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**Testimony In Support of House Bill 2516
Establishing the burden of proving reversible error on the defendant
for a sentencing issue raised for the first time on appeal and authorizing jurisdiction
for the correction of illegal sentences while a direct appeal is pending**

**Presented to the Senate Committee on the Judiciary
By Assistant Solicitor General Natalie Chalmers**

March 8, 2022

Chair Warren and Members of the Committee:

Thank you for the opportunity to provide testimony in support of HB 2516 on behalf of Attorney General Derek Schmidt.

The goal of this bill is to limit claims on appeal that a defendant's criminal history score is incorrect when there is no record to establish the validity of the claim and to encourage defendants to pursue challenges to their criminal history through a motion to correct an illegal sentence at the district court.

In *State v. Obregon*, 309 Kan. 1267, 444 P.3d 331 (2019), the Kansas Supreme Court held that the Pre-Sentence Investigation's (PSI) failure to designate a subsection of a Florida statute required a remand to determine if the conviction was properly classified as a person felony. This has subsequently led to a number of claims raised for the first time on appeal that the PSI is not sufficient evidence to score the conviction in a defendant's criminal history because of a failure to cite to a specific subsection in a statute or because the State did not prove that a prior misdemeanor conviction was counseled.

For example, for the first time on appeal, defendants are challenging whether a Kansas crime is a felony if the specific subsection is not listed in the PSI. Many of those challenges lack merit, but the State currently cannot prove that fact because the appellate courts are not allowed to rely on documents from other cases. Thankfully, the Kansas Supreme Court recently ended the ability for many of those challenges to succeed. E.g. *State v. Corby*, No. 122,584, __ Kan. __ (2022) (decided January 21, 2022) (scoring of Kansas crimes as felonies); *State v. Roberts*, __ Kan. __, 498 P.3d 725 (2021) (allegation of an uncounseled misdemeanor). This bill is consistent with those cases.

This bill also seeks to put many of these challenges where they belong: in the district court. If the issue was raised through a motion to correct an illegal sentence, rather than for the first time on appeal without an adequate record, the district court could resolve many of the issues that lack merit merely by taking judicial notice of its own records. And for those that have merit, the district court is likely the quicker route to success for defendants.

Thus, the bill ensures that motions to correct an illegal sentence can be filed in the district court even while an appeal is pending and that any change in law that would apply while the appeal is pending would also apply to those motions.

Further, the bill ensures that both the State and defendants have the ability to appeal motion to correct illegal sentence rulings. There had been some concern about jurisdiction in recent appellate cases, but the Kansas Supreme Court recently affirmed the State's ability to challenge the legality of a sentence for the first time on appeal. *State v. McCroy*, __ Kan. __, 486 P.3d 618 (2021). This bill does not seek to undermine that ruling.

After the bill was introduced, the Office of the Attorney General was informed that the Office of Judicial Administration (OJA) has some practical concerns regarding the amendments on page 1, line 36, through page 2, lines 1-7, as well as page 3, lines 20-23. After the bill passed the House, the Office also learned that the Kansas District Judges Association (KDJA) opposes the same language. After speaking with a court services specialist from the OJA and hearing from the KDJA, our Office has no issue with removing those purposed changes. It is our understanding that OJA and the KDJA will provide testimony explaining the suggested removal.

For the above reasons, the Office of the Attorney General supports this Committee adopting this bill, but would also encourage you to consider amendments to address OJA and KDJA's concerns. Thank you for your time.

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