

August 30, 2013

Open Letter to Stakeholders Regarding Retroactivity of the HB 2170 Graduated Sanctions:

The Kansas Sentencing Commission is of the opinion that the implementation of the graduated sanctions in K.S.A. 2012 Supp. 22-3716(c) as amended by 2013 House Bill 2170 are applicable to an offender whose crime of conviction was committed prior to July 1, 2013. The Commission believes the graduated sanctions are not substantive changes in the law and do not affect the defendant's rights. They are simply procedural refinements within the existing probation violation system which the Kansas Legislature intended to apply retroactively to every offender on probation, regardless of date of conviction. Therefore, the graduated sanctions should be applied retroactively in all cases.

The Legislature Intended for the Graduated Sanctions to Apply