

SESSION OF 2019

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2048

As Amended by Senate Committee on Judiciary

Brief*

HB 2048, as amended, would amend statutes in the Kansas Criminal Code and the Code of Criminal Procedure related to criminal history, appeals, and correction of illegal sentences, as follows.

Criminal History

The bill would amend a statute in the Kansas Criminal Code governing criminal history classification to make current provisions for classification of an out-of-state crime as person or nonperson applicable only to misdemeanors. The bill would then add the following provisions applicable to out-of-state felony crimes.

Out-of-State Felony Crimes

The bill would require an out-of-state conviction or adjudication for the commission of a felony offense or an attempt, conspiracy, or criminal solicitation to commit a felony offense (out-of-state felony) be classified as a person felony if one or more of the following circumstances is present, as defined by the convicting jurisdiction in the elements of the out-of-state offense:

- Death or killing of any human being;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating, or harassing any person;
- Bodily harm or injury, physical neglect or abuse, restraint, confinement, or touching of any person, without regard to degree;
- The presence of a person, other than 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 non-controlled substance;
- Possessing, viewing, depicting, distributing, recording, or transmitting an image of any person;
- 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;
- Being armed with, using, displaying, or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or
- Entering or remaining within any residence, dwelling, or habitation.

Additionally, the bill would require an out-of-state felony be classified as a person felony if the elements of the out-of-state felony necessarily prove a person was present during the commission of the offense, if the person present was someone other than 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 non-controlled substance. "Presence of a person" would include physical presence and presence by electronic or telephonic communication.

An out-of-state felony would be classified as nonperson if the elements of the offense do not require proof of any of the above circumstances.

[*Note:* The bill appears to make additional amendments by adding statutory references. However, these amendments are made to reconcile conflicting versions of the statute and are non-substantive.]

Claims in Appeals Related to Criminal Cases

The bill would amend a provision listing certain claims arising from criminal cases that may be reviewed in “any appeal” to specify that these claims may be reviewed in “any appeal from a judgment of conviction.” The claims, which would not be amended by the bill, are:

- A departure sentence resulted from partiality, prejudice, oppression, or corrupt motive;
- The sentencing court erred in including or excluding recognition of a prior conviction or juvenile adjudication for criminal history scoring purposes; or
- The sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.

The bill would state these amendments are procedural and are to be construed and applied retroactively.

Correction of Illegal Sentence

The bill would amend the statute governing correction of an illegal sentence to specify an illegal sentence may be corrected only while the defendant is serving such sentence

and to define “change in the law” as a statutory change or an opinion by a Kansas appellate court, unless the opinion is issued while the sentence is pending an appeal from the judgment of conviction.

The bill would state these amendments are procedural and are to be construed and applied retroactively.

Effective Date

The bill would be in effect upon publication in the *Kansas Register*.

Background

The bill was introduced by the House Committee on Corrections and Juvenile Justice at the request of the Kansas Sentencing Commission (KSC). As introduced, the bill would have added provisions requiring consideration of the name and elements of the out-of-state offense and whether it prohibits similar conduct to that prohibited by the closest approximate Kansas offense. The bill also would have added a statement of legislative intent.

In the House Committee hearing, the KSC executive director testified in support of the bill, stating it was intended to respond to the Kansas Supreme Court decision in *State v. Wetrich*, 307 Kan. 552 (2018). Representatives of the Kansas County and District Attorneys Association (KCDA) and Johnson County and Sedgwick County District Attorneys’ Offices offered neutral testimony supporting the intent of the bill but offering alternative language to address the *Wetrich* decision. A representative of the Office of the Attorney General provided written-only neutral testimony supporting consideration of alternative approaches. A representative of the Kansas Association of Criminal Defense Lawyers (KACDL) testified in opposition to the bill, stating it is unnecessary and unconstitutional.

The House Committee amended the bill with language based upon the neutral conferees' suggestions and added a retroactivity provision.

In the Senate Committee on Judiciary hearing, representatives of the Johnson County and Sedgwick County District Attorneys' Offices and the Office of the Attorney General testified in support of the bill. A representative of the KCDAA testified as a neutral conferee. The proponent and neutral conferees testified generally they supported the bill with the adoption of a proposed amendment that had been distributed at the hearing that would further adjust the language of the House Committee amendment, remove the retroactivity provision from the criminal history portion, and add provisions related to appeals and correction of illegal sentences. A representative of the KACDL testified in opposition to the bill, expanding on the concerns expressed before the House Committee.

The Senate Committee adopted the amendment supported by the proponents and neutral conferee.

According to the KSC's prison bed impact assessment on the bill, as introduced, in FY 2018 536 out-of-state felony convictions were recorded in offenders' five most recent and severe felony convictions.

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the KSC indicates enactment of the bill may affect prison admissions, bed space, and the KSC's workload, but the KSC cannot determine what the effects would be. The Office of Judicial Administration indicates enactment of the bill would have no fiscal effect on the Judicial Branch.