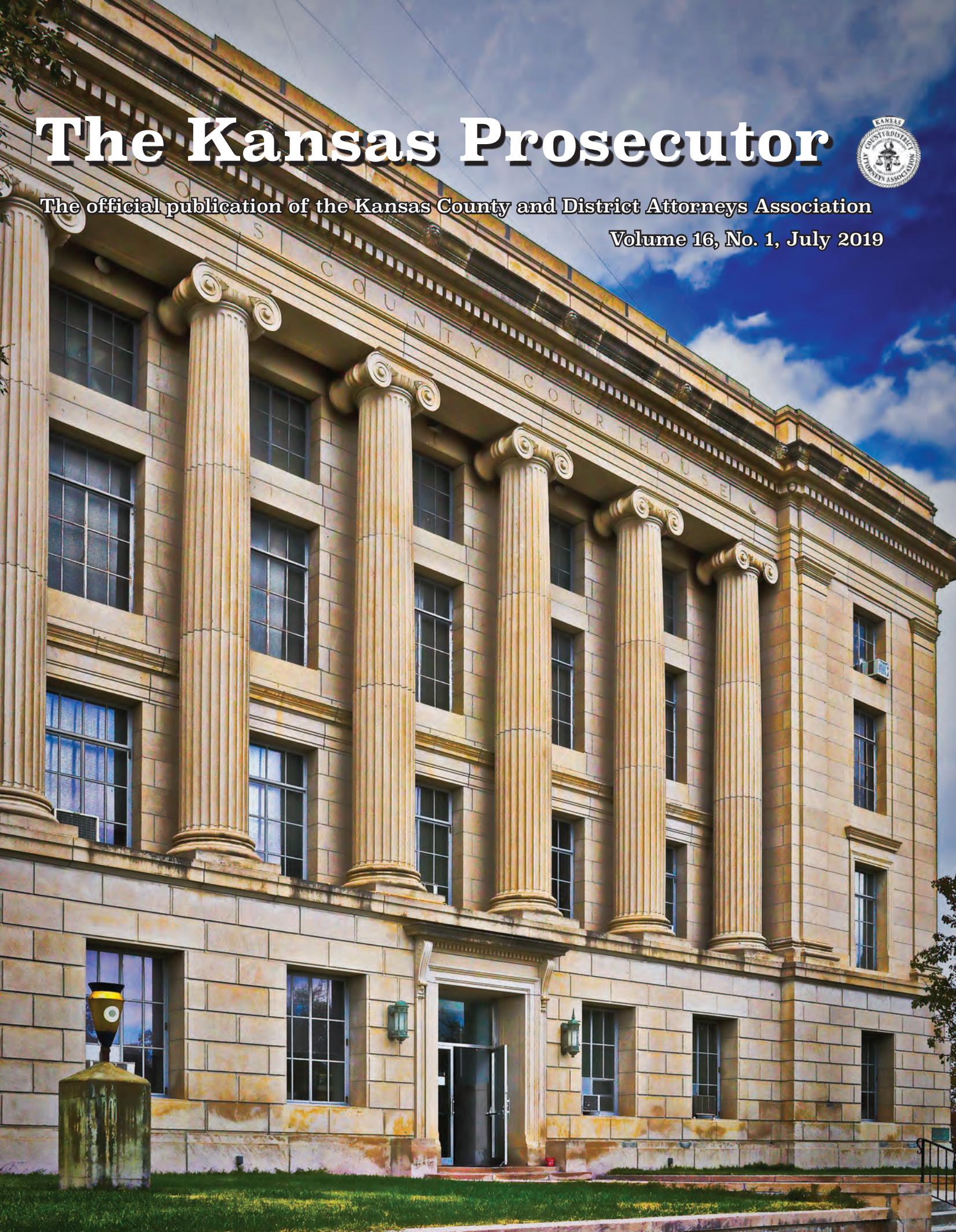


The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association

Volume 16, No. 1, July 2019



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Our mission:

The purpose of the KCDAA is to promote,
 improve and facilitate the administration
 of justice in the state of Kansas.

