**House Corrections and Juvenile Justice Committee**
**February 9, 2021**

**House Bill 2144**
**Testimony of the Kansas Association of Criminal Defense Lawyers (KACDL)**
**Presented by Clayton Perkins**
**Neutral**

Dear Chairman Jennings and Members of the Committee:

HB 2144 will require that an appellant challenging their criminal history for the first time on appeal designate a record showing prejudicial error. I understand that the goals of the bill are to limit the number of cases being remanded by the appellate courts for sentencing hearings that will, ultimately, result in the same sentence being imposed, and to reemphasize that criminal history challenges should first occur at the district court so that sentences get fixed faster. These are understandable and reasonable goals. The KACDL is presently neutral on the bill but would be supportive of it with a few amendments to make it more workable at the district court and appellate levels.

In way of background, the criminal history worksheet that is prepared as part of the Presentence Investigation Report (PSI) pursuant to K.S.A. 21-6813 is the bedrock of Kansas' process for determining a defendant's criminal history score. That worksheet is essentially a list of a defendant's prior convictions, which is supposed to be supported by court records that should be attached to the worksheet, and then used to calculate the criminal history score. Since our sentencing grids use both the crime of conviction and the criminal history score to determine a sentence, it is a huge factor in the ultimate sentence a defendant will receive. As the PSI is often completed and provided to the parties just a few days before sentencing, and then relied upon by the parties, accuracy in the criminal history worksheet is incredibly important to making sure people get sentenced right.

Unfortunately, the criminal history worksheet does not always accurately reflect a defendant's prior convictions. For example, I had a case on appeal where a defendant was sentenced under a grid box "D" for a high-level felony based on having one prior conviction for a person felony listed on the criminal history worksheet. When I looked up the records for that prior conviction, however, I learned that he was not convicted, but had just entered a diversion agreement that did not result in a conviction, and it also should not have been scored as a person offense to begin with. Once I notified the prosecuting attorney of the mistake, they agreed it needed to be fixed. Fixing that mistake

in the criminal history worksheet changed the defendant's sentence by several years, and made sure he was sentenced accurately in accordance with Kansas' Laws.

Mistakes also happen when the criminal history worksheet does not accurately reflect the full crime of conviction. For example, if you look at our burglary statute, K.S.A. 21-5807, you can see that the statute includes both crimes that are person offenses and crimes that are nonperson offenses. A criminal history worksheet that then lists a prior conviction as just "Burglary" and "K.S.A. 21-5807" wouldn't actually tell us if it should be counted as person or nonperson, and can lead to it being scored incorrectly.

These mistakes should not happen. They should be caught by the State's attorneys who have the burden to present the evidence of the defendant's criminal history and have a duty to make sure the laws are applied accurately. Just as importantly, they should be caught by defense counsel who has the duty to advocate for their client, should recognize the mistakes, and object to them at the sentencing. But these mistakes do happen. This bill and the amendments we are asking for are about how we minimize these mistakes, and remedy them quickly, so defendants do not serve sentences longer than the law says they should, and so Kansans are not paying the costs of incarceration for folks who are incarcerated longer than the law says they should be.

In *State v. Obregon*, 309 Kan. 1267, 444 P.3d 331 (2019), the Kansas Supreme Court provided a remedy for cases like the burglary example where the criminal history worksheet does not have enough information to determine if the offense should be a person offense or nonperson offense. That remedy is to remand the case to the district court for a hearing that gives the State the opportunity to present more evidence to prove the particular subsection of the prior conviction. Usually that is done simply by providing copies of the journal entries of sentencing, which clarify the subsection. This remedy is, understandably, frustrating for the prosecution when they may already have a journal entry showing the prior conviction was scored correctly. Likewise, it can be a slow remedy for a defendant who is in prison serving too long a sentence. Particularly, in the worst-case scenarios, the appeal can take so long that the defendant has already served that illegally too long sentence before the remand is even ordered.

As it is currently written, HB 2144 solves the prosecution's frustration in avoiding those remands that change nothing, by making the defendant provide the proof on appeal that they were incorrectly scored. We are asking for four amendments that will minimize mistakes at sentencing and make the fixing of incorrect sentences faster.

