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Criminal Justice Reform in Kansas

The past several years have seen bipartisan calls for a myriad of criminal justice reform efforts including the expansion of re-entry programs to assist the reintegration of parolees into society; the reduction of sentences to reduce prison populations; and community-based treatment options for people with drug and/or mental health issues in order to divert their entry into the criminal justice system.

Entities as diverse as The Koch Institute¹ and the ACLU have drawn attention for their support of criminal justice reform efforts. To that end, the bipartisan “First Step Act” was recently signed into federal law² in an effort to enhance federal inmates’ access to rehabilitative programs (mental health, and drug treatment and job training); expanded “good time” eligibility; and reductions in mandatory minimum sentences for certain drug crimes.³

As will be discussed below, these calls for reform come at a time in Kansas when issues within the Kansas Department of Corrections, the Kansas mental health system and recent case law affecting the Kansas Sentencing Grid have heightened the urgency for this discussion.

The following is my effort to place these ongoing discussions into a larger context for policy makers at the state and local level as well as anyone with an interest in improving the system by which we seek justice in Kansas.

1. <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/>. See also, discussion at: “Koch-Backed Criminal Justice Reform Bill To Reach Senate.” *National Public Radio*, December 16, 2018. <https://www.npr.org/2018/12/16/677252467/koch-backed-criminal-justice-reform-bill-to-reach-senate>.

2. “The Bipartisan Criminal Justice Bill Will Affect Thousands of Prisoners. Here’s How Their Lives Will Change.” *Time*, Gina Martinez, December 20, 2018.

I. Issues:

A. The Current State of Kansas Prisons

It is fair to describe the Kansas prison system as currently under a high degree of stress with unfilled positions and staff working multiple shifts to supervise prisons that are over capacity.⁴ Very recently, Kansas Secretary of Corrections, Roger Werholtz, has drawn attention to disturbances at state prison facilities which he reasonably attributes to persistent understaffing and overcrowded conditions/ double bunking.⁵

The prison population as of February 28, 2019 was 10,098⁶ inmates, which represented 101% of the capacity of the Kansas Correctional System. The August 2018 Population Projections anticipate 10,655 inmates by the end of 2020 and 11,546 by 2025.⁷

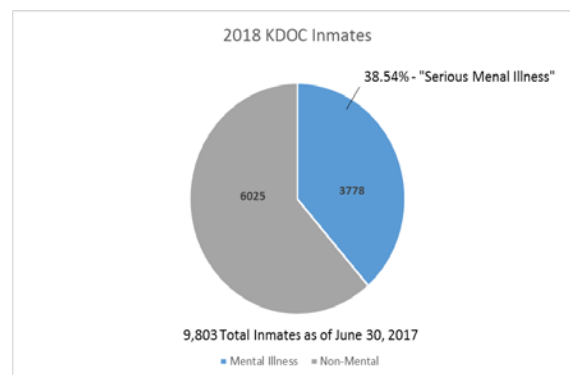
For Fiscal year 2019, the Kansas Department of Corrections requested a budget of \$417,142,938.00.⁸ The budget request for community corrections programs related to community-based probation supervision for 2018-2019 was \$22,932,000.00.⁹

The Governor's recommendation for "offender programs and reentry" for 2019, was \$7,798,596.00. Of that amount, \$1,850,723.00 was earmarked for substance abuse programs.¹⁰ Note that the budget for "offender programs and reentry" in 2009 was \$13.85 million—more than \$6 million more than the amount requested in 2019.¹¹

B. Role of Mental Health

According to the Kansas Department of Corrections, 38.54% of KDOC adult inmates have a serious mental illness: 3,778 inmates.¹² Of that number, 1,074 inmates – or 11 %— are considered to be "severely and persistently" mentally ill.¹³

In 2018, the Sedgwick County jail housed a total of 3,188 inmates who were on psychiatric medication, according



3. The First Step Act will offer a fairer deal to prison inmates," Editorial Board, The Washington Post, December 19, 2018.

4. "Kansas Prisons 'under stress': Photos show destroyed facilities, injured officers." Wichita Eagle, Jonathan Shorman, January 30, 2019. <https://www.kansas.com/news/politics-government/article225303670.html>

5. "Kansas Spent at least \$414,000 Repairing Prisons After Riots," John Hanna, Topeka Capital Journal (and U.S. News World Report, <https://www.usnews.com/news/best-states/kansas/articles/2019-02-05/kansas-spent-at-least-414-000-repairing-prisons-after-riots>), February 5, 2019.

6. March 4, 2019 letter from Kansas Secretary of Corrections, Roger Werholtz, to Kansas Sentencing Commission.

7. KS Sentencing Commission's "Fiscal Year 2019 Adult Inmate Prison Population Projections," page 18.

8. <http://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY18/2018BudgetAnalysisRpts/DOC.pdf>.

