiction, whether under federal statute, another state's statute, a municipal ordinance, tribal law, etc. This requires Kansas to have a method for classifying out-of-state convictions according to those labels. Under K.S.A. 21-6811 as it currently is, this is done by direction to "refer to the comparable offense under the Kansas criminal code[.]" That "comparable" language is used in three areas. First, if the out-of-state conviction is a misdemeanor "comparable" offenses are used to score it as a class A, B, or C misdemeanor, or it is unscored if there is no comparable Kansas Offense.[5] Second, if the out-of-state conviction is not labeled as a felony or misdemeanor "comparable" Kansas offenses are used to score it as such, or it is unscored if there is no comparable offense.[6] Third, the out-of-state conviction is scored as person or nonperson by referring to "comparable" Kansas offenses, or it is scored nonperson if there is no comparable Kansas offense.[7] All those uses of the

[5] K.S.A. 21-6811(e)(2)(B)
[6] K.S.A. 21-6811(e)(2)(C)
[7] K.S.A. 21-6811(e)(3)

term "comparable" left the question of what it takes for an out-of-state offense to be comparable to a specific Kansas offense.

In March of 2018, the Kansas Supreme Court resolved that question in *State v. Wetrich*.[8] In that opinion the Court synthesized legislative history and the purpose of the KSGA to develop a workable, and constitutionally sound, test for determining if an out-of-state offense is comparable to a particular Kansas offense. Under *Wetrich*'s test, "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."[9] This is the same test employed in Federal Courts to classify prior state crimes for sentencing under the Armed Career Criminals Act.[10] It provides a reliable means for Kansas courts and attorneys to consistently determine when an out-of-state offense is comparable to either a Kansas person offense, a Kansas nonperson offense, or not comparable to any Kansas offense.

Clarifying "comparable" is unnecessary after *Wetrich*, but even if it was, HB 2048 only makes things more confusing.

Turning to HB 2048 itself, the language attempts to redefine "comparable" following *Wetrich*. This prompts the first question of why it is necessary to change the meaning of "comparable" following *Wetrich*. The *Wetrich* opinion provided the needed clarification for how to classify out-of-state crimes consistent with the purpose and history of the KSGA. Kansas courts and attorneys now have a reliable standard to apply statewide. Even further, out-of-state convictions are still being used to calculate criminal history scores following *Wetrich*. An out-of-state felony conviction is still a felony conviction, and those count on the grid whether they would be person or nonperson offenses. Likewise, *Wetrich* does not mean out-of-state crimes cannot be classified as person offenses, it only makes sure than an out-of-state crime would correspond to a conviction for a person offense in Kansas. It is unnecessary to change the meaning of "comparable" following *Wetrich*.

Moreover, even if a *Wetrich* fix was necessary, HB 2048's specific language only creates more confusion. For example, HB 2048 does not provide an actual standard for determining when an out-of-state offense is comparable to a Kansas offense, it simply says *Wetrich* is not the test. How

[8] *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018)
[9] *State v. Wetrich*, 307 Kan. 552, 562, 412 P.3d 984 (2018).
[10] *Mathis v. U.S.*, 136 S. Ct. 2243, 2248, 195 L. Ed. 2d 604 (2016)

would a district court, let alone an attorney or criminal defendant, under HB 2048, know when an out-of-state offense is going to be classified as person or nonperson? HB 2048 provides three factors that "shall be considered" but does not provide any guidance to go from looking at those factors to classifying an out-of-state offense.

In addition, two of the three factors listed in HB 2048 are problematic. First, subsection (j)(1)(A) of HB 2048 says to look to the name of the out-of-state offense. However, using the name of offenses is a notoriously bad way of figuring out what is actually criminalized in the statute. For example, many states call all batteries as assaults, even though they were distinct crimes at common law and are still distinct under the Kansas statutes. Likewise, the Kansas statutes frequently use the same name, such as burglary, for describing offenses that are either person or nonperson. Relying on names of out-of-state offenses only increases confusion.