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County Courthouse Portraits



About the Cover

The present Rooks County Courthouse was built
 in 1921. The builder was Cuthbert & Sons, and
 the architect was F.C. Squires from Topeka. The
 structure was a Bedford Stone Structure with
 county offices on the first three floors and a jail on
 the fourth floor. The building was completed in
 1923. The staircases are made of solid marble and
 the corridors are lined from the floor up five feet
 with solid sheets of marble. The corridor floors
 are original ceramic tile. The doors and casings
 are all solid original oak. Near the end of 2000,
 the building was officially listed on the National
 Register of Historic Places.

*Photo by John Morrison, Prairie Vistas
 Gallery.*

President's Column



by Charles Branson, KCDA President, Douglas County District Attorney

We Have to Tell Our Story and Celebrate Our Work

"Don't worry when you are not recognized, but strive to be worthy of recognition."

- Abraham Lincoln

Prosecutors do amazing work! Of course, if you are reading this article there is a chance you already share this opinion or know this as a fact. Many of us started our career as prosecutors when it was unseemly to talk about our compassion or understanding unless we were referring to the victim in our case. Lately, prosecutors have come under fire for what some claim is our callous approach to our work; this notion that we "just lock people up".

However, I have a theory that I think is much closer to the truth. Prosecutors do a poor job of informing the public of what we do. Contrary to the Lincoln quote, we do need to worry about not being recognized.

As prosecutors we do not set out to be recognized for the work we do. We are driven by our desire to protect the citizenry, to seek the truth and to maintain the dignity of society. However, during the course of our careers when we do extraordinary things or when the ledger of our daily work creates a tome of distinction, recognition is appropriate.

We should not just celebrate hard fought cases, we should celebrate all the things we do as prosecutors to better the lives of victims, defendants and the public. Maybe a prosecutor in your office took extraordinary steps to help a victim. Maybe it was making the extra effort to understand the mental health issue of a defendant or being patient as they worked through a substance abuse issue before fashioning a result that exhibited an understanding of the problems that created the criminal conduct.

KCDA presents annual awards of recognition or achievement to its members or policy makers for

their contributions to the profession or organization. Please consider the work of your colleagues and nominate one of them for their outstanding work.

The Prosecutor of the Year Award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year. Nominations may be made by either the prosecutor himself/herself or by a colleague. The nominee must be a regular member of the KCDA.

The Lifetime Achievement Award is presented to a regular KCDA member for his/her longevity as a prosecutor. The nominee must have served no less than 25 years in a prosecutor position, and not previously received this award. Nominations may be made by either the prosecutor himself/herself or by a colleague.

The Associate Member Prosecutor of the Year Award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year from an office other than a County or District Attorney's office. Nominations may be made by either the prosecutor himself/herself or by a colleague. The nominee must be an associate member of the KCDA.

The Policymaker of the Year Award is presented to an individual who is determined to have made the most significant impact on policy related to county and district attorneys either during the past year or over an extended career of public service. One award is presented each year. The award is open to individuals having public policy making authority as evidenced by legislative support of the KCDA.

Awards will be presented during the Fall Conference taking place October 21-22, 2019 in Wichita, Kansas. I hope you will join us there. 🇺🇸

Legislative Report

by Kim Parker, KCDAAs Prosecutor Coordinator

2019 Kansas Legislative Session Brings Change



Greetings Kansas Prosecutors, I am delighted to report this year was my third session representing the KCDAAs at the Kansas Statehouse. Once again, I was proud and honored to see firsthand the true commitment of our 165 Kansas legislators to the betterment of our state and to share with them the efforts and leadership of Kansas prosecutors in protecting our communities, improving our criminal justice system, and promoting excellence in prosecution.

The 2019 Legislative Session began January 14th, adjourning Sine Die May 29th, the day after horrific storms hit our state. The storms of the session looked small against the force of nature. The last formal acts included HCR5015 ratifying and providing for continuation of the May 9th state of disaster emergency declaration for certain Kansas counties introduced in the house by Speaker Pro Tem Blaine Finch of Ottawa, an override of Governor Kelly's line item veto of the budget and the confirmation of the new Court of Appeals Judge Sarah Warner.