9. Kansas Department of Corrections FY 2018-2019 KDOC Budget, February 2018. <https://www.doc.ks.gov/newsroom/legislative/2018/budget-ppt>.

10. Kansas Department of Corrections FY 2018-2019 KDOC Budget, February 2018, page 12 & graph at page 13.

11. Kansas Department of Corrections FY 2018-2019 KDOC Budget, February 2018, page 12 & graph at page 13.

12. Kansas Department of Corrections FY 2018-2019 KDOC Budget, February 2018, page 7 and graph on page 8

13. Kansas Department of Corrections FY 2018-2019 KDOC Budget, February 2018, page 7 and graph on page 8; *see also*, "The Cost of Mental Illness: Kansas Facts and Figures," Hanke Heun-Johnson, Michael Menchine, Dana Goldman, Seth Seaburt, USC Schaeffer, Center for Health Policy & Economics, March 2018. <https://healthpolicy.usc.edu/wp-content/uploads/2018/07/KS-Facts-and-Figures.pdf>.

to Sedgwick County Sheriff Jeff Easter.

At the same time, the behavioral health infrastructure in Kansas has been under increased pressure. According to the Report to the Kansas Legislature from the Mental Health Task Force, submitted January 14, 2019, page 4: “The number of available state [mental health] hospital beds decreased from more than 1,000 beds in 1990 to 258 staffed beds in 2017.”

On June 21, 2015, a moratorium began at Osawatomie State Hospital (OSH), followed that December by the decision to decertify the facility by the Federal Centers for Medicare and Medicaid Services (CMS).¹⁴ Accreditation was granted again in December of 2017 but the moratorium persists as does the reduction in beds—down from 206 beds in 2015 to 166 beds currently.¹⁵

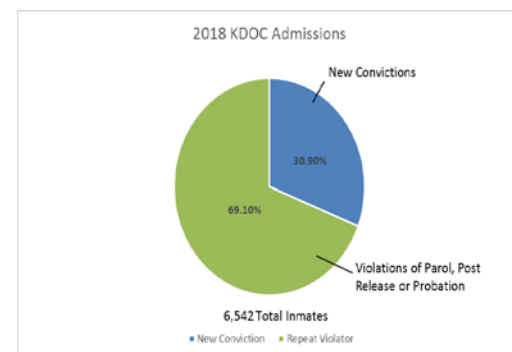
The 2019 report of the Mental Health Task Force further recommends that 36-60 beds are needed at OSH and Larned State Hospital in the next 24 months with an additional 221 beds (regionally or at OSH and Larned) in the next five years to “stabilize the system.”¹⁶

In FY 2018, “major supplemental requests to the state budget” were made, including the following¹⁷ related specifically to the State’s mental health infrastructure:

- Department for Aging and Disability Services: \$13.9 million from the State General Fund to replace state hospitals billing systems and adult care home retroactive payments;
- Osawatomie State Hospital: \$14.7 million from the State General Fund for a funding shortfall due to decertification and a federal and fee fund shortfall;
- Larned State Hospital: \$9.9 million from the State General Fund for federal funding shortfalls, Sexual Predator Treatment, and other adjustments;
- Parsons State Hospital: \$2.5 million from the State General Fund for federal fund shortfalls, increased staffing, and x-ray machine replacement and maintenance.

II. The Projected State of Kansas Prisons

The Kansas Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” (dated August 2018) reported that the state prison population in Kansas would grow from its FY 2018 population of 9,973 inmates incarcerated to 12,054 by



14. “Report of the Special Committee on Larned and Osawatomie State Hospitals to the 2017 State Legislature,” p. 1-2:

http://www.kslegresearch.org/KLRD-web/Publications/CommitteeReports/2016CommitteeReports/spc_larned_osawatomie_sh-cr.pdf; and “Report to the Kansas Legislature,” Mental Health Task Force, January 14, 2019, pp 5-6.

15. Kansas Department for Aging and Disability Services, news Release, March 7, 2018. <https://www.kdads.ks.gov/media-center/news-releases/2018/03/07/the-joint-commission-grants-full-accreditation-to-larned-state-hospital>; and “Report to the Kansas Legislature,” Mental Health Task Force, January 14, 2019, pp 5-6 .

16. “Report to the Kansas Legislature,” Mental Health Task Force, January 14, 2019, Recommendation 1.1, pp5-6 &, 10-11.

17. “FY 2018-2019 Preliminary Agency Budget Summaries” submitted to the 2018 Kansas Legislature, page iii.

http://www.kslegresearch.org/KLRD-web/Publications/AppropriationsRevenue/FY2018-2019_PrelimBudgetSum.pdf.

the year 2028,¹⁸ even further past capacity. Again, as stated above, the letter from Secretary Werholtz to the Sentencing Commission dated March 4, 2019, clarified that the prison population was already at 10,098—well past capacity.

