Senate Judiciary Committee
March 19, 2019
Senate Bill 80

Kansas Association of Criminal Defense Lawyers
Opponent

Dear Chairman Wilborn and Members of the Committee:

On behalf of the Kansas Association of Criminal Defense Lawyers, we appear today in opposition to HB 2048. We are attorneys in Kansas practicing in the field of criminal defense appeals. HB 2048 is a hastily written and unnecessary change to the way out-of-state prior convictions are scored in Kansas. It is replacing a stable system with one that will overly score out-of-state prior convictions as person offenses, failing to reserve prison space for the most serious recidivist offenders. It also contains an unconstitutional retroactivity provision.

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, 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. 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.

Importantly, Kansas law prohibits prosecutors and criminal defendants from engaging in any form of plea bargaining over the criminal history of the defendant.[5] When a criminal defendant enters a guilty or no contest plea, neither the State nor a defendant is guaranteed a particular criminal history score. This is the case even though the difference between a single criminal history box on the sentencing grid can have tremendous impact, such as changing whether a defendant is presumed to receive a probation sentence rather than a prison sentence, or changing a defendant's prison sentence by several years.

That process of 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. To give some scale to just how much labeling goes into all of this, Kansas has over 200 different criminal statutes in our criminal code, and many of those statutes then contain several different crimes, all of which require the labeling discussed above.[6] 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. Approximately 130 of those statutes contain crimes that are labeled as nonperson felonies or misdemeanors.[7]

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[5] K.S.A. 21-6812(f)

[6] K.S.A. 21-5401 through K.S.A. 21-6509

[7] K.S.A. 21-5410, K.S.A. 21-5418, K.S.A. 21-5428, K.S.A. 21-5504, K.S.A. 21-5513, K.S.A. 21-5603, K.S.A. 21-5606, K.S.A. 21-5609, K.S.A. 21-5705, K.S.A. 21-5706, K.S.A. 21-5707, K.S.A. 21-5708, K.S.A. 21-5709, K.S.A. 21-5710, K.S.A. 21-5712, K.S.A. 21-5713, K.S.A. 21-5714, K.S.A. 21-5801, K.S.A. 21-5802, K.S.A. 21-5803, K.S.A. 21-5805, K.S.A. 21-5806, K.S.A. 21-5807, K.S.A. 21-5808,

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.[8] 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.[9] 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.[10] All those uses of the 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*.[11] In that opinion the Court synthesized legislative history and the purpose of the KSGA to develop a workable, and constitutionally

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K.S.A. 21-5809, K.S.A. 21-5811, K.S.A. 21-5812, K.S.A. 21-5813, K.S.A. 21-5817, K.S.A. 21-5818, K.S.A. 21-5819, K.S.A. 21-5821, K.S.A. 21-5822, K.S.A. 21-5823, K.S.A. 21-5824, K.S.A. 21-5825, K.S.A. 21-5826, K.S.A. 21-5827, K.S.A. 21-5828, K.S.A. 21-5829, K.S.A. 21-5830, K.S.A. 21-5831, K.S.A. 21-5832, K.S.A. 21-5834, K.S.A. 21-5835, K.S.A. 21-5837, K.S.A. 21-5838, K.S.A. 21-5839, K.S.A. 21-5840, K.S.A. 21-5902, K.S.A. 21-5903, K.S.A. 21-5904, K.S.A. 21-5905, K.S.A. 21-5906, K.S.A. 21-5907, K.S.A. 21-5910, K.S.A. 21-5911, K.S.A. 21-5912, K.S.A. 21-5913, K.S.A. 21-5914, K.S.A. 21-5915, K.S.A. 21-5917, K.S.A. 21-5918, K.S.A. 21-5919, K.S.A. 21-5920, K.S.A. 21-5922, K.S.A. 21-5923, K.S.A. 21-5927, K.S.A. 21-5928, K.S.A. 21-5929, K.S.A. 21-5930, K.S.A. 21-5931, K.S.A. 21-5935, K.S.A. 21-5936, K.S.A. 21-5937, K.S.A. 21-5938, K.S.A. 21-5939, K.S.A. 21-6001, K.S.A. 21-6002, K.S.A. 21-6003, K.S.A. 21-6004, K.S.A. 21-6005, K.S.A. 21-6101, K.S.A. 21-6102, K.S.A. 21-6103, K.S.A. 21-6104, K.S.A. 21-6105, K.S.A. 21-6107, K.S.A. 21-6108, K.S.A. 21-6202, K.S.A. 21-6205, K.S.A. 21-6206, K.S.A. 21-6207, K.S.A. 21-6301, K.S.A. 21-6302, K.S.A. 21-6303, K.S.A. 21-6304, K.S.A. 21-6305, K.S.A. 21-6306, K.S.A. 21-6308a, K.S.A. 21-6310, K.S.A. 21-6311, K.S.A. 21-6317, K.S.A. 21-6318, K.S.A. 21-6321, K.S.A. 21-6322, K.S.A. 21-6324, K.S.A. 21-6332, K.S.A. 21-6401, K.S.A. 21-6402, K.S.A. 21-6404, K.S.A. 21-6405, K.S.A. 21-6406, K.S.A. 21-6407, K.S.A. 21-6408, K.S.A. 21-6409, K.S.A. 21-6412, K.S.A. 21-6414, K.S.A. 21-6415, K.S.A. 21-6416, K.S.A. 21-6417, K.S.A. 21-6418, K.S.A. 21-6419, K.S.A. 21-6501, K.S.A. 21-6502, K.S.A. 21-6503, K.S.A. 21-6504, K.S.A. 21-6505, K.S.A. 21-6506, K.S.A. 21-6507.