The 2019 session, like those in the past, produced a fair amount of controversy and while taxes, budget and Medicaid expansion dominated most discussions, many other significant measures managed to receive due attention and consideration. The groundwork for all bills was accomplished by the 28 standing committees in the House and 15 standing committees in the Senate, hearing testimony on bills assigned and determining the worthiness of each bill for advancement to the chambers they serve.

The legislative proposals from our association were largely considered by either **Senate Judiciary**

led by Senator Rick Wilborn of McPherson, **House Judiciary** led by Fred Patton of Topeka, or **Corrections and Juvenile Justice** led by Russ Jennings of Lakin. The leadership and experience of these chairs and their dedicated committee members was instrumental in the passage of measures designed to improve criminal justice in our state.

This year two significant bills (HB2191 and HB2048) proposed by our association were passed by both houses and signed by the governor. HB2191 allows electronically stored information obtained by lawful search warrant to be transferred out of state for further examination. HB2048, adopted as part of the Omnibus Crime Bill SB18, responds to the Kansas Supreme Court decision, *State v. Wetrich*, 412 P.3d 984 (Kan. 2018). This legislative measure allows for just consideration of serious out-of-state criminal convictions in the scoring of defendant's criminal history at the time of sentencing.

SB18 also amends statutes regarding: Counterfeit currency; Access to presentence investigation reports; Authority to enter into diversion agreements; Appeals related to criminal cases; Correction of illegal sentences; Drug abuse treatment programs; Probation violation sanctions; The penalties for the crimes of involuntary manslaughter and abuse of a child; A mitigating factor for sentencing when a victim is an aggressor or participant in the criminal conduct associated with a crime of conviction; and Law enforcement notifications to domestic violence victims.

Last session, our efforts for a comprehensive change to the DUI statutes left a few things undone,



Speaker Pro Tem Blaine Finch

Legislative Report continued...

including preliminary breath testing. A special Judicial Council Committee was formed to consider changes to DUI laws. The committee chaired by Representative Brad Ralph of Dodge City proposed HB 2104. This bill was heard by Representative Fred Patton in House Judiciary, early in the session and was easily advanced becoming law on April 18th.

The *Wetrich* case along with other sentencing and diversion bills inspired the creation of the Criminal Justice Reform Commission HB2290 advanced by Representative Russ Jennings in an effort to avoid piecemeal fixes to the criminal justice statutes and provide a more comprehensive and holistic look at the criminal justice system and recommend solutions to the Kansas Legislature in 2020. In addition HB2290 amends law related to various public agencies including, Crime victims Compensation Division (Office of the Attorney General); Kansas Youth Suicide Prevention Coordinator (OAG); Kansas VINE Coordinator (OAG); Payment for Defense of KORA and KOMA Violations; Background Checks (Kansas Bureau of Investigation); Kansas Open Records Act Exceptions; and the Kansas Closed Case Task Force.

Other legislation of interest include **SB28** and



Representative Russ Jennings

House Substitute for SB25:

SB 28 Claire and Lola's Law would prohibit state agencies and political subdivisions from initiating child removal proceedings or child protection actions or proceedings based solely upon the parent's or child's possession or use of cannabidiol treatment preparation. in accordance with the affirmative



Senator Rick Wilborn and Representative Fred Patton

defense established by the second section of the bill. "Cannabidiol treatment preparation" would be defined to mean an oil containing cannabidiol and tetrahydrocannabinol and having a tetrahydrocannabinol concentration of no more than 5 percent relative to the cannabidiol concentration in the preparation verified through testing by a third-party, independent laboratory.

House Sub. for SB 25 (the Budget Bill) which requires for fiscal year 2019 the Department for Children and Families to establish a working group that will (1) gather data and issue a report on the impact of 2016 SB 367 on youth with offender behaviors entering into foster care placement or in a foster care placement; (2) evaluate services being offered and identify services needed; and (3) include representatives from the above agency, the Kansas Department for Children and Families, child welfare organizations, mental health organizations, the Judicial Branch, law enforcement, and any other organizations with information on services as determined by the secretary of corrections and further in fiscal year 2020 requiring the agency to study the impact of 2016 SB 367 on crossover youth, who are defined as youth in foster care or at risk of being in foster care due to conduct that resulted in, or could result in, juvenile offender allegations. The agency will be required to submit a report of its findings by November 1, 2019, to the relevant enumerated legislative committees. The topics the study will be required to cover include: comparing crossover youth with the broader juvenile offender population, a qualitative and quantitative analysis of what happens after crossover youth are taken into custody by public safety agencies or placed into the foster care system, and gaps in intervention services for crossover youth.

