

STATE OF KANSAS
Tenth Judicial District
OFFICE OF DISTRICT ATTORNEY
STEPHEN M. HOWE, DISTRICT ATTORNEY
March 15, 2019

Re: House Bill 2048

Dear Chairman Wilborn and Committee Members Thank you for the opportunity to submit our written response in support of HB 2048.

Elements and Increase Punishments

Crimes are statutory creations that require certain facts - called elements - to be proven to a jury beyond a reasonable doubt.¹ But whether a fact is an element of the offense is a question of constitutional law, and is answered by the courts.

The United States Supreme Court, in *Apprendi v. New Jersey*, has defined an “element of an offense” as: “any fact that increases the penalty for a crime beyond the prescribed statutory maximum.”²

To give an example of an element, to convict John Doe of burglary, the State would be required to establish that he, (1) without authority, (2) entered or remained within any structure,³ (3) with the intent to commit a felony, theft, or sexually motivated crime therein.⁴ In Kansas, this would be a severity-level-seven offense, carrying a maximum sentence of thirteen months in prison.

If the state was able to prove, beyond a reasonable doubt, that there was a person inside the structure, then John would be guilty of a severity-level-five person felony, and be subject to a sentence of up to thirty-four months in prison.⁵ If the State were able to additionally establish that the structure was a dwelling, then John would be guilty of a severity-level-four person felony, and be subject to up to forty-three months in prison.⁶ Because these additional facts (person inside and dwelling) expose John to a longer sentence, the constitution requires that they be considered an element of the offense, which must be put to a jury and proven beyond a reasonable doubt.

If, however, the fact does not expose John to a longer sentence, it is, by itself, not an element of the offense. For example, the state could convict John of burglary by establishing, beyond a reasonable doubt, that he entered or remained within a “structure.” The fact that the structure is a building, manufactured home, mobile home, or tent does not change the length of the defendant’s sentence, so the type of structure is not an element of the offense.⁷

Apprendi and Criminal History

The one exception to the *Apprendi* rule is for prior crimes used to increase a defendant’s sentence.⁸ The rationale for 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.

If John was convicted of a severity-level-five burglary, his maximum sentence would be thirty-four months in prison. But if the State could establish that John has a prior conviction, then he can (and will) be exposed to a longer sentence; that fact (the prior conviction) need not be put to a jury and proven beyond a reasonable do

Person versus Nonperson Offense

Wetrich requires an understanding of how strongly Kansas has distinguished and emphasized person, over nonperson, crimes. If John had been convicted of rape, a severity-level-one crime, and he had three prior nonperson felonies, he would have a criminal history score of “E,” subject to a maximum sentence of 246 months in prison. If, however, those crimes were scored person felonies, he would have a criminal history score of “A,” be subjecting him to a sentence of up to 653 months in prison. The same person, the same crime in Kansas, but different interpretations of a prior conviction can result in a thirty-three year difference in a defendant’s sentence.

The designation of person/nonperson most significantly affects those individuals who are charged with the most serious of offenses - a primary objective of the Kansas Sentencing guidelines since 1993. If John was convicted of burglary of a structure, scoring one crime as a nonperson felony (rather than person) would reduce his sentence from twenty-six to seventeen months. If, however, John was convicted of rape, it would reduce his sentence from a maximum of 267 months to 203 months: a reduction of over five years in prison solely based upon how that one burglary conviction was scored.

And it is likely that, if John is brazen enough to break into an occupied home, he has committed other similar burglaries. If he were convicted of rape and three of his burglary convictions were scored as nonperson (rather than person) felonies, he could receive a reduction in his sentence from 653 months to 246 months in prison.⁹

Wetrich's Application

If the severity level of the crime is the "mind" of the sentencing guidelines, the scoring of prior convictions as person or nonperson is almost certainly the "heart," and *Wetrich* is its pacemaker. For more than 25 years, Kansas sentencing courts determined if an out-of-state prior offense was a "person" felony or not by evaluating whether that out-of-state conviction was comparable to a Kansas person offense by finding the closest approximation, without reference to whether the elements were absolutely identical. In fact, decades of caselaw made clear the elements of the prior offense need not be identical to the Kansas offense; merely comparable.

But *Wetrich* changed all of that in 2017. *Wetrich* determines when a crime is a person or nonperson felony. In *Wetrich*, the court was asked to determine if a prior Missouri conviction for burglary should be scored a person or nonperson offense. Until *Wetrich*, burglary convictions out of Missouri were always considered person offenses for purposes of criminal history scoring in Kansas. But *Wetrich* argued that the Missouri conviction for burglary was not "comparable" to the Kansas person crime of burglary, as it was broader. The State argued that the term "comparable" only required that they be similar, not identical or narrower.

The *Wetrich* Court found that, to be comparable under the statute, the elements of the out-of-state conviction must be identical or narrower than the comparable Kansas Crime. It went on to find that the Missouri burglary statute was broader than the Kansas offense of burglary, as it allowed a defendant to be convicted when he had the intent to commit *any* crime, whereas Kansas limits burglary to an intent to commit thefts, felonies, and sexually motivated crimes.

Most people would not define "comparable" as "identical or narrower." But the Court confined the term "comparable" to meet what it concluded satisfies constitutional muster. Although the *Wetrich* decision was not explicitly based upon constitutional law, it has defined a constitutional bright line.

Wetrich and Equal Protection

For the most part, the *Apprendi/Wetrich* rule works well with Kansas crimes committed under the Kansas Sentencing Guidelines. The elements found in Kansas crimes are generally consistent over time. For example, the elements of rape in Kansas in 1995 (i.e. sexual intercourse without consent) are the same today.

Unfortunately, *Wetrich* has wreaked havoc on the determination of out-of-state prior convictions. It has caused out-of-state convictions (like burglaries of residences, child molestation, and even murder) to be scored as nonperson felonies.

And it is irrelevant if the facts in the out-of-state conviction are identical with the elements of the Kansas crime. The courts only compare the statutory elements. So, even had the State been able to prove that *Wetrich* intended to commit a theft when he entered the dwelling, it would not have mattered. Because the elements within the Missouri burglary statute are broader, not the facts in any given case, *Wetrich* requires that the prior offense of burglary from Missouri always be treated as a nonperson felony.

A potentially devastating repercussion of *Wetrich* is that Kansas residents (i.e. people who have committed their crimes in Kansas) will serve longer sentences than those who committed their crimes elsewhere.

States cannot treat individuals from other states differently than they treat their own citizens.¹⁰ The fact that *Wetrich* results in disparate treatment could result in no convictions being scored as person felonies.

House Bill 2048

It appears that a *Wetrich* fix may not be a viable option this year. But while an overhaul of sentencing takes place, HB 2048 will be a significant improvement on the scoring of out-of-state convictions. Instead of focusing on the entire crime, like in *Wetrich*, the HB 2048 focuses on specific elements of a crime