[8] K.S.A. 21-6811(e)(2)(B)

[9] K.S.A. 21-6811(e)(2)(C)

[10] K.S.A. 21-6811(e)(3)

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

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."[12] This is the same test that is employed in Federal Courts to classify prior state crimes for sentencing under the Armed Career Criminals Act.[13] 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.

HB 2048 changes the way criminal sentencing currently works

HB 2048 seeks to undo the clarity now present in criminal sentencing brought by *State v. Wetrich* by changing the way prior out-of-state felony convictions are scored as either person on nonperson crimes. Whereas the *State v. Wetrich* test looked to which crimes are currently labeled as person crimes in Kansas and then sees if the out-of-state crime would fit one of those, HB 2048 now seeks to label an out-of-state crime as person so long of it has any one of approximately 40 different elements listed in (B)(i) and (B)(ii). For a number of reasons discussed below, this is a bad approach for classifying out-of-state crimes.

The changes HB 2048 makes are not well thought out

There are a number of reasons why HB 2048 in its current form is a bad approach for classifying out-of-state crimes as person or nonperson. The first problem is that it will result in a tremendous number of traditionally "nonperson" offenses being scored as "person" offenses. This is because the elements approach in HB 2048 is poorly tailored to the complex distinctions between person and nonperson crimes in Kansas. In broad strokes, person crimes are crimes where a person is physically hurt, whereas nonperson crimes involve most everything else. The elements listed in HB 2048, while they may seem to be tailored to instances of physical harm, are actually quite broad and encompass a number of what would be nonperson crimes in Kansas.

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

As a first example, take the element listed in (B)(i)(a) "death . . . of a human being." It may seem at first glance that any crime featuring the death of a human being would a "person" offense. That is not so. Kansas has three nonperson crimes that contain the death element, including the crime of failing to report a death.[14] That means under HB 2048 that a person with an out-of-state conviction that is identical to any of those nonperson Kansas offenses is going to be scored as a person offense, resulting in harsher sentencing. When something as basic as a "death" is leading to those problems, it becomes obvious that HB 2048 is going to lead to a lot more of those problems. Rather than go through every single one of them we have identified so far, we will just focus on some of the worst.

What is likely going to be the worst problem in HB 2048 overclassifying crimes as person is contained in subsections (B)(i)(d) and (B)(ii) which label crimes as person so long as the elements indicate the presence of another person during the commission of the prior crime, whether actually in person or just their presence electronically or telephonically. After a quick look at the Kansas criminal code, there appear to be about 50 different statutes for nonperson crimes that would fit under that definition.[15] That means over a third of Kansas' nonperson crimes would be classified as person offenses if a defendant committed the identical offense in another state. This seems obvious when you consider that many different property crimes still require another person be present, such as fraud or bribery.[16] That will lead to a massive number of defendants being subject to harsher sentences solely because their prior crimes occurred in another state. That is a problem for the Kansas justice system.