A. Who is in Kansas Prisons?

1. Probation Violations

In FY 2018, of the 6,542 offenders admitted to Kansas prisons, 30.9% were admitted solely for new convictions¹⁹—the rest were admitted for violations of probation, parole/post-release either by violating a term of probation or being convicted of a new crime while on supervision.

HB 2170, enacted in 2013, requires judges to follow a “graduated sanctions” model for offenders placed on probation. “Quick dips” (2-3 day jail sanctions for technical violations of probation up to 18 days total) are followed by 60-120 day and/or 90-180 day “soaks” in prison for subsequent violations of probation. Under K.S.A. 22-3716 (that embodies HB 2170), Judges may exhaust the 120 day or the 180 day graduated sanction—with the option of employing subsequent “soaks” for subsequent violations—before probation is finally revoked and the underlying sentence is ordered to be served, unless: (1) the judge granted a “dispositional departure” at the time of the original sentencing and placed a defendant on probation despite that person being “presumptive prison” (due to either the seriousness of their crime or the extent of their criminal history, or both), OR (2) unless the Judge finds that the offender poses a community safety risk under K.S.A. 22-3716(c)(4) . Note: HB 2396 (2019 Session) is now in Conference Committee to consider adding additional basis for direct admission at revocation.

The result is that a person now has to be convicted of violating the law, then found to have committed a serious violation of probation at least once, receive a “quick dip,” commit a second violation of probation and receive a “soak” and then commit a third violation of probation before they would be eligible to serve the original term of incarceration. Each “soak” adds to the jail credit and thereby reduces the amount of days subsequently spent in the penitentiary in the event of a final revocation and imposition of sentence.

According the Kansas Sentencing Commission’s January 19, 2019 presentation to the Kansas House Corrections and Juvenile Justice Committee, after “failure to report,” the 2nd and 3rd leading alleged violations of supervision were failure of a drug test (3450 violations) and

18. KS Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” page 3.

19. KS Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” page 8, §2

failure in a treatment program (3062 violations). The 4th leading cause was an allegation of a new crime (2672 violations).

2. Violent Offenders

In 2006, Jessica's Law increased the penalty for sex crimes committed against children under the age of 14 from specific/determinate "grid" sentences to "off-grid" sentences. In other words, the penalty for first time offenders increased from 55-59-61 months (severity level 3), 117-121-123 months (severity level 2) or 155-159-161 months (severity level 1) to life in prison without parole eligibility until 25 years and life without parole for repeat offenders.

In 2014, the legislature increased the penalty for first degree (premeditated) murder from life with parole eligibility after 25 years, to life with parole eligibility after 50 years. First degree (felony) murder was increased from life with parole eligibility after 20 years to parole eligibility after 25 years.

The result of these enhanced sentences is that off-grid and non-drug severity level 1, 2 and 3 offenses – all of which are violent, person offenses – will account for 40.8% of the projected increase in the Kansas prison population by the year 2028.²⁰

What this means in raw numbers is that in FY 2018 there were 2,516 severity level 1, 2 or 3 non-drug inmates (ex: Aggravated Kidnapping, Second Degree [Intentional] Murder, Second Degree [Reckless] Murder and Aggravated Robbery), and an additional 1,412 "off-grid" offenders (Capital Murder or First Degree [premeditated] Murder or Jessica's Law sex crimes against children 13 years of age or younger) in Kansas prisons. That was a total of 3,928 people of the 9,973 inmates, or 40% of current inmates. By 2028, the Kansas Sentencing Commission projects these numbers to increase, resulting in 3,528 severity level 1, 2 or 3 non-drug offenders and 1,663 off-grid offenders. That would be a total of 5,191 inmates out of the projected 12,054 projected inmates by 2028.²¹

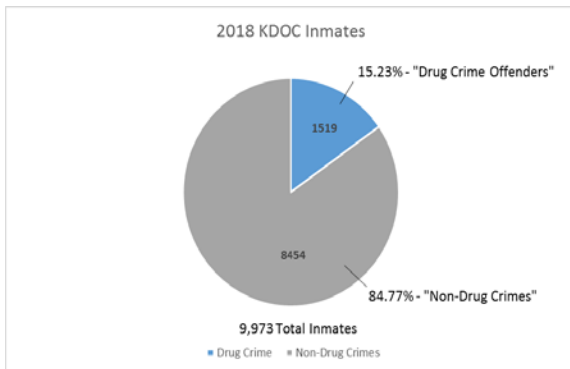
I do not advocate for a reduction in the statutory penalties for serious, violent crime. However, when considering criminal justice in Kansas, one must acknowledge the impact that decades-long increases in sentences will have on long-term prison populations.

