To: House Corrections and Juvenile Justice Committee
From: Clayton J. Perkins on behalf of KACDL
RE: Ex Post Facto problems with retroactive application of KCDAA proposed language on HB 2048
Date: February 21, 2019

I am writing in response to Representative Carmichael's request for case law supporting that retroactive application of the KCDAA's proposed amendment to HB 2048 would violate the Ex Post Facto Clause of the Federal Constitution. For purposes of this discussion, I am assuming that the KCDAA's proposed language would do just what it is proposed to do: prior out-of-state convictions that, under current law, would be scored as nonperson offenses would change to be scored as person offenses, thereby placing a defendant in a higher grid box.

**Ex Post Facto Clause**

The Ex Post Facto Clause of Article 1, § 10 of the United States Constitution states that "[n]o State shall . . . pass any . . . ex post facto Law." While there are several categories of ex post facto violations, the one relevant to this discussion is "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Peugh v. United States*, ___ U.S. ___, 133 S. Ct. 2072, 2081 (2013) (quoting *Calder v. Bull*, 3 U.S. [3 Dall.] 386, 397, [1798]).[1]

**Kansas courts have not directly addressed this issue**

To date, Kansas appellate courts have not had to directly address whether an ex post facto violation would occur through retroactive legislation that increases a defendant's criminal history score to place them in a different grid box. By my review, the only time the legislature has made a retroactive change to the way prior convictions are scored was through 2015 HB 2053, often referred to as "the *Murdock* fix". Because the Kansas Supreme Court ultimately overruled *Murdock* and several years of precedent to reach a statutory interpretation consistent with 2015 HB 2053 (meaning nothing actually changed due to 2015 HB 2053), it did not have to address the potential ex post facto violations. *State v. Keel*, 302 Kan. 560, 590, 357 P.3d 251 (2015). Even so, the Kansas Supreme Court suggests that 2015 HB 2053's retroactive application could have been an ex post facto violation:

[1] Underlined items are hyperlinked to the actual cases and statutes.

> … the question of whether the amended statute increases punishment is at the heart of the defendant's claim. . . . [T]he amended statute [i.e. the amendment in 2015 HB 2053] was not in effect when Keel's sentencing issues arose, and the issue was not addressed in district court, was not a part of the original appeal, was not argued before this court, and was not comprehensively addressed in the subsequent briefs filed in this matter. In passing these amendments, the legislature explicitly indicated its intention that the amendments are to be applied retroactively. *We note this expressed intention is not dispositive of any constitutional question that might have arisen in this case under the Ex Post Facto Clause.* [Internal citation omitted.][2] But today's decision eliminates the need for any ex post facto analysis to occur in this case.

*Keel*, 302 Kan. at 590-91 (emphasis added).

**Hard 50 fix is not analogous to proposed retroactive amendment**

At the hearing on HB 2048, David Lowden from the Sedgwick County District Attorney's Office suggested that their proposed amendment be retroactively applied, arguing it would not be an ex post facto problem because it is like the Hard 50 fix. Mr. Lowden is referring to the 2013 special session called to address the U.S. Supreme Court's decision in *Alleyne v. U.S.*, 570 U.S. 99 (2013). The ruling in *Alleyne* meant the Kansas "Hard 50" law was unconstitutional because a judge, rather than a jury, decided whether to impose the sentence. The legislature quickly passed an amendment, which applied retroactively, to create a procedure by which a jury would decide whether to impose life with no possibility of parole for 50 years rather than the presumptive sentence of life with no possibility of parole for 25 years.

In *State v. Bernhardt*, 304 Kan. 460 (2016), the Kansas Supreme Court held that retroactive application of the special session law was not an ex post facto violation, because Mr. Bernhardt's potential sentence had not changed — the only change was to the procedure by which it could be imposed. *Bernhardt*, 304 Kan. at 480. The Hard 50 was an available sentence at the time Bernhardt committed his crime — the amended procedure did not increase his possible sentence. *Bernhardt* drew support from *Dobbert v. Florida*, 423 U.S. 282 (1977) (which ties into a case in the next section).

[2] See also *Bernhardt*, 304 Kan. at 480: "[T]he legislature cannot simply declare a statutory amendment 'procedural,' thereby insulating later application of the changed law from ex post facto scrutiny."

