House Corrections and Juvenile Justice Committee
February 11, 2020

House Bill 2518
Testimony of the Kansas Association of Criminal Defense Lawyers (KACDL)
Presented by Clayton J. Perkins
Opponent

Dear Chairman Jennings and Members of the Committee:

HB 2518 will treat all prior convictions that include an attached domestic violence designation as prior domestic batteries in order to enhance the punishment for actual domestic battery convictions. There are four reasons to oppose this bill.

1. **The domestic violence designation applies to property crimes.** K.S.A. 21-5111(i) defines domestic violence broadly so that it "includes any other crime committed against a person **or against property**" when directed against a person the offender had a qualifying relationship with. This means that property crimes are included as criminal offenses given the domestic violence designation pursuant to K.S.A 22-4616. HB 2518 would treat property crimes as prior domestic battery convictions even though Kansas law designates those as non-person offenses.

2. **Attorneys have not been treating the domestic violence designation like it will be used to enhance domestic batteries.** Defense counsel has a duty to inform their clients of the consequences of a conviction, including explaining what comes with having a domestic violence designation pursuant to K.S.A. 22-4616. However, HB 2518 adds a new collateral consequence to a conviction with an attached domestic violence designation. Adding a new consequence retroactively undermines the reliability of the system. It means that defendants cannot fully trust their attorneys to give them complete information because the rules might shift as time goes on. If HB 2518 is a necessary change it should be made prospectively only using express language such as:

> "(C) criminal offense **committed on or after July 1, 2020** that includes the domestic violence designation pursuant to K.S.A. 2019 Supp. 22-4616, and amendments thereto."

3. **HB 2518 could interact poorly with *State v. Fowler* and K.S.A. 21-6810(d)(10).** *State v. Fowler*, No. 116803, is a case argued before the Kansas Supreme

Court on November 1, 2019.[1] In that case, the defendant had both a felony possession of methamphetamine conviction and a felony domestic battery conviction. His two prior misdemeanor domestic battery convictions were used both to enhance his current domestic battery and as part of his criminal history score for the possession of methamphetamine conviction. The question the Court is examining is whether K.S.A. 21-6810(d)(10) prohibits that kind of "double counting" of priors. When it comes to prior misdemeanor convictions the impact of a ruling for the defendant in *Fowler* would be fairly minimal. However, HB 2518 would include prior felony offenses with a domestic violence designation as part of this "double counting" issue. This could cause unexpected problems when dealing with sentencing in multiple conviction cases like *Fowler*.

4. **HB 2518 is likely unconstitutional**. Generally speaking, the Sixth Amendment to the United States Constitution requires that any fact that enhances the severity of punishment for a crime must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 495, 120 S. Ct. 2348, 2365, 147 L. Ed. 2d 435 (2000). However, there exists a narrow exception to that rule for the "fact of a prior conviction." *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781, 782 (2002). That exception is how our sentencing system, which is heavily dependent upon prior convictions, continues to function. The domestic violence designation pursuant to K.S.A. 22-4616 is relatively unique because it is not part of the prior conviction itself, but is a "designation" placed on the criminal case.[2] As the designation is not the "fact of a prior conviction" but an additional, unique, designation, it is unlikely that the exception to the *Apprendi* rule will apply. Therefore HB 2518 is likely unconstitutional because it enhances the severity of punishment for a crime without a jury finding.

Thank you for your time and consideration.

Sincerely,

Clayton J. Perkins
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[1] The case is on petition for review from the Court of Appeals' opinion *State v. Fowler*, 55 Kan. App. 2d 92, 408 P.3d 119 (2017).

[2] In an unpublished opinion, the Court of Appeals has even clarified that the domestic violence finding is not an element of the charged crime. *State v. Ochoa*, 429 P.3d 250, 2018 WL 5091856, at *11 (Kan. App. 2018).