20. KS Sentencing Commission's "Fiscal Year 2019 Adult Inmate Prison Population Projections," page 3.

21. KS Sentencing Commission's "Fiscal Year 2019 Adult Inmate Prison Population Projections," graph at page 21.

3. Drug Crimes

By comparison to the 40 % of inmates held for violent crime, there were 1,519 “drug crime” offenders²² of the 9,973 offenders in prison in 2018, which was 15% of the total population. By the year 2028, there are projected to be 1,958 drug offenders of the 12,054 projected inmates, or 16%.²³



Until 2012, the drug grid in Kansas had 4 severity levels—the lowest severity level, level 4, being reserved for possession crimes. In 2012, the Kansas Legislature added a severity level 5 to the drug grid for drug possession—which is a “presumptive probation” crime for anyone other than people with two or more prior “person” felony convictions.

The Sentencing Commission’s Annual Report for 2018 is not yet complete, but the FY 2017 Annual report shows that 1,348 of the 2,049 drug offenders who were incarcerated that year were convicted of severity level 5 drug possession.²⁴

Put another way, in the last year that data is available, 65% of the 15% of inmates who went to the penitentiary for drug crimes were sentenced for the lowest level drug possession on the grid. When addressing the public policy questions raised by this reality, it is important to examine the length of the sentences that are actually being served by inmates as a result of HB 2170 and how many violations of probation must occur prior to incarceration.

4. Short-Term Sentences

As stated above, as of March of 2019, there were 10,098 inmates in Kansas prisons. During FY 2018, 6,389 inmates were released from Kansas prisons.²⁵ The chart below shows that 70.3% of inmates in KDOC in July of 2017 arrived owing less than 5 years. In other words, it’s a revolving door. Low level, non-violent offenders spend short periods of time occupying one chair at a time in a never-ending game of musical chairs, only to be replaced by another inmate arriving to serve his or her own short stay for his or her own violation of supervision. Many of these offenders circle back to this game after violating their probation or parole/post-release conditions or by committing new crimes while on supervision, again and again. These

22. The “Fiscal 2019 Adult Inmate Population Projection” did not break down the percentage of inmates convicted of distribution vs. first or second time possession.

23. KS Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” graph at page 20.

24. 2017 “Kansas Sentencing Commission Annual Report,” graph at page 3.

25. KS Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” page 2.

offenders—“*supervision violators*”—constituted 45.2% of the prison population in FY 2018.²⁶

Duration of Confinement in KDOC adult facilities as of June 30, 2017²⁷:

	Number	Percent
6 months or less	2,108	21.5%
Over 6 months to 1 year	1,179	12.0%
1 year to 2 years	1,519	15.5%
Over 2 years to 3 years	925	9.4%
Over 3 years to 4 years	643	6.6%
Over 4 years to 5 years	522	5.3%
Over 5 years	2,907	29.7%
Total	9,803	100.0%

*Note: there were 114 inmates housed in non-KDOC facilities.

The “average length of stay” in prison for all drug offenders in 2017—including small possession weight, increased weight, distribution, manufacturing and inmates with prior drug convictions—was twenty-three (23) months.²⁸ With this in mind, would calls for even shorter prison terms for drug offenders²⁹ actually divert in some way, the number of inmates in the penitentiary? I am not advocating for longer sentences for drug offenders but does sending someone to prison to occupy a bunk for 6 months make society safer? Does it decrease the likelihood of re-offense? Does it make the inmate more likely to successfully complete parole/post-release when he or she was unable to complete (pre-incarceration) probation?

A consistent subject of criminal justice reform discussions are first time drug offenders, particularly those arrested for possession of marijuana. Under current Kansas law, possession of marijuana for personal use, not distribution, does not become a felony until the person has been convicted of misdemeanor possession of marijuana on two prior occasions. On a new arrest, after two prior convictions, the person can be charged with a severity level 5 drug felony. First time possession of less than 1 gram of Methamphetamine or heroin, less than 3.5 grams of cocaine and less than 10 dosage units of prescription narcotics are all, likewise, severity level 5 non-person, drug felonies. A person with no prior criminal history (history “T”), charged with such a first time drug possession crime, would face 10, 11 or 12 months in prison under the Kansas Sentencing grid with a presumption of probation.

