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March 19, 2019

Testimony Regarding HB 2048
Submitted by David Lowden and Aaron Breitenbach,
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On Behalf of Marc Bennett, District Attorney, Eighteenth Judicial District

Honorable Chairman Wilborn and Members of the Senate Judiciary Committee:

Thank you for the opportunity to address you regarding House Bill 2048. On behalf of Marc Bennett, District Attorney of the Eighteenth Judicial District, we join the Kansas County and District Attorneys Association, the Attorney General's Office, and others in calling for immediate legislative action to better enable sentencing courts to hold criminal offenders accountable for their out-of-state prior convictions. Current application of K.S.A. 21-6811 based on prevailing case law is causing absurd results, particularly in border counties. The people of Kansas would not want those who commit violent felonies in other states to be treated more leniently than those who commit similar or lesser prior offenses here in Kansas, but that is precisely what is happening.

As you know, this bill was amended in the House from a proposal by the Kansas Sentencing Commission to remedy the issues caused by State v. Wetrich, 307 Kan. 552, 412 P.3d 984 (2018), and related cases. Section 1 would abandon, for felony offenses, the "comparable" process in K.S.A. 21-6811(e), as different states are inevitably going to use different words to describe the multitude of dangerous or violent acts felons commit. Instead of determining an offender's criminal history through uncertain scrutiny of other legislatures' word choice, this bill allows an offender's out-of-state criminal history to be determined through an examination of the elements of the prior offense(s).

Specifically, we believe it should be the stated policy of the State of Kansas that a prior out-of-state felony that necessarily requires proof of any of the following should be treated as a person felony for the purpose of determining an offender's criminal history score pursuant to the Kansas Sentencing Guidelines Act:
(1) death or killing of any human being;
(2) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;
(3) bodily harm or injury, physical neglect or abuse, restraint, confinement or touching of any person, without regard to degree;
(4) the presence of a person, other than defendant, a charged accomplice or another person with whom defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance;

(5) possessing, viewing, depicting, distributing, recording or transmitting any image of any person;
(6) lewd fondling or touching, sexual intercourse or sodomy with or by any person or an unlawful sexual act involving a child under the age of consent;
(7) being armed with, using, displaying or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or
(8) entering or remaining within any residence, dwelling or habitation.

In addition to the benefit of extricating the legislature from the process of attempting to predict what words other states may use and how our courts will interpret them, this method of determining criminal history is inherently severable and flexible over time. If the legislature or courts find that one or more of the enumerated circumstances are too narrow, too broad, or somehow legally infirmed, it can be struck or amended in the future without jeopardizing the entire scheme. This process will not score as many out-of-state felonies as person crimes as before Wetrich, but it should provide greater certainty and public safety going forward.

As for all of the felony sentences imposed since 1993, we seek procedural relief from the storms raging across the State's district courts by amending K.S.A. 22-3504 and 21-6820 as proposed in the balloon amendment in your materials. A series of cases in recent years have led to decades old (sometimes even completed) sentences being re-litigated. In 2018, the legislature attempted to make clear that changes in the law after a sentence is pronounced should not be used to later deem a sentence "illegal." While the meaning of a "change in the law" seems clear, decisions such as State v. Smith, 56 Kan.App.2d 343 (9/14/18), indicate seismic decisions like Wetrich that contradict years of case law may be a mere "reinterpretation" of existing law, not a change itself.

Setting aside constitutional infirmities or ineffective assistance of counsel, which currently can and must be remedied by other means, if a judge follows the law as written and interpreted at the time a sentence is pronounced, it should not later be called an illegal sentence. If a defendant chooses not to timely appeal a sentence, it should stand.

In summary, we seek to more reliably identify offenders who have previously committed violent or dangerous felonies out-of-state and provide greater finality in all criminal sentences imposed. Passing this bill would further enshrine in statute two widely-held beliefs: (1) those who commit felonies in other states under circumstances our legislature recognizes to harm or endanger others should not be treated as non-violent offenders when they continue their felonious conduct against the people of Kansas; and (2) our courts, communities, and (most importantly) victims deserve finality in judgments every bit as much as defendants.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Aaron Breitenbach
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