The first is to subsection (b)(5) of K.S.A. 21-6813, which provides for the preparation for the criminal history worksheet as part of the PSI. As it is currently

written, that section assumes the journal entries of prior convictions will be obtained and attached to the criminal history worksheet. However, in practice, that is rarely if ever happening. To fix this, we suggest amending K.S.A. 21-6813(b)(5) as follows:

> (5) A listing of prior adult convictions or juvenile adjudications for felony or misdemeanor crimes or violations of county resolutions or city ordinances comparable to any misdemeanor defined by state law. Such listing shall include an assessment of the appropriate classification of the criminal history on the criminal history scale and the source of information regarding each listed prior conviction and any available source of journal entries or other documents through which the listed convictions may be verified. *The journal entries for each listed prior conviction that is necessary to establish the appropriate classification on the criminal history scale or to establish a special sentencing rule shall be attached to the criminal history worksheet and be part of the court record. If any other documents verifying the listed convictions* ~~If any such journal entries or other documents~~ are obtained by the court services officer, they shall be attached to the *criminal history worksheet and be part of the court record* ~~presentence investigation report~~. Any prior criminal history worksheets of the defendant shall also be attached.

This provides that the journal entries of prior convictions necessary to support a conviction will always be obtained, attached, and included in the record. This will mean that we will always start from the most accurate information in establishing a criminal history score, and prevent errors in the criminal history worksheet. This will assist the State in carrying the burden of proving a defendant's criminal history, and wards off challenges that the State did not carry that burden by relying on an inaccurate criminal history worksheet. It will also prevent defendants from serving incorrect sentences, like the example I provided above, which was apparent just by looking at the journal entry. Finally, it should provide longer term cost saving because we will not be paying the costs of incarceration for those incorrectly sentenced too long, and we will have fewer sentencing appeals.

The second amendment is to subsection (b) of K.S.A. 21-6814 to state:

> "(b) Except to the extent disputed in accordance with subsection (c), the *criminal history worksheet and attached documents prepared for the court pursuant to K.S.A. 21-6813(c)(5)* ~~summary of the offender's criminal history prepared for the court by the state~~ shall satisfy the state's burden of proof regarding an offender's criminal history."

This is primarily to clarify language that we use the criminal history worksheet from the PSI, with the attached journal entries, in establishing criminal history. We have always used the criminal history worksheet rather than some other "summary", so the language has never really made sense. It also prevents a defendant from making an argument that the State did not carry the burden by not providing some other summary.

The third amendment is to add some additional language to the proposed new subsection (d) of K.S.A. 21-6814 in HB 2144 to clarify the process for designating a record of prejudice on appeal:

> *(d) If an offender raises a challenge to the offender's criminal history for the first time on appeal, the offender shall have the burden of designating a record that shows prejudicial error. If the offender fails to provide such record, the appellate court shall dismiss the claim.* ***In designating a record of prejudice, the offender may provide the appellate court with journal entries of the challenged criminal history that were not originally attached to the criminal history worksheet, and the court may take judicial notice of those journal entries. The State may provide journal entries establishing a lack of prejudice, and the court may take judicial notice of those journal entries. The court may also take judicial notice of complaints, plea agreements, jury instructions, and verdict forms for Kansas convictions when deciding if prejudice exists. The court may remand the case if there is a reasonable question as to whether prejudice exists.***

This gives us a process for designating a record on appeal to establish prejudice, lets the State rebut that when appropriate, and lets the appellate court remand the case in the rare instance when that is necessary. As it is right now, appellate counsel has usually been allowed to add journal entries establishing prejudice to the record on appeal as documents that should have been originally attached to the criminal history worksheet. However, some recent appellate cases have questioned whether that process is an appropriate way for the State or defense to get into the record the missing documents that would allow a more expedient resolution of the appeal. This just clarifies that process.

The fourth, and final, amendment is to K.S.A. 21-6820(i), and is meant to provide a faster means to resolve these issues in the district court rather than the appellate courts:

> (i) The sentence court shall retain authority irrespective of any ~~notice of~~ appeal ~~for 90 days after entry of judgment of conviction to modify its judgement and sentence to correct any arithmetic or clerical errors~~ *to correct an illegal sentence pursuant to K.S.A. 22-3504, and amendments thereto. Notwithstanding*

*any provision to the contrary in K.S.A. 22-3504, if a motion to correct an illegal sentence is filed while a direct appeal is pending, any change in the law that occurs during the pending direct appeal shall apply.*

This would clarify that the parties can resolve these sentencing issues in the district court through a motion to correct an illegal sentence, while an appeal is pending. This provides another vehicle for a defendant who received an illegal sentence to possibly obtain relief. In fact, for those defendants serving relatively short periods of incarceration it may provide the only possibility for relief because the appellate process can be slow. It also places the issue in the district court which can best handle any evidentiary issues that could arise.

For the above reasons, we are presently neutral but would support the bill if it includes the amendments discussed in this testimony. Thank you for your time.

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