In a document entitled “Memorandum” to then Governor Jeff Colyer, dated September 19, 2018, the Executive Director of the Kansas Sentencing Commission wrote that, based on FY2018 data, 91 offenders were convicted of 3rd or subsequent (felony) possession of marijuana

26. KS Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” page 8, §2

27. Kansas Department of Corrections FY 2018-2019 KDOC Budget, February 2018, graph at page 15.

28. Ks. Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” page 2.

29. “Incoming Gov. Kelly, Koch Industries agree on need for reform as Kansas prisons fill up,” Jonathan Shorman, Wichita Eagle, December 21, 2018.

in Kansas. Of that number, 6 were sentenced to prison, for an average length of stay of 21 months. Note that a sentence of 21 months for a severity level 5 offense is only available on the Kansas Sentencing grid for defendants with three or more prior felony convictions in addition to their 2 prior misdemeanor marijuana convictions.

As set forth above, after HB 2170, a person charged with felony drug possession – whether marijuana, cocaine, heroin, or methamphetamine—would have to commit a serious violation of his or her probation (in addition to “technical” violations like testing positive for drugs while on probation), receive a “quick dip,” then be placed back on probation, pick up a second probation violation that comes with either a 60-120 day or a 90-180 day “soak,” be reinstated on probation and then violate probation a third time before the judge could send them to prison. The “jail credit” they earn for their quick “soaks” would be something between 60 and 150 days, depending on how many soaks the defendant received. The “good time credit” eligibility for a severity level 5 drug crime is 20%.

So, assuming a person with no criminal history received a felony conviction for drug possession and assuming they did not spend a single day in jail awaiting trial/plea—then received the standard eleven (11) month sentence, by the time they got to prison, they would have 2.2 months of “good time” eligibility, plus 2-5 months of jail credit subtracted from their sentence. Meaning, this person would take up bed space in the penitentiary for approximately 3.8 months to 6.8 months before returning to society.

III. Past Reform Efforts in Kansas

The article “25 Years of the Kansas Sentencing Guidelines: Where We Were, Where We Are, and What’s Next?” *The Journal of the Kansas Bar Association*, July/August 2017, written by Terri Savely, reviewed the history of the Kansas Sentencing Guidelines and, ultimately,³⁰ the inability of a myriad of legislative efforts over the years to curb the increase in prison population in Kansas:

Have the last 25 years seen any advancement toward the original goals of the KSGA? One of the original goals has largely been achieved: the more structured nature of KSGA sentences has allowed the Commission and DOC to more accurately estimate future inmate populations. However, the KSGA has not, as a secondary matter, been effective in reducing prison overcrowding issues. Every annual report issued by the Commission has contained projections reflecting that Kansas prison populations will continue to grow.

...

Granted, the determinate sentencing process has allowed the legislature to make

30. “25 Years of the Kansas Sentencing Guidelines: Where We Were, Where We Are, and What’s Next?” *The Journal of the Kansas Bar Association*, July/August 2017, Terri Savely, p. 30.

more adjustments over the years to try to keep non-violent, low-level offenders out of DOC facilities. Regrettably, the actual long-term impacts of those measures are uncertain. The largest drop in Kansas prison population occurred between 2000 and 2002. This temporary drop was primarily due to Senate Bill 323, which reduced the number of probation and post-release violators admitted to DOC prisons. Even back then, however, the Commission estimated that prison populations would increase by over 20 percent by fiscal year 2012 without additional changes. Likewise, Senate Bill 123, adopted in 2003, impacted drug sentencing, but its impact was not all as anticipated.³¹ While the mandatory drug-treatment sentences prevented low-level drug possession offenders from being sent to prison, it actually had little impact on prison populations. This lack of impact occurred because most SB 123-equivalent convictions resulted in non-prison sentences even prior to the adoption of the bill.³²

The impact of reform efforts undertaken over the past nineteen years is most clearly seen with respect to drug offenders. As set forth above, approximately 15% of current Kansas inmates are serving sentences for drug crimes. The graduated sanctions imposed by HB 2170, the reductions in admission for parole and post-release violators under SB 323, and the mandatory treatment under SB123, have all failed to lower admissions into prison for drug crime offenders. Meanwhile, the average sentence served for all drug crimes was twenty three (23) months,³³ —a sentence that is only available for people with multiple prior convictions. As set forth above, someone with no prior history convicted of their first low weight possession of drugs, would serve a sentence less than 7 months—and only after multiple probation violations.

While there may be any number of reasons for legislators to focus their attention on drug crimes in an effort to positively affect criminal justice reform—reducing what are already extremely low sentences for possession of drugs will do little to fundamentally relieve prison overcrowding. That is not to say increased sentences are any better. But if we actually want to stop the revolving door, we need a new approach.

IV. State v. Wetrich

At the heart of the Kansas Sentencing Guidelines is the notion that punishment is to be based on the severity of the crime committed **and** the criminal history “score” of the offender. A recent decision from the Kansas Supreme Court has impacted the effect of criminal history for offenders with out-of-state convictions.