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[14] Failure to report the death of a child. K.S.A. 21-5938(b)(1) Interference with law enforcement K.S.A. 21-5904(a)(1)(D)(falsely reporting info on a death); 21-5418. Hazing

[15] K.S.A. 21-5410, K.S.A. 21-5428, K.S.A. 21-5603, K.S.A. 21-5609, K.S.A. 21-5708, K.S.A. 21-5801, K.S.A. 21-5805, K.S.A. 21-5821, K.S.A. 21-5822, K.S.A. 21-5823, K.S.A. 21-5824, K.S.A. 21-5825, K.S.A. 21-5829, K.S.A. 21-5831, K.S.A. 21-5832, K.S.A. 21-5835, K.S.A. 21-5838, K.S.A. 21-5839, K.S.A. 21-5840, K.S.A. 21-5903, K.S.A. 21-5905, K.S.A. 21-5907, K.S.A. 21-5912, K.S.A. 21-5913, K.S.A. 21-5917, K.S.A. 21-5919, K.S.A. 21-5923, K.S.A. 21-5927, K.S.A. 21-5928, K.S.A. 21-5929, K.S.A. 21-5936, K.S.A. 21-6001, K.S.A. 21-6004, K.S.A. 21-6005, K.S.A. 21-6101, K.S.A. 21-6102, K.S.A. 21-6103, K.S.A. 21-6105, K.S.A. 21-6202, K.S.A. 21-6207, K.S.A. 21-6303, K.S.A. 21-6406, K.S.A. 21-6407, K.S.A. 21-6501, K.S.A. 21-6502, K.S.A. 21-6503, K.S.A. 21-6505, K.S.A. 21-6506, K.S.A. 21-6507, K.S.A. 21-6508.

[16] K.S.A. 21-5801, K.S.A 21-6001.

Perhaps noticing the overly broad nature of (B)(i)(d) and (B)(ii), HB 2048 tries to contain the limiting statement that the "person" element will not apply to "the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or noncontrolled substance." However, upon closer examination, that language does nothing to limit the scope of the provision. For example, "a charged accomplice" is simply not part of the elements of the crime; it will never be present because no crime lists as an element "a charged accomplice." Likewise, many crimes can indicate the presence of non-victims who are also not "charged accomplices" like illegal gambling.[17] Even further, the limitation for distribution-type crimes is tied to a "controlled substance or noncontrolled substance." We do not know what a "noncontrolled substance" is because it is not statutorily defined, but there are many nonperson crimes that would potentially go beyond that such as distributing counterfeit currency.[18] Likely the phrase should be "any item" rather than "controlled or noncontrolled substance." In any event, even where HB2048 tries to limit its scope it fails.

As a final point, just consider the use of the word "person" as an element in HB 2048. That might seem like an unambiguous phrase that will not cause problems. However, under the Kansas Criminal Code the term "person" is defined as "an individual, public or private corporation, government, partnership, or unincorporated association."[19] So even those words, using the Kansas criminal code's definitions will lead to broader than expected results. HB 2048 is potentially treating out-of-state crimes against corporations as "person" offenses.

This is all to say that HB 2048 in its current form is poorly thought out. It is overly broad in many areas, and is sure to miss things in other areas. The Kansas justice system is not going to be improved by this hasty rewrite of criminal sentencing matters.

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[17] K.S.A. 21-6404
[18] K.S.A. 21-5840(2)
[19] K.S.A. 21-5111(t)

HB 2048 is worse at classifying out-of-state crimes than *Wetrich*

Another important point in all of this is that HB2048 is worse than the current system following the *State v. Wetrich* opinion. When looking at HB 2048 it should first be important to ask why it is necessary to change anything 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*.

It is also important to note one of the important parts of *Wetrich* that is lost in HB 2048 – it recognizes that Kansas does not have an interest in classifying out-of-state crimes as person offenses when the crimes are for conduct that could be either a nonperson offense, or even noncriminal in Kansas. We believe that Kansas does have a strong interest in having a system that treats prior convictions the same regardless to whether they happened in another state or in Kansas. However, we do not believe that Kansans have an interest in having criminal defendants treated as violent recidivists when they have prior convictions for crimes that would not be considered such if they occurred in Kansas, or their prior conviction was for conduct that would not be criminal at all in Kansas. The *Wetrich* test handles that problem. HB 2048 does not, and will result in many defendants being treated as dangerous recidivists even though their criminal history is for conduct that would not be a person offense if it occurred in Kansas.

Finally, there is one last benefit to the *Wetrich* test, it is flexible. The *Wetrich* test can be used to match any out-of-state crime to the Kansas system. It uses the entire Kansas criminal code as its bedrock for comparison. In contrast, HB 2048 is limited to the approximately 40 elements that were considered as it was hastily drafted. It is going to miss things that the *Wetrich* test would have caught. Replacing the *Wetrich* test with HB 2048 is not an improvement for Kansas.