Each of the bills mentioned above and enacted into law this year can be accessed online at www.kslegislature.org.

I have been privileged to witness the persistent work of prosecutors to provide better outcomes and highlight a few here, still others remain unnamed. Several Kansas County and District Attorney's demonstrated their commitment to good public policy by submitting

testimony or personally appearing at the Statehouse to testify and help advance legislation: Douglas County Attorney Charles Branson, Leavenworth County Attorney Todd Thompson, Thomas County Attorney Rachel Lamm, McPherson County Attorney Greg Benefiel, Wyandotte County District Attorney Mark Dupree, Sedgwick County District Attorney Marc Bennett, Thomas Stanton of Reno, Sean Minihan and Jacob Gontesky of Johnson, and David Lowden and Aaron Breitenbach of Sedgwick County. Other prosecutors worked diligently to draft and redraft legislation include Ann Swegle and Justin Edwards of Sedgwick, and Chris McMullin of Johnson.



The Prosecutors of Kansas are a diverse group with variances in resources, size, and demographics. As always, we have an allegiance and duty to truth and a common commitment to public safety. Our

Association of Kansas County and District Attorney's allows us to come together to constantly seek avenues that promote a justice system that is fair, transparent, trustworthy and accountable to the citizens of this state. We are leaders for excellence and best practices in the criminal justice system.

Opportunities abound for us. We will meet the challenge and demonstrate our commitment to these values.

Our work as prosecutors with the Kansas legislature is critical to the improvement of our criminal justice

system. Your leadership is critical as we prepare for the 2020 legislative session and participate in the work of Judicial Council, Kansas Sentencing Commission, Criminal Justice Reform Task Force and other special committee work.



We need your input for the next

legislative session. Please submit your proposals and comments by August 31st to kari@kearneyandassociates.com. 

Executive Director's Column

by Steve Kearney, KCDA Executive Director

The Best Resource for Policymakers in Rapidly Changing Times: Prosecutors



All of us are subjected to a 24-hour news cycle with a constant barrage about the victimization of our fellow citizens. Mass shootings, domestic violence, human trafficking, the uber rich and privileged committing crimes to ensure their children a seat at the table of higher education and the list goes on. The criminal justice system is under unprecedented scrutiny and with prosecutors in the national and local news more and more frequently, this seemed like the perfect time to remind our readers about not only what Kansas prosecutors do on a daily basis to improve the search for justice, but also what incredible local resources they are for the citizens of Kansas and specifically for policy makers.

With the sensationalized high-profile matters on the national scene, there is never a lack of willing commentators, regardless of where you get your news, from the Mueller report, to the curious handling of the Jesse Smollett case or to the spectacular fall of Michael Avenatti. While all the hoopla takes the oxygen out of the room, pause to think about the day to day efforts of the Kansas prosecuting community as they go about their search for justice on behalf of Kansans.

You can rest assured that Kansas prosecutors believe in the pursuit of fair and even-handed justice every day. To put a finer point on it, while there is no question that prosecutors are law and order inclined, that does not mean that they check their judgment and concern for their fellow man at the door. They are seeking justice in each unique case for all involved. The compassion and the personal reflection I have seen prosecutors exhibit time and again as a case unfolds should never be overlooked.

Kansas prosecutors are always striving to meet our evolving societal challenges in culture that is increasingly plagued with homelessness, poverty, untreated mental illness and addiction. New approaches and best practices are being incorporated into Kansas prosecution with regularity. In response to these needs in Kansas in 2015, the KCDA Board of Directors established a “Best Practices Committee”. This committee was tasked with developing policies and practices as a resource and guide for prosecutors and other law enforcement professionals across Kansas as they grapple with the ever-changing criminal justice system.