In State v. Wetrich, 307 Kan. 552, 559 & 561-62 (March 2018), the Kansas Supreme

31. From citations in Ms. Savely’s article: Stemen, D. and Reengifo, A., “Alternative Sentencing Policies for Drug offenders: Evaluating the Effectiveness of Kansas Senate Bill 123,” p. 48, National Institute of Justice, March 2012.

32. From Ms. Savely’s article, Id., 2012 NIJ Report, p 50.

33. KS Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” page 2.

Court changed the ability to count an inmate’s out-of-state convictions, when it adopted the “*identical or narrower*” rule to out of state convictions. The Wetrich court stated:

“To reiterate, the Kansas statutory provision that we are construing states, with emphasis added:

“(3) The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson, *comparable offenses* under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a *comparable offense* in effect on the date the current crime of conviction was committed, the out-of-state conviction shall be classified as a nonperson crime.” (Emphasis added.) K.S.A. 2017 Supp. 21-6811(e)(3) interpreting “comparable offenses” in K.S.A. 2017 Supp. 21-6811(e)(3) to mean that the out-of-state crime cannot have broader elements than the Kansas reference offense—that is, using the *identical-or-narrower* rule—further the KSGA’s goal of an even-handed, predictable, and consistent application of the law across jurisdictional lines. [citation omitted] (discussing goal of doctrine of stare decisis to effect even-handed, predictable, and consistent application of the law). Accordingly, we hereby adopt that interpretation. For an out-of-state conviction to be comparable to an offense under the Kansas criminal code, the elements of the out-of-state crime *cannot be broader than the elements of the Kansas crime*. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced.

By way of explaining the impact of the Wetrich decision on the Kansas Sentencing guidelines, from the inception of the Kansas Sentencing Guidelines in 1993 to the Wetrich decision in March of 2018, an offender convicted of a severity level 3 Aggravated Robbery who has two prior burglary convictions from Missouri was “scored” as a criminal history “B,” and faced a range of sentence of 206-216-228 months. After Wetrich, the priors from Missouri, which the court determined were more broadly defined than Kansas, do not count as “person” felonies. As a result, the same offender would now be scored an “E” and faces a range of 82-88-92 months.

This disparity in the manner by which prior convictions across state lines are now to be scored raises questions as to the sustainability of the Kansas Sentencing Grid in its current form. Calls for a legislative change range from a modest approach to redefine how prior convictions are assessed to more ambitious calls to scrap the entire sentencing guidelines in favor of a new grid that affords more discretion to trial courts.

V. Moving Forward

Kansas ranks thirty-fifth nationally in the number of inmates per 100,000 citizens.³⁴ The

³⁴ <https://www.sentencingproject.org/the-facts/#detail>; see also Kansas Department of Corrections FY 2018 Annual Report, page 5.

chart below compares Kansas to our neighbors using 2016 census numbers:

	<u>Population</u>	<u>Prison Population</u>	<u>Inmates per 100,000</u>
Missouri	5,988,927	32,461	526
Oklahoma	3,751,351	26,486	700
Colorado	5,029,324	19,862	383
Kansas	2,853,118	9,628	322
Nebraska	1,826,341	5,235	283

National recidivism rates—defined as re-arrest following release—continue to run at approximately 66% according to Bureau of Justice Statistics, with property offenders the most likely to be re-arrested, with 82.1 % of released property offenders arrested for a new crime compared with 76.9 % of drug offenders, 73.6 % of “public order” offenders and 71.3 % of violent offenders.³⁵ Importantly, according to the Kansas Department of Corrections FY 2018 Annual Report (p6), Kansas recidivism rates were 33.91% the last reported year--significantly lower than the national average.

While we face overcrowding issues in the Kansas Department of Corrections, when one looks at the relatively low number of inmates in our state, coupled with the reality that the majority of inmates entering our prisons each year are there for violations of supervision—probation and parole/post-release—to serve relatively minimal length sentences, it seems clear that we as a State need to redouble our efforts to reduce the flow of inmates coming into the system for failing at probation and post-incarceration. Past efforts including HB 2170, SB 123 and SB 323 may have been well-intended, but have not provided sustained reductions to re-incarceration.

VI. Community Resources: Mental Health & Drug Treatment

We know that 39% of the people in the penitentiary (and a like number in jails) suffer from mental health issues. We also know that the number of mental health beds in the state has plummeted since 1990. Practical experiences in Kansas City and Wichita suggest that the recommendations by the Mental Health Task Force (referenced above) that the State increase the number of treatment beds could reduce recidivism with fiscal benefits to the state.

