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**Testimony in Support of House Bill 2073
Concerning crimes, punishment, and criminal procedure**

**Presented to the House Corrections and Juvenile Justice Committee
By Assistant Solicitor General Natalie Chalmers**

February 5, 2019

Chairman Jennings and Members of the Committee:

Thank you for the opportunity to testify on behalf of Attorney General Derek Schmidt in support of House Bill 2073. This bill fixes three issues that have arisen from recent Kansas Supreme Court cases.

The first section is in response to *State v. Fitzgerald*, 308 Kan. 659, 423 P.3d 497 (2018). In that case, the Kansas Supreme Court reaffirmed that “any person” as the term is used in K.S.A. 21-5504(b)(1) does **not** include the defendant. This led to the reversal of Fitzgerald’s conviction for forcing an 8-year-old child to perform fellatio on him. The conviction was reversed because sufficient evidence did not fit the charge since the defendant did not qualify as “any person.”

Despite the clear holding of *Fitzgerald*, the plain language of the statute would not put a reasonable prosecutor on notice that “any person” cannot include the defendant. Thus, to prevent such reversals from ever happening again, the Office of the Attorney General encourages passing this bill. The proposed language puts prosecutors on clear notice of the caselaw so another reversal will not occur.

As a final note on this proposal, it was an intentional choice not to modify the language in (b)(3). That language should be construed as options within a means rather than alternative means. Such a construction would not require the defendant not to qualify as “any person.” As the State is currently making this argument in the appellate courts, this office does not want to endanger the conviction in that case. Moreover, specifically omitting the language in (b)(3), will clarify that “any person” can include the defendant in that section.

The second section’s purpose is to limit opinions such as *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018), which effectively undermined the ability of the State to score most out-of-state convictions as person felonies, from applying to final sentences. It does so by ensuring that challenges to a defendant’s criminal history score must either occur during the direct appeal or through the use of K.S.A. 22-3504. That goal also protects the legislative intent in passing

K.S.A. 2017 Supp. 22-3504, which was enacted to prevent changes in law, such as *Wetrich*, from applying to sentences that are already final.

The third and final section is proposed to end numerous remands to the district courts because of an insufficient inquiry into the defendant's ability to pay BIDS fees at the time the defendant is sentenced. E.g. *State v. Ayers*, 309 Kan. ___, 432 P.3d 663, 664-65 (January 11, 2019) (relying on *State v. Robinson*, 281 Kan. 538, 547, 132 P.3d 934 (2006)). *Robinson* appears difficult to follow by the district courts since it has caused remands in over 300 cases. The current language in K.S.A. 22-4513 causing such problems should be deleted. It is unnecessary in light of K.S.A. K.S.A. 21-6607(c)(4) (fees assessed with probation), and K.S.A. 22-3717(m)(5) (fees assessed by the prisoner review board upon postrelease). Those provisions allow for the court or prisoner review board to make a more accurate assessment of the defendant's ability to pay fees closer in time to when the fees would be paid.

The Office of the Attorney General encourages the adoption of this bill to ensure the effective operation of the criminal justice system. Thank you for your time.