Second, subsection (j)(1)(C)'s direction to consider whether an offense "prohibits similar conduct" to the "closest approximate" offense is contradictory and confusing. It is contradictory because all previous uses of "comparable" in K.S.A. 21-6811 provide both a rule for when an out-of-state offense is comparable to a Kansas offense, and a rule for when the out-of-state offense is not comparable to a Kansas offense. However, by looking to the "closest approximate" Kansas offense HB 2048 implies there is always a comparable offense. That contradicts the way the statute already works. It is also confusing because it provides no guidance to determine what prohibiting "similar conduct" means. Courts and attorneys will be left to guess how out-of-state offenses will be classified, which, as discussed below, leads to constitutional problems.

In sum, further clarification of "comparable" is unnecessary following *Wetrich*, and even if it was, HB 2048 only add confusion.

HB 2048 is unconstitutional and will cause arbitrary results in the long run.

Even beyond the criticisms of HB 2048, it is also constitutionally infirm in two distinct ways, both of which were warned of in the *Wetrich* opinion.

The restrictions imposed by the right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution

In 2000, the United States Supreme Court decided *Apprendi v. New Jersey*, which held that the Sixth, and Fourteenth Amendments require any fact that increases the maximum penalty for a crime to be proven to a jury beyond a reasonable doubt.[11]

In 2013, the Court decided *Descamps v. U.S.*, which, while interpreting the federal Armed Career Criminal Act (ACCA), made clear that *Apprendi* applied to the use of a prior conviction to enhance the sentence of a subsequent offense. But the prior crimes at issue generally arose under state, rather than federal statutes, so the question was how to determine if they were comparable to the generic federal offense triggering sentence enhancement. The Court began by recognizing that any factual finding beyond the mere existence of a prior crime is a fact that must be proven to a jury beyond a reasonable doubt to comport with *Apprendi*.[12] Highly summarized, in order for a prior conviction to be comparable, it could not be broader than the generic federal offense. In other words, it had to have identical-or-narrower elements (the facts required to prove the offense under the applicable statute) than the elements of the generic federal offense.

In 2016, the Court again reiterated its holding in *Descamps* in *Mathis v. U.S.*, making clear that "a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same."[13] The Court again made clear that the only constitutional way to utilize a prior offense for sentencing enhancement is if the statutory elements of the prior conviction are identical-or-narrower than the statutory elements of the current offense to which it is being compared. In so doing, it emphasized that the label a jurisdiction assigns to a particular offense "has no relevance" to the comparability analysis.[14]

In *Wetrich*, the Kansas Supreme Court noted those cases, and their own cases adopting that standard, stating, "The clear implication in *Dickey* is that constitutional constraints would require that, to be a comparable offense, a prior out-of-state crime must have identical or narrower elements

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[11] *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).
[12] *Descamps v. U.S.*, 570 U.S. 254, 260-261, 269, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).
[13] *Mathis v. U.S.*, -- U.S. --, 136 S.Ct. 2243, 2252, 2254, 195 L.Ed.2d 604 (2016).
[14] *Mathis v. U.S.*, 136 U.S. at 2251.

than the Kansas offense to which it is being compared."[15] However, the Kansas Supreme Court found it unnecessary to decide that constitutional rule was necessary because it construed "comparable" in K.S.A. 21-6811 as consistent with the Sixth Amendment.

HB 2048 now expressly tries to undo that meaning of comparable by removing the requirement that the elements of the out-of-state offense be identical to or narrower than the corresponding Kansas offense. The Kansas Supreme Court has already provided the warning with this regard. HB 2048 is constitutionally infirm under Sixth Amendment standards.

The restrictions imposed by the right to notice under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution

In 2015, the United States Supreme Court decided *Johnson v. U.S.*, which held that the "residual clause" of ACCA, which provided for sentencing enhancement if a defendant had three prior convictions for a "violent felony", was unconstitutionally vague because it "both denies fair notice to defendants and invites arbitrary enforcement by judges."[16] The problems with that clause were two-fold:

> "In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'"[17]

The second problem was that "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[18] Those problems combined in *Johnson* resulting in a sentencing statute that was unconstitutionally vague.[19] Because *Johnson*'s vagueness finding functionally removed the ACCA's residual clause, the ruling had retroactive effect requiring the resentencing of numerous defendants.[20]

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[15] *State v. Wetrich*, 307 Kan. 552, 557, 412 P.3d 984 (2018)
[16] *Johnson v. U.S.*, 135 S. Ct. 2551, 2557, 192 L.Ed.2d 569 (2015).
[17] *Johnson v. U.S.*, 135 S. Ct. at 2557.
[18] *Johnson v. U.S.*, 135 S. Ct. at 2558.
[19] *Johnson v. U.S.*, 135 S. Ct. at 2558.
[20] *Welch v. U.S.*, 136 S. Ct. 1257, 1265, 194 L. Ed. 2d 387 (2016).

