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Testimony Regarding HB 2048
Submitted by David Lowden and Aaron Breitenbach, Assistant District Attorneys
On Behalf of Marc Bennett, District Attorney
Eighteenth Judicial District
And the Kansas County and District Attorneys Association

Honorable Chairman Jennings and Members of the House Corrections and Juvenile Justice 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, I join the Kansas Sentencing Commission 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 counties neighboring other states. It is highly unlikely the people of Kansas expect those who commit violent felony offenses in other states and then re-offend in Kansas to be treated more leniently than offenders who commit similar or lesser prior offenses here in Kansas. And yet, that is precisely what is happening. The need for change is clear.

However, the remedy currently proposed in this bill does not fix the problems caused by State v. Wetrich, 307 Kan. 552, 412 P.3d 984 (2018), and related cases. To the contrary, it further codifies a process that district and appellate courts have used to find a number of dangerous, violent out-of-state offenses are not "comparable" to Kansas person felonies and therefore incapable of being used to demonstrably enhance an offender's sentence in accord with the expectations of the legislature and our communities. Even if its drafters succeed in getting appellate courts to accept the proposed statutory guidance on how to interpret the word "comparable," it does nothing to address the yet to be resolved due process concerns our appellate courts have raised with any process of comparing one state's laws with another.

We ask this committee to consider abandoning the "comparable" process in K.S.A. 21-6811 and the current bill regarding out-of-state prior felony convictions, as different states are inevitably going to use different words in describing 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, we believe an offender's out-of-state criminal history should be determined through an examination of

the conduct or consequences comprising the elements of the prior conviction(s).

Included in the testimony of Kim Parker Kansas County and District Attorneys is our proposed amendment to K.S.A. 21-6811. In summary, we believe it should be the stated policy of the State of Kansas that a prior out-of-state felony conviction that necessarily requires proof of any of the following should be treated as a prior 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 a human being;
2) death or killing of an animal;
3) threatening harm or violence, causing fear or terror, intimidating, or harassing a person;
4) bodily harm, injury, neglect, abuse, restraint, confinement, or touching of another person, without regard to degree;
5) the presence of a person other than defendant or an alleged accomplice;
6) possessing, viewing, depicting, distributing, recording, or transmitting any image of a person;
7) "sexually explicit conduct," as defined in 21-5510(d)(1), involving any person or animal;
8) being armed with, using, displaying, or brandishing a firearm or other weapon, as defined in the jurisdiction of conviction; or
9) entering or remaining within a structure, building, 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 to name or define specific crimes and how our courts will interpret the same, this method of determining criminal history is inherently severable. If the legislature or courts find that one or more of the enumerated circumstances is too narrow, too broad, or otherwise legally infirmed, it can be struck or amended in the future without jeopardizing the entire scheme. Attempts such as the current proposal continue to put all efforts to consider out-of-state felonies in a single proverbial basket. Instead of attempting to dictate how courts should apply or interpret the legislature's intent, the legislature should more simply state its intent of the conduct it wishes to consider as a "person" crime. That is most consistent with the legislature's purview and the expectations of the communities it represents.

In summary, we seek to amend K.S.A. 21-6811 so as to more reliably identify offenders who have previously committed violent or dangerous felonies out-of-state. We ask this committee to amend the proposed bill to chart a new path for the process of examining out-of-state prior convictions that is more in line with the legislature's mandate and authority. Such an amendment would put into law a widely-held value: that 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.
Thank you for your time, attention and consideration in this matter.

Respectfully submitted,
David Lowden and Aaron Breitenbach
Assistant District Attorneys
Eighteenth Judicial District