HB 2048 is an example of a hastily written statute in response to a court case that had an unfavorable result for the State. It is trading the stability of the current system for something new and unknown in order to "fix" the sentences of a handful of defendants. Its impact and consequences are unknown. Just last week, the Kansas Supreme Court had a week of arguments including many in cases trying to understand the impact of other legislative changes to the sentencing process made in similar circumstances. The changes are happening so quickly the court system does not even have time to understand what last changed before the new ones set in. *Wetrich* should not be undone by HB 2048 – it should be allowed to develop through the Courts, and this legislature should consider when a "fix" is needed once there is time to get actual data on the impact and consider a statute that is well-tailored to the problem.

The retroactive application of HB 2048 violates the constitutional prohibition on ex post facto laws

Finally, it is important to point out that even if this legislature believes HB 2048 is necessary, the bill should not be made retroactive as doing so is unconstitutional as it violates the prohibition on ex post facto laws. The Ex Post Facto Clause of Article 1, § 10 of the United States Constitution states that "[n]o State shall . . . pass any . . . ex post facto Law." While there are several categories of ex post facto violations, the one relevant to this discussion is "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."[20]

Kansas courts have not directly addressed this issue

To date, Kansas appellate courts have not had to directly address whether an ex post facto violation would occur through retroactive legislation that increases a defendant's criminal history score to place them in a different grid box. By our review, the only time the legislature has made a retroactive change to the way prior convictions are scored was through 2015 HB 2053, often referred to as "the Murdock fix". Because the Kansas Supreme Court ultimately overruled *Murdock* and several years of precedent to reach a statutory interpretation consistent with 2015 HB 2053 (meaning

[20] *Peugh v. United States*, ___ U.S. ___, 133 S. Ct. 2072, 2081 (2013) (quoting *Calder v. Bull*, 3 U.S. [3 Dall.] 386, 397, [1798]).

nothing actually changed due to 2015 HB 2053), it did not have to address the potential ex post facto violations.[21] Even so, the Kansas Supreme Court suggests that 2015 HB 2053's retroactive application could have been an ex post facto violation:

> "... the question of whether the amended statute increases punishment is at the heart of the defendant's claim. . . . [T]he amended statute [i.e. the amendment in 2015 HB 2053] was not in effect when Keel's sentencing issues arose, and the issue was not addressed in district court, was not a part of the original appeal, was not argued before this court, and was not comprehensively addressed in the subsequent briefs filed in this matter. In passing these amendments, the legislature explicitly indicated its intention that the amendments are to be applied retroactively. *We note this expressed intention is not dispositive of any constitutional question that might have arisen in this case under the Ex Post Facto Clause.* [Internal citation omitted.][22] But today's decision eliminates the need for any ex post facto analysis to occur in this case."[23]

The Hard 50 fix is not analogous to this proposed retroactive amendment

Some may suggest that the retroactivity of HB 2048 would not be an ex post facto problem because it is like the Hard 50 fix. That is referring to the 2013 special session called to address the U.S. Supreme Court's decision in *Alleyne v. U.S.*, 570 U.S. 99 (2013). The ruling in *Alleyne* meant the Kansas "Hard 50" law was unconstitutional because a judge, rather than a jury, decided whether to impose the sentence. The legislature quickly passed an amendment, which applied retroactively, to create a procedure by which a jury would decide whether to impose life with no possibility of parole for 50 years rather than the presumptive sentence of life with no possibility of parole for 25 years.

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[21] *State v. Keel*, 302 Kan. 560, 590, 357 P.3d 251 (2015)

[22] *See also Bernhardt, 304 Kan. at 480: "[T]he legislature cannot simply declare a statutory* amendment 'procedural,' thereby insulating later application of the changed law from ex post facto scrutiny."

[23] *Keel*, 302 Kan. at 590-91 (emphasis added).

In *State v. Bernhardt*, 304 Kan. 460 (2016), the Kansas Supreme Court held that retroactive application of the special session law was not an ex post facto violation, because Mr. Bernhardt's potential sentence had not changed — the only change was to the procedure by which it could be imposed. *Bernhardt*, 304 Kan. at 480. The Hard 50 was an available sentence at the time Bernhardt committed his crime — the amended procedure did not increase his possible sentence. *Bernhardt* drew support from *Dobbert v. Florida*, 423 U.S. 282 (1977) (which ties into a case in the next section).

But what we have with HB 2048 is not a different procedure to reach the same possible sentence. To the contrary, the amendment's proponents have testified, at length, that *it is expressly their intent to increase* the Kansas sentences that defendants with out-of-state prior convictions would receive.