Even as our system of criminal justice struggles with societal changes, actions by all three branches of government present other challenges. We need to remain vigilant. For example, Kansas, not unlike other jurisdictions, has tried different reform measures intended to reduce the burgeoning population in our prisons and county jails. Our sentencing guidelines touted as *truth in sentencing* in the early 90’s moved away from indeterminate sentencing with wide judicial discretion, to a more rigid system of various factors many believed would deliver a more evenhanded sentencing system. The Kansas Sentencing Commission was established at that time with the statutory charge to *develop a sentencing guideline model or grid based on fairness and equity and provide a mechanism for linking justice and corrections policies.*¹ This reform is more than 20 years old and the time is right for it to be evaluated to ensure it meets the needs of Kansans. Policy makers please engage your local prosecutor as a resource as the next iteration is debated. Talk to those that see the effects on the ground.

Another example is the latest reform effort by the 2016 Legislature passage of SB 367, an expansive juvenile justice reform effort, based on recommendations from a bipartisan work group appointed by leadership from all three branches of state government. This reform effort restricted the use of out-of-home placement, and in turn was projected to save millions of dollars that would then be used for evidenced-based services for youth that would be supervised while remaining at home. Prosecutors, Court Services Officers and many others involved in the direct implementation of SB 367 warned of public safety consequences regarding violent juveniles, among other concerns.

Now several years into implementation, the concerns from those in the trenches are coming home to roost. With the bifurcated juvenile system we use in Kansas, children in need of care on one side and juvenile offenders on the other, and in an effort to keep the number of juvenile offenders in custody low, violent juvenile offenders are being placed in the custody on the civil side of the equation which is ill-equipped to deal with this small, but increasingly dangerous population. Direct care providers, foster families, and social workers are already being injured and it is only a matter of time before someone is seriously harmed. Public safety has been diminished.

There is more to come on SB 367 to help address the shortcomings in this reform. Once again, remember your local prosecutor a resource when considering these matters and reach out to them to find out how changes to the system will impact the real world we all have to live in.

Thank you all for your service in the pursuit of justice for all Kansans. It is my honor to have one small part in supporting your efforts.

Steve Kearney serves as the Executive Director of the Kansas County and District Attorney's Association. His career includes service as a street cop, prosecutor, adjunct professor of criminal justice and special agent with the FBI. 

County Courthouse Portraits



Rooks County Courthouse

John D Morrison

Prairie Vistas Gallery
151 N Rock Island, Suite 1D
Wichita, KS 67202
316-214-7566

www.prairievistas.com

**Submit your announcements for
the Autumn edition of The Kansas
Prosecutor by September 1st.**

We would like to publish baby announcements, new attorneys, anniversaries, retirements, awards, office moves, if you have been published, or anything else you would like to share!

Send your milestones to:
bfoster@sundevsolutions.com

KCDAA's Day on Capitol Hill

by **Todd Thompson, Leavenworth County Attorney**

Kansas prosecutors assembled again in Washington D.C. for the National District Attorney Association's Capital Conference. As in years past, our Kansas delegation had meetings with legislators from Kansas. "We want to be proactive about the laws that are passed," Leavenworth County Attorney Todd Thompson said. "Regularly meeting with our legislators gives us an ability to explain the issues we are facing, to engage in conversation, and to help promote our interests."

Marc Bennett (Sedgwick County District Attorney), Mark Dupree (Wyandotte County District Attorney) Charles Branson (Douglas County District Attorney), Steve Howe (Johnson County District Attorney), and Michael Kagay (Shawnee County District Attorney) joined Thompson.



Kansas prosecutors went to Washington advocating for issues important to Kansas. One of their pressing issues was to amend the Electronic Communications Privacy Act (ECPA) to give law enforcement access to vital electronic evidence. This includes, but is not limited to, situations in which law enforcement, pursuant to a valid court order, is prevented from accessing information contained in password-protected smartphones. Further, prosecutors advocated for Kansas' own Kelsey Smith Act, which would allow law enforcement to receive information about the location of a 911 call. It would also give law enforcement access to information about where a cell phone is located when there is a reasonable belief that someone's life is at risk of death or serious physical harm.