The Mental Health Task Force Report to the state legislature issued Jan. 5, 2018, observed,

“Regional crisis centers could be developed based on the Rainbow Services, Inc. (R.S.I.) model in Wyandotte County, which provides services such as 24-hour assessment and triage for individuals experiencing a mental health crisis, crisis

35. Office of Justice, National Institute of Justice, Recidivism: Durose, Matthew R., Alexia D. Cooper, and Howard N. Snyder, “*Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*” (pdf, 31 pages), Bureau of Justice Statistics Special Report, April 2014, NCJ 244205.

observation, and short-term crisis stabilization for adults.”³⁶

The report added that R.S.I. absorbed 4,543 admissions from 2,480 individuals from the time it opened in April 2014 to August 2016. “In 2015 alone, it is estimated that RSI saved about \$4 million in state hospital costs, \$2 million in emergency room visits, and \$75,000 in jail costs.”³⁷

In Sedgwick County, COMCARE (the Sedgwick County licensed community mental health center) anticipated saving \$4 million after it opened its expanded Community Crisis Center in 2015 to provide additional services not previously provided, including sobering beds and a 23 hour crisis intervention unit.³⁸ The program served 5,799 people in 2018 at an annual cost of approximately \$1.3 million in state funds. The Wichita State University Hugo Wall School of Public Affairs has assessed the program each year since the Center’s opening and found savings to the community of more than \$8.1 million annually through 2017³⁹ with estimated savings from 2018 approaching \$12 million.

I have found no studies specifically addressing the direct corollary between access (or lack thereof) to mental health and drug treatment facilities in a given community to the rate of incarceration from the same community. However, some effort has been made to study the impact that the drug courts and mental health courts have had on recidivism/incarceration rates. While research is limited by relatively small sample sizes, a substantial number of meta-analyses *have* compiled drug court research data to evaluate the overall effectiveness of those programs.⁴⁰ In general, most studies have found that drug courts reduce recidivism rates and costs associated with incarceration.⁴¹ For example, since the inception of the Sedgwick County drug court in 2008, 283 probationers have successfully completed the program. Given the average annual cost to incarcerate one inmate in Kansas is roughly \$24,500.00,⁴² if each of those 283 probationers had simply failed on probation and been incarcerated in the KDOC for one year, it would have cost the state not less than \$6,933,500.00.

36. Rainbow Services, Inc. (n.d.). Retrieved from <https://www.kdads.ks.gov/provider-home/providers/rainbow-services-inc>;

37. Marso, A. “Leader of KCK Mental Health Center Touts Savings from Care.” December 12, 2017, from <http://kcur.org/post/leader-kck-mental-health-center-touts-savings-care>.

38. Dodson, L., Bruckner, M., & Covell, J. (2016): Sedgwick County COMCARE; and “Sedgwick County Takes Integrated Approach to Mental Health Crisis Intervention.” Deborah Shaar, KMUW, October 6, 2016; <http://www.kmuw.org/post/sedgwick-county-takes-integrated-approach-mental-health-crisis-intervention>.

39. The Substance Abuse Center of Kansas: One Year Post Implementation Cost Avoidance Study. Wichita, KS: Hugo Wall School of Public Affairs, WSU

40. Thanks to research provided by Shellie Solomon, Justice & Security Strategies, Inc: See, Brown, R. T. (2010), “Systematic review of the impact of adult drug-treatment courts,” *Translational Research*, 155(6), 263-274; and Koetzle, D., Listwan, S. J., Guastaferrro, W. P., & Kobus, K. (2015), “Treating high-risk offenders in the community: The potential of drug courts,” *International Journal of Offender Therapy and Comparative Criminology*, 59(5), 449-465.

41. Koetzle, et.al, supra, 2015; and Marlowe, D. (2010), “Research update on adult drug courts,” *National Association of Drug Court Professionals*.

42. “Kansas seeks to cut prison costs while being tough on crime,” by Nicholas Clayton, *Kansas City Star*, February 8, 2015.

Again, the point of this memo is not to tout the virtues of drug courts—though, that is certainly a worthwhile conversation. I use the example of drug courts because they have been studied and shown to have a positive impact on recidivism. Because drug and mental health courts provide a means of ensuring compliance with a treatment regimen, not the treatment itself, the success of these programs is necessarily dependent on access to community-based treatment. If drug courts have been successful, it means the communities they serve provide accessible drug and mental health treatment programs.

In Sedgwick County, which annually contributes over 20% of all inmates to the Kansas Department of Corrections, data over the last 3 years shows that at any given time 11% of all adult criminal cases filed here contain at least one count related to methamphetamine—possession, distribution or sale. Meaning, the offender still had meth **in their possession** at the time they were arrested, whether the arrest was drug-related or for a property or violent crime. How many more crimes and/or supervision violations occur because the defendant is in the throes of addiction? According to community corrections professional in Wichita, the “majority” of violations of (pre-incarceration) probation are related to drug use.

