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**Testimony in Support of House Bill 2144  
Establishing the burden of proving reversible error on the defendant  
for a sentencing issue raised for the first time on appeal**

**Presented to the Corrections and Juvenile Justice Committee  
By Assistant Solicitor General Natalie Chalmers**

**February 9, 2021**

Chairman Jennings and Members of the Committee:

Thank you for the opportunity to provide testimony in support of HB 2144 on behalf of Attorney General Derek Schmidt.

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

In *State v. Obregon*, 309 Kan. 1267, 444 P.3d 331 (2019), the Kansas Supreme Court held that the PSI's failure to designate a subsection of a Florida statute required a remand to determine if the conviction was properly classified as a person felony. This has subsequently led to a number of claims by defendants that the PSI is not sufficient evidence to score the conviction in their criminal history because of a failure to cite to a specific subsection in a statute.

For example, in one case the defendant accurately alleged that the Presentencing Investigation Report (PSI) did not specify if the prior conviction for fleeing and eluding was a felony or a misdemeanor. The State then obtained documents that established it was unquestionably a felony. But based on another case by the Kansas Supreme Court, it is unclear if the Kansas Court of Appeals will be able to consider those documents to reject the issue. Thus, the result could be a remand that wastes judicial resources on an issue that will provide the defendant no relief. But if the issue was raised through a motion to correct an illegal sentence, the district court should be able to swiftly resolve the issue through taking judicial notice of its own records.

Thus, the concern by the Office of the Attorney General is that extensions of *Obregon* effectively end any necessity of objecting to the PSI and force appellate counsel and the appellate courts to waste resources on issues that should have been handled by an objection or that could be more efficiently decided by the district court through a motion to correct an illegal sentence.

However, in recent conversations with a member of the Kansas Association of Criminal Defense Lawyers (KACDL), the Office of the Attorney General realized that its proposal, without modification, may cut off some defendants' ability to obtain relief that can only be obtained on direct appeal. KACDL will propose an amendment to K.S.A. 21-6820(i) to ensure that motions to correct an illegal sentence can be filed in the district court even while an appeal is pending and that any change in law that would apply while the appeal is pending would also apply to those motions. This office supports that proposal.

But it should also be noted that the Kansas Supreme Court is currently faced with deciding whether the appellate courts have jurisdiction to hear a State's appeal raising a challenge to the illegality of the sentence without another jurisdictional basis for the appeal.<sup>1</sup> Questions during those case suggest that defendants may also facing jurisdictional hurdles with appealing a motion to correct an illegal sentence. Thus, consideration should be given to whether explicit jurisdiction language should clarify that both the State and defendants can appeal a motion to correct an illegal sentence. This office defers to the Revisor's office on where that jurisdictional language should be placed if the Legislature wishes to add explicit jurisdictional language.

The Office of the Attorney General also understands the KACDL will recommend an amendment to K.S.A. 21-6813(b)(5), to require the journal entries relied on to establish the defendant's criminal history score to be attached to the PSI. This office agrees that such a requirement would assist both defendants and the State in having the necessary records to determine whether an issue has merit. Thus, it agrees with that recommendation.

For the above reasons, the Office of the Attorney General supports this Committee adopting this bill, but would also encourage the modification set forth in this testimony. Thank you for your time.

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<sup>1</sup> Those cases were argued on February 3, 2021, in appellate case numbers 121,789 (*State v. Clark*) and 120,783 (*State v. McCroy*).