Our prosecutors advocated for adequate funding to combat the opioid crisis and other drug related addictions. Regarding this issue, newly elected U.S. Representative Steve Watkins said, "I look forward to continuing to work with the Kansas District Attorneys in combatting the opioid crisis, methamphetamine addiction, and providing support for programs that reduce the demand for illegal opioid use."

One of the issues addressed was to require training for pharmacists and physicians to curb over-prescribing medications to patients. Additionally, the need to continue to support funding for programs that help reduce the demand for illegal substances was one of the most important issues the prosecutors wanted to get across.



Our delegation highlighted different issues we have been seeing from methamphetamine addiction affecting every part of the state and how we need more treatment facilities.

U.S. Senator Jerry Moran said, "I appreciate that several Kansas District Attorneys traveled to Washington, D.C. to discuss issues crucial to the safety of Kansans, including curbing the opioid epidemic, providing resources for mental health and drug treatment facilities, and working to implement the First Step Act. District Attorneys play a vital role in keeping our communities safe, and as chairman of the Senate Appropriations Subcommittee on Commerce, Justice, and Science, I will continue to look for ways to provide necessary resources for District Attorneys across our state."

Finally, our prosecutors raised the issue of the importance of asset forfeitures to help deter crime and fund much needed necessities for law enforcement and prosecutors. The Kansas delegation explained how it is aware that

of 2018, this museum is set out to give visitors a “walk in the shoes” experience of law enforcement. Also, it has many interactive exhibits and a memorial to law enforcement officers killed in the line of duty.



taking assets from drug dealers helps deter crime, but also that there are assets collected involving drug-related matters where no suspect can be determined. Law enforcement should be able to forfeit these assets.

The memorial was especially moving for Douglas County District Attorney Charles Branson. “It was a humble yet proud moment to see my great great grandfather’s service memorialized along with so many other heroes.” Charles great-great-grandfather Galba E. Branson was elected



After the meeting with the legislators, the Kansas prosecutors had an opportunity to visit the new National Law Enforcement Museum found adjacent to the National Law Enforcement Officers Memorial in Washington, DC’s Judiciary Square. Opened in October

Taney County Missouri Sherriff in 1888. He and Deputy U.S. Marshall Ed Funk were shot and killed during a shootout with the Miles brothers on July 4, 1889 near Kirbyville, MO. 

Member Milestones

Ladner Restires

After 30 years as a prosecutor, Christine Ladner accepted a fellowship in human trafficking in Kansas City, Missouri which began in February. She is now an Equal Justice Works Crime Victims Justice Corps fellow. There are approximately 46 EJWCVC fellowships placed at nonprofits across the U.S. Funded mostly by the D.O.J., these fellows focus on assisting survivors of human trafficking. Her host organization is Legal Aid of Western Missouri. Christine prosecuted in Sedgwick County, Shawnee County, the Attorney General's Office and Saline County.

Driskell Joins Saline County

Alex Driskell has joined the Saline County Attorney's Office as an Assistant County Attorney. He was born in Dunedin, Florida and grew up in Taylorville, Illinois. He graduated from Illinois State University in May of 2015 with undergraduate degrees in Psychology and Criminal Justice Sciences. He moved to Kansas to attend the University of Kansas School of Law in August of 2015 and graduated in May of 2018. Alex volunteers with Big Brothers Big Sisters and with the middle school youth group at Trinity United Methodist Church. Alex is also engaged to Laurel Michel, who is an associate at Kennedy, Berkley, Yarnevich & Williamson, Chartered.

Graham Retires

Lloyd Graham retired June 1st from the Geary County Attorney's Office. After graduating from Washburn Law School in 1980, he served as an Assistant Geary County Attorney until 1986, then private practice until 2008 when he returned to the Geary County Attorney's Office. Future plans will be "guided" by his lovely wife Barbara.

Ford County Hosts Summer Interns

Ivan Moya and Victoria Toothaker, both first-year law students at Washburn University School of Law, recently joined the Ford County Attorney's Office as summer interns. The Office operates a summer internship program for law students as a way of providing real-world, courtroom experience for law students and to generate interest among law students in practicing law in southwest Kansas upon graduation from law school. Both Mr. Moya and Ms. Toothaker will be with the office until early August, 2019.