But what we have with the KCDAA's proposed amendment is not a different procedure to reach the same possible sentence. To the contrary, the amendment's proponents testified, at length, that *it is expressly their intent to increase* the Kansas sentences that defendants with out-of-state prior convictions would receive.

**This issue has been decided by the United States Supreme Court**

Even though Kansas appellate courts have not had to directly reach the issue, the matter is well settled by United States Supreme Court precedent. In 2013, the United States Supreme Court addressed retroactive application of amended federal sentencing guidelines, with a majority holding that doing so violated the Ex Post Facto Clause. *Peugh*, 133 S. Ct. at 2088. In *Peugh*, the defendant, who had been convicted of bank fraud based on an incident that occurred in 2000, argued that retroactive application of the 2009 Federal Sentencing Guidelines on him violated the Ex Post Facto Clause because the 2009 guidelines called for a longer sentence (i.e. 70 to 87 months) than was the suggested sentence when he committed bank fraud in 2000 (i.e. 30 to 37 months). *Peugh*, 133 S. Ct. at 2081.

In analyzing Mr. Peugh's Ex Post Facto claim, the Court noted that the "touchstone of this Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment *attached to the covered crimes*.'" *Peugh*, 133 S. Ct. at 2082 (emphasis added)(citing *Garner v. Jones*, 529 U.S. 244, 250 (2000) (quoting *California Dep't of Corr. v. Morales*, 514 U.S. 499, 509 [1995]). The Court held that retroactive application of the 2009 Sentencing Guidelines violated the Ex Post Facto Clause: "[T]he Ex Post Facto Clause forbids the [government] to enhance the measure of punishment by altering the *substantive 'formula' used to calculate the applicable sentencing range.* That is precisely what the amended Guidelines did here." *Peugh*, 133 S. Ct. at 2088 (citing *Morales*, 514 U.S. at 500)(emphasis added). Thus, the Court vacated Mr. Peugh's sentence.

The *Peugh* Court also cited a prior case, *Miller v. Florida*, 482 U.S. 423 (1987) to support its conclusion. When Mr. Miller committed his offense, the Florida sentencing guidelines called for a presumptive sentence of 3 ½ to 4 ½ years in prison; after commission of the offense, the Florida Legislature revised its sentencing guidelines and, at the time of sentencing, the revised guidelines called for a presumptive sentence of 5 ½ to 7 years in prison. *Miller*, 482 U.S. at 424-25. The Florida Supreme Court had held that this change was "merely a procedural change" not implicating the Ex Post Facto

Clause. *Miller*, 482 U.S. at 428. The United States Supreme Court *unanimously* disagreed. Although the difference between procedure and substance is sometimes murky, the *Miller* Court saw it clearly in that case:

> Although the distinction between substance and procedure might sometimes prove elusive, here the change at issue appears to have little about it that could be deemed procedural. The 20% increase in points for sexual offenses in no way alters the method to be followed in determining the appropriate sentence; it simply inserts a larger number into the same equation. The comments of the Florida Supreme Court acknowledge that *the sole reason for the increase was to punish sex offenders more heavily*; the amendment was intended to, and did, increase the "quantum of punishment" for category 2 crimes.

*Miller*, 482 U.S. at 433-34 (citations omitted) (emphasis added). The *Miller* Court analyzed *Dobbert* (which the government argued as support for its position), but found it did not apply: "Thus, this is not a case where we can conclude, as we did in *Dobbert,* that '[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.'" *Miller*, 482 U.S. at 435.

In sum, *Bernhardt* and *Dobbert* were not ex post facto because the amended statute only changed the procedure, not the possible punishment. But *Peugh* and *Miller* were ex post facto because the presumptive sentence itself increased after the relevant statutes were amended.

**Applying *Miller* and *Peugh* to KCDAA's amendment**

Here, changing the law to cause prior out-of-state convictions – that are currently being scored as nonperson offenses – to become scored as person offenses, and, therefore, increase a defendant's sentences, is at the heart of the KCDAA's proposal. Just as in *Miller* and *Peugh*, retroactive application of the KCDAA's proposal would retroactively increase a defendant's sentence by altering the formula used to calculate the applicable sentencing range. As shown in *Miller* and *Peugh*, retroactive alteration of the formula used to calculate the applicable sentencing range would violate the Ex Post Facto Clause.