The Kansas Supreme Court in *Wetrich* indicated that the vagueness problems of *Johnson* would arise under the Kansas statutes if not construed to provide a reliable process, stating:

> "Allowing sentencing courts to utilize an imprecise, ad hoc comparison of out-of state crimes to Kansas offenses under K.S.A. 2017 Supp. 21-6811(e)(3) to enhance the current Kansas sentence promotes, rather than curtails, the disparate treatment of similarly situated persons that the KSGA sought to cure. Moreover, statutes fixing sentences that are so vague that the test for enhancement devolves into "guesswork and intuition" can run afoul of due process considerations. See *Johnson v. United* States, 576 U.S. ——, 135 S.Ct. 2551, 2556-59, 192 L.Ed. 2d 569 (2015) (finding enhancement residual clause of ACCA unconstitutionally vague)."[21]

In making the decision that it did, the Kansas Supreme Court narrowly avoided the far broader consequences that a vagueness finding would entail. However, the "similar conduct" inquiry mentioned in HB 2048 is almost identical to the vagueness concerns identified in *Johnson* and warned about in *Wetrich*. It asks courts to rely upon a "judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." Likewise, it leaves uncertain what is actually necessary for an out-of-state offense to be comparable to a Kansas offense. HB 2048 sets up the same vagueness problem that the Kansas Supreme Court avoided with the *Wetrich* opinion.

HB 2048 is constitutionally infirm under the due process clauses of the Fifth and Fourteenth Amendments.

Conclusion

HB 2048 injects unnecessary language into K.S.A. 21-6811 that creates unneeded confusion and is unconstitutional. In short, there is no need to enact HB 2048.

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[21] *State v. Wetrich*, 307 Kan. 552, 561, 412 P. 3d 984 (2018)

Appendix A

1993 Nondrug Grid

SENTENCING RANGE - NONDRUG OFFENSES

Category→	A	B	C	D	E	F	G	H	I
Severity Level ↓	3+ Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3+ Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2+ Misdemeanors	1 Misdemeanor No Record
I	204 194 185	193 183 173	178 170 161	167 158 150	154 146 138	141 134 127	127 122 115	116 110 104	103 97 92
II	154 146 138	144 137 130	135 128 121	125 119 113	115 109 103	105 100 95	96 91 86	86 82 77	77 73 68
III	103 97 92	95 90 86	89 85 80	83 78 74	77 73 68	69 66 62	64 60 57	59 55 51	51 49 46
IV	86 81 77	81 77 72	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	68 65 61	64 60 57	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

LEGEND

Presumptive Probation

Border Box

Presumptive Imprisonment

1993 Drug Grid

SENTENCING RANGE - DRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

LEGEND
Presumptive Probation
Presumptive Imprisonment

Appendix B

2010 Nondrug Grid

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 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
12 months for felonies classified in Severity Levels 7-10

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

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

SENTENCING RANGE – DRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misd.	1 Misd. No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

Probation Terms are:

36 months recommended for felonies classified in Severity Levels 1-2

18 months (up to) for felonies classified in Severity Level 3
and, on and after July 1, 2009, felony cases sentenced pursuant to K.S.A. 2010 Supp. 21-4729 (SB 123)

12 months (up to) for felonies classified in Severity Level 4

Postrelease Supervision Terms are:

36 months for felonies classified in Severity Levels 1-2

24 months for felonies classified in Severity Level 3

12 months for felonies classified in Severity Level 4 except for some K.S.A. 2010 Supp 21-36a06 (K.S.A. 65-4160 and 65-4162) offenses on and after 11/01/03.

Postrelease for felonies committed before 4/20/95 are:

24 months for felonies classified in Severity Levels 1-3

12 months for felonies classified in Severity Level 4

2010 Drug Grid