Ivan Moya grew up in Garden City, Kansas. From 2016 until 2018, Mr. Moya served as a long-term substitute teacher at Garden City High School. Mr. Moya is also the Communications Director of the Washburn Student Bar Association and is also involved in the Environmental Law Society, Phi Alpha Delta Law Fraternity, the Hispanic American Law Students Association, and the Asian Americans Law Student Association.



Victoria ("Tori") Toothaker is a Dodge City native. She received her bachelor's degree in political science from Washburn University in 2018. She is the first Washburn Student to complete the school's Law Early Admission Program (LEAP) by earning her bachelor's degree two years after graduating high school. Currently, Ms. Toothaker is the Junior Kansas Bar Association representative for the Washburn Student Bar Association.

Bauch Gets Promoted

Andrew Bauch, an Assistant District Attorney in Douglas County, Kansas, was recently promoted to the rank of Lt Col. Bauch (on the right), is pictured receiving his promotion orders. Bauch serves as the Staff Judge Advocate for the 139th Airlift Wing in Saint Joseph, Missouri as a member of the Missouri Air National Guard.



Criminal Justice Reform

by Marc Bennett, Sedgwick District County Attorney

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.

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 at or near 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 June 30, 2017 was 9,803⁶ inmates. As such, the system is projected to reach its capacity within the next 5 years.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

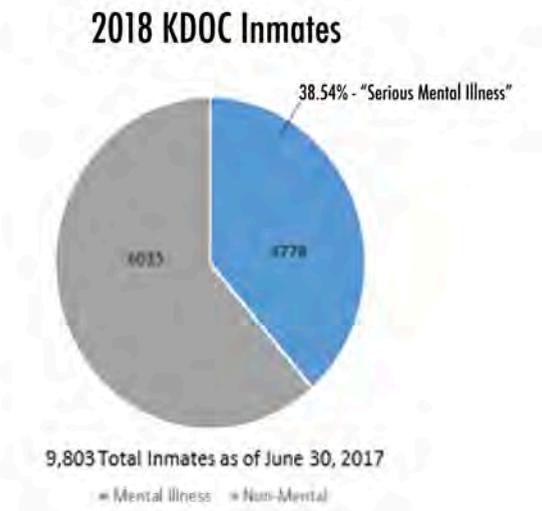
The Governor’s recommendation for “offender programs and reentry” for 2019, was \$7,798,596.00. Of that amount, \$1,850,723.00 was earmarked for substance abuse programs.¹⁰

Note that the budget for “offender programs and reentry” in 2009 was \$13.85 million—over \$6 million more than the amount requested in 2019.¹¹

B. Role of Mental Health

According to the Kansas Department of Corrections, 39% 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 to Sedgwick County Sheriff, Jeff Easter.



At the same time, the behavioral health infrastructure in Kansas has been under increased pressure. In December of 2015, the federal centers for Medicare and Medicaid Services (CMS) decertified Osawatome State Hospital.¹⁴ Accreditation was granted again in December of 2017,¹⁵ but wait times at OSH persist for community members who have been deemed under K.S.A. Chapter 59, to be a danger to themselves or others based on a mental health issue.

In FY 2018, “major supplemental requests to the state budget” were made, including the following¹⁶ 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;
- Osawatome 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.

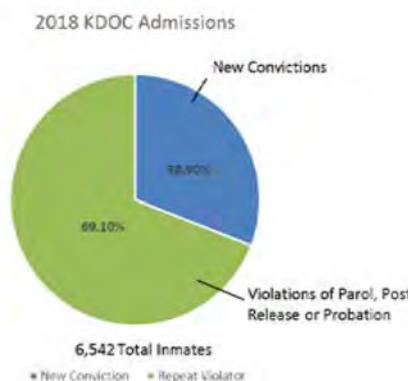
II. The Projected State of Kansas Prisons

The Kansas Sentencing Commission’s “Fiscal Year 2019 Adult Inmate Prison Population Projections,” reports that the state prison population in Kansas will grow from its FY 2018 population of 9,973 inmates incarcerated to 12,054 by the year 2028,¹⁷ well past its 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 convictions¹⁸—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.

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.

