

**House Corrections and Juvenile Justice Committee
February 1, 2022**

**House Bill 2516
Testimony of the Kansas Association of Criminal Defense Lawyers (KACDL)
Presented by Clayton Perkins
Proponent**

Dear Chairman Owens and Members of the Committee:

HB 2516 makes several important amendments to current laws affecting sentencing of people convicted of criminal offenses. It will require that court services officers preparing the Presentence Investigation Reports (PSI) attach any journal entries for each listed prior conviction that is necessary to either establish the criminal history classification or establish application of a special sentencing rule and make those journal entries part of the court record. It will also require that an appellant challenging their criminal history for the first time on appeal designate a record showing prejudicial error. Finally, it will allow sentencing courts to consider motions to correct illegal sentence while a direct appeal is pending, and allow appeals from rulings on those motions.

Because the goals of this bill are to reduce illegal sentences by ensuring accurate classification of criminal history, to limit the number of remands of appellate cases for sentencing hearings that will result in the same sentence being imposed, and to emphasize the resolution of criminal history challenges in the district court, the KACDL is a proponent of this bill and encourages its passage.

In way of background, the criminal history worksheet that is prepared as part of the Presentence Investigation Report (PSI) pursuant to K.S.A. 21-6813 is the bedrock of Kansas' process for determining a defendant's criminal history score. That worksheet is essentially a list of a defendant's prior convictions, which is supposed to be supported by court records that should be attached to the worksheet, and then used to calculate the criminal history score. Since our sentencing grids use both the crime of conviction and the criminal history score to determine a sentence, it is a huge factor in the ultimate sentence a defendant will receive. As the PSI is often completed and provided to the parties just a few days before sentencing, and then relied upon by the parties, accuracy in the criminal history worksheet is incredibly important to making sure people get sentenced right.

Unfortunately, the criminal history worksheet does not always accurately reflect a defendant's prior convictions. For example, I had a case on appeal where a defendant was

sentenced under a grid box “D” for a high-level felony based on having one prior conviction for a person felony listed on the criminal history worksheet. When I looked up the records for that prior conviction, however, I learned that he was not convicted, but had just entered a diversion agreement that did not result in a conviction, and it also should not have been scored as a person offense to begin with. Once I notified the prosecuting attorney of the mistake, they agreed it needed to be fixed. Fixing that mistake in the criminal history worksheet changed the defendant’s sentence by several years, and made sure he was sentenced accurately in accordance with Kansas’ Laws.

Mistakes also happen when the criminal history worksheet does not accurately reflect the full crime of conviction. For example, if you look at our burglary statute, K.S.A. 21-5807, you can see that the statute includes both crimes that are person offenses and crimes that are nonperson offenses. A criminal history worksheet that then lists a prior conviction as just “Burglary” and “K.S.A. 21-5807” wouldn’t actually tell us if it should be counted as person or nonperson, and can lead to it being scored incorrectly.

These mistakes should not happen. They should be caught by the State’s attorneys who have the burden to present the evidence of the defendant’s criminal history and have a duty to make sure the laws are applied accurately. Just as importantly, they should be caught by defense counsel who has the duty to advocate for their client, should recognize the mistakes, and object to them at the sentencing. But these mistakes do happen. This bill addresses how we minimize these mistakes, and remedy them quickly, so defendants do not serve sentences longer than the law says they should, and so Kansans are not paying the costs of incarceration for folks who are incarcerated longer than the law says they should be.

In *State v. Obregon*, 309 Kan. 1267, 444 P.3d 331 (2019), the Kansas Supreme Court provided a remedy for cases like the burglary example where the criminal history worksheet does not have enough information to determine if the offense should be a person offense or nonperson offense. That remedy is to remand the case to the district court for a hearing that gives the State the opportunity to present more evidence to prove the particular subsection of the prior conviction. Usually that is done simply by providing copies of the journal entries of sentencing, which clarify the subsection. This remedy is, understandably, frustrating for the prosecution when they may already have a journal entry showing the prior conviction was scored correctly. Likewise, it can be a slow remedy for a defendant who is in prison serving too long a sentence. In the worst-case scenarios, the appeal can take so long that the defendant has already served that illegally too long sentence before the remand is even ordered.

Section 1 of HB 2516 amends K.S.A. 21-6813(b)(5) to require attachment of journal entries for all prior convictions that impact criminal history classification or application of a special sentencing rule. The current statute requires attachment of journal entries only if they are “obtained” by the court services officer. In practice, that is rarely, if ever, happening. This amendment would ensure that copies of the journal entries of prior convictions necessary to support an increased sentence will always be obtained, attached, and included in the record.

This will mean that we will always start from the most accurate information in establishing a criminal history score, and prevent errors in the criminal history worksheet. This will assist the State in carrying the burden of proving a defendant’s criminal history, and wards off challenges that the State did not carry that burden by relying on an inaccurate criminal history worksheet. It will also prevent defendants from serving incorrect sentences which may be apparent simply by looking at the journal entry, like the example I provided above. Finally, it should provide longer term cost saving because we will not be paying the costs of incarceration for those incorrectly sentenced too long, and we will have fewer sentencing appeals.

Section 2 amends K.S.A. 21-6814 in two ways. The amendment to subsection (b) appropriately clarifies that the criminal history worksheet, with attached journal entries, is used to establish criminal history. We have always used the criminal history worksheet rather than some other “summary”, so the language has never really made sense. It also prevents a defendant from making an argument that the State did not carry the burden by not providing some other summary.

The proposed new subsection (d) both solves the prosecution’s frustration by avoiding sentencing remands that change nothing by making the defendant provide proof on appeal that they were incorrectly scored and clarifies the process by which the defendant can designate the record of prejudice on appeal. This gives us a process for designating a record on appeal to establish prejudice, lets the State rebut that when appropriate, and lets the appellate court remand the case in the rare instance when that is necessary.

Appellate counsel has usually been allowed to add journal entries establishing prejudice to the record on appeal as documents that should have been originally attached to the criminal history worksheet. However, recent appellate cases have limited both the State or defense from presenting the missing documents that would allow a more expedient resolution of the appeal. This just clarifies that process.

Section 3 amends K.S.A. 21-6820(i) to allow a motion to correct an illegal sentence be raised at the district court while a direct appeal is pending. This provides another vehicle for a defendant who received an illegal sentence to possibly obtain relief. In fact, for those defendants serving relatively short periods of incarceration it may provide the only possibility for relief because the appellate process can be slow.

Because this bill advances the goals of ensuring correct sentences and provides procedures by which the goals may be achieved in the district and appellate courts, we support this bill for passage. Thank you for your time.

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