This issue has been decided by the United States Supreme Court

Even though Kansas appellate courts have not had to directly reach the issue, the matter is well settled by United States Supreme Court precedent. In 2013, the United States Supreme Court addressed retroactive application of amended federal sentencing guidelines, with a majority holding that doing so violated the Ex Post Facto Clause. *Peugh*, 133 S. Ct. at 2088. In *Peugh*, the defendant, who had been convicted of bank fraud based on an incident that occurred in 2000, argued that retroactive application of the 2009 Federal Sentencing Guidelines on him violated the Ex Post Facto Clause because the 2009 guidelines called for a longer sentence (i.e. 70 to 87 months) than was the suggested sentence when he committed bank fraud in 2000 (i.e. 30 to 37 months). *Peugh*, 133 S. Ct. at 2081.

In analyzing Mr. Peugh's Ex Post Facto claim, the Court noted that the "touchstone of this Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh*, 133 S. Ct. at 2082 (emphasis added) (citing *Garner v. Jones*, 529 U.S. 244, 250 (2000) (quoting *California Dep't of Corr. v. Morales*, 514 U.S. 499, 509 [1995]). The Court held that retroactive application of the 2009 Sentencing Guidelines violated the Ex Post Facto Clause: "[T]he Ex Post Facto Clause forbids the [government] to enhance the measure of punishment by altering *the substantive 'formula' used to calculate the applicable sentencing range*. That is precisely what the amended Guidelines did here."

Peugh, 133 S. Ct. at 2088 (citing *Morales*, 514 U.S. at 500)(emphasis added). Thus, the Court vacated Mr. Peugh's sentence.

The *Peugh* Court also cited a prior case, *Miller v. Florida*, 482 U.S. 423 (1987) to support its conclusion. When Mr. Miller committed his offense, the Florida sentencing guidelines called for a presumptive sentence of 3 ½ to 4 ½ years in prison; after commission of the offense, the Florida Legislature revised its sentencing guidelines and, at the time of sentencing, the revised guidelines called for a presumptive sentence of 5 ½ to 7 years in prison. *Miller*, 482 U.S. at 424-25. The Florida Supreme Court had held that this change was "merely a procedural change" not implicating the Ex Post Facto 4 Clause. *Miller*, 482 U.S. at 428. The United States Supreme Court unanimously disagreed. Although the difference between procedure and substance is sometimes murky, the *Miller* Court saw it clearly in that case:

> "Although the distinction between substance and procedure might sometimes prove elusive, here the change at issue appears to have little about it that could be deemed procedural. The 20% increase in points for sexual offenses in no way alters the method to be followed in determining the appropriate sentence; it simply inserts a larger number into the same equation. The comments of the Florida Supreme Court acknowledge that *the sole reason for the increase was to punish sex offenders more heavily*; the amendment was intended to, and did, increase the "quantum of punishment" for category 2 crimes."[24]

The *Miller* Court analyzed *Dobbert* (which the government argued as support for its position), but found it did not apply: "Thus, this is not a case where we can conclude, as we did in *Dobbert*, that '[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.'" *Miller*, 482 U.S. at 435.

[24] *Miller*, 482 U.S. at 433-34 (citations omitted) (emphasis added)

In sum, *Bernhardt* and *Dobbert* were not ex post facto because the amended statute only changed the procedure, not the possible punishment. But *Peugh* and *Miller* were ex post facto because the presumptive sentence itself increased after the relevant statutes were amended.

Applying Miller and Peugh to HB 2048

Here, changing the law to cause prior out-of-state convictions – that are currently being scored as nonperson offenses – to become scored as person offenses, and, therefore, increase a defendant's sentences, is at the heart of HB 2048. Just as in *Miller* and *Peugh*, retroactive application of the KCDAA's proposal would retroactively increase a defendant's sentence by altering the formula used to calculate the applicable sentencing range. As shown in *Miller* and *Peugh*, retroactive alteration of the formula used to calculate the applicable sentencing range would violate the Ex Post Facto Clause.

Conclusion

HB 2048 is a hastily drafted and unnecessary change to the way out-of-state prior convictions are scored in Kansas. It is replacing a stable system with one that will overly score prior convictions, failing to reserve prison space for serious recidivist offenders. Its retroactivity provisions are also unconstitutional to boot. In short, there is no need to enact HB 2048.

Respectfully,

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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	76 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	125 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	39 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 6
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:
Postrelease for felonies committed before 4/20/95 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

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