2. Violent Offenders

In 2006, Jessica’s Law was passed increasing the penalty for sex crimes committed against children under the age of 14 from 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 (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, up to life with parole eligibility after 50 years. First (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 2028.¹⁹

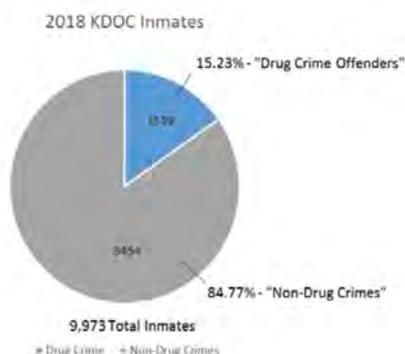
What this means in raw numbers is that in FY 2018 there were 2,516 severity level 1, 2 or 3 non-drug inmates (ex: Aggravated Kidnapping, Second Degree [Intentional] Murder, Second Degree [Reckless] Murder and Aggravated Robbery), and an additional 1,412 off-grid offenders (Capital Murder or First Degree [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 2028.²⁰

I am not advocating 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.

3. Drug Crimes

Note that by comparison, there were 1,519 “drug crime” offenders²¹ of the 9,973 offenders in prison 2018, which is 15% of the current prison population. By the year 2028, there are projected to be 1,958 drug offenders of the 12,054 projected inmates, or 16%.²²



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 possession, which are “presumptive probation” for anyone with fewer than two 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.²³

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, in FY 2018, there were 9,973 inmates in Kansas prisons. During the same period, 6,389 inmates were released from Kansas prisons.²⁴ 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 offenders - “supervision violators” - constituted 59.1% of the prison population in FY 2018.

Duration of Confinement in KDOC adult facilities as of June 30, 2017²⁵:

	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.²⁶ With this in mind, would calls for even shorter prison terms for drug offenders²⁷ 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 successful complete parole/post-release when he or she was unable to complete 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 (severity level

5) 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 severity level 5 non-person, drug felonies. A person with no prior criminal history (history “I”), 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.

As set forth above, after HB 2170, such a person would have to commit a serious violation of his or her probation (in addition to any minor, 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 a drug crime—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 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 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,²⁸ 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 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.²⁹ 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.³⁰

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, reductions in admission for parole and post-release violators under SB 323, and 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,³¹ - a sentence that is only available for people with multiple prior convictions for other crimes. 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 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* - furthers 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. The same offender is now scored an “E” and faces a range of 82-88-92 months.

This disparity in the manner by which prior convictions across state lines will now 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 scored 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.³² The chart below compares Kansas to our neighbors using 2016 census numbers:

	<u>Population</u>	<u>Prison Population</u>
Missouri	5,988,927	32,461
Oklahoma	3,751,351	26,486
Colorado	5,029,324	19,862
Kansas	2,853,118	9,628
Nebraska	1,826,341	5,235

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.³³

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 need to redouble our efforts to reduce recidivism for those on probation and those leaving incarceration. HB 2170 made it harder to revoke probation for simple violations, but the graduating sanctions model did nothing to lower the number of violations leading to re-incarceration.

We need to focus on the reasons people continue to committing new crimes or other violations in violation of the terms of their probation and parole/post-release by.

Community Resources: Mental Health & Drug Treatment

Knowing that 39% of the people in the penitentiary (and a like number in jails) suffer from mental health issues, increased access to mental health treatment in local communities offers both a chance to reduce recidivism and off-set costs to the community.

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 observation, and short-term crisis stabilization for adults.”³⁴

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.”³⁵

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.³⁶ However, 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.³⁶

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.³⁷ In general, most studies have found that drug courts reduce recidivism rates and costs associated with incarceration.³⁸ 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 \$24,500.00,³⁹ 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.

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.

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?

Conclusion

As policy makers 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 sent to serve short-term prison terms after repeated violations of supervision or the commission of new crimes while on supervision, only to be released without adequate access to community-

based drug and mental health treatment and re-entry resources, who are then ripe to commit more crimes or violations of supervision.

Can we as a state commit to increasing regional access to mental health and drug treatment to slow the tide? If so, we stand to improve our system, lower costs, lower incarceration and do so without compromising public safety.

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

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