VII. Additional Observations

Currently in Kansas, when an adult is charged with a crime, three options exist to resolve the matter: (1) conviction (via trial or plea); (2) dismissal; or (3) diversion (per K.S.A. 22-2907-2912) which is essentially probation offered prior to conviction. In a diversion, the defendant is required to comply with supervision terms and progress is then supervised by the county or district attorney. The vast majority of prosecutors in this state run small offices of one or two prosecutors with no staff or budget to supervise diverted individuals. To address this lack of resources, I sponsored HB 2292 in the 2019 legislative session that would have allowed prosecutor’s offices to enter into an MOU with court services or community corrections (the two probation supervision agencies in the state) to supervise diversions. The bill was tabled to be part of the larger discussion to be conducted by the Kansas Criminal Justice Reform Commission, created by HB 2018. Even if HB 2292 had passed, defendants still need adequate access to treatment—whether their supervision is by way of diversion or probation, or later, parole/post-release.

Some states (for example, Oklahoma and Texas) offer a formalized “deferred adjudication,” a concept not employed in Kansas whereby a defendant enters a plea to charges, but is not sentenced by the court and therefore not adjudged “guilty.” The person is then ordered to comply with supervision terms. If the defendant is successful, the case is ultimately dismissed.

If not, the defendant moves forward with sentencing. The advantage to the defendant is the avoidance of the collateral consequences of a conviction.

Forced by court order to lower the population in overcrowded prisons, California enacted Proposition 47 in 2014 to reduce many drug crimes and thefts from felonies to misdemeanors. The impact of such measures on public safety has been a point of contention in national debates. Proponents of Prop 47 argue that reducing nonviolent crimes from felonies to misdemeanors (unless the suspect had prior convictions for murder, rape, sex offenses or gun charges) has saved that state millions in incarceration costs, leading to savings that are better spent in “safe neighborhood” funding. Opponents say that the consequent uptick in shoplift, thefts and burglaries (all now misdemeanors) has eroded public safety and that “reducing” felonies to misdemeanors is no improvement at all if the defendants simply serve their sentence in a county jail rather than a state prison. To date, the efficacy of such an effort is very much up for debate.

Conclusion

As policy makers and the Kansas Criminal Justice Reform Commission consider the state of criminal justice in Kansas, I suggest specific emphasis be placed on addressing what steps can be taken to stop the revolving door created by inmates being ordered to serve short-term prison terms after repeated violations of supervision – or the commission of new crimes –while on supervision, only to be released to commit more crimes or violations of supervision while on parole/post-release.

Can we as a state commit to increasing regional access to mental health and drug treatment to slow the tide? The experience at Rainbow Services Inc. in Kansas City and the Community Crisis Center in Wichita show that the availability of treatment in a community has not only the effect of positively addressing the mental health and drug issues of local citizens, but it does so at a significant cost savings. These models offer an opportunity to improve our system, lower costs, lower incarceration and do so without compromising public safety.

Kansas prisons are over capacity. The impetus for a quick fix will be hard to ignore with each passing day. But nearly two decades of reform efforts in Kansas in the form of HB 2170, SB 323 and SB 123 have proven ineffective in stemming the tide. If a concerted effort is not made statewide to address the reasons why 45.2% of the people in Kansas prisons are there for supervision violations, we will simply increase the speed of the revolving door by *only* reducing penalties for drug crimes. Likewise, a Prop 47-styled effort to change low-level, non-violent felonies to misdemeanors, may have the benefit of reducing the number of convicted felons over time, but society is no better and public safety is not improved if these folks fail at the same rate

on their misdemeanor probation as they did on felony probation and then end up filling our county jails to capacity instead of our state prisons.

There is no silver bullet. No single program or approach will solve the issues we face. But our relatively low numbers by regional comparison put us in a position that we can still make substantive improvements while maintaining public safety and confidence in our criminal justice system. When nearly half the inmates in our prisons are there for supervision violations, it seems to me we get the most out of focusing on why they violate. When 2 of the top 4 reasons for probation violations are explicitly drug-related and the other two (absconding and commission of a new crime) are often related to drug use – that seems a logical place to start. Add to that, the fact that 39% of inmates have mental health issues and the path forward comes into focus: we must address ways to increase access to quality treatment for drug addiction and mental health issues at the local and regional level for people before they commit crimes, while they are trying to rehabilitate on probation and while they are trying to reintegrate into society after release.

Improvement will not come easily or cheaply. Treatment programs are not just brick and mortar, they require qualified (well-paid) professionals. But, what choice do we have?

The prosecutors of Kansas and the KCDA (Kansas County and District Attorney's Association) are more than willing to work with policy makers and stakeholders statewide to bring about positive improvements to our system.

Thank you for your time and attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc Bennett". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marc Bennett
District Attorney
18th Judicial District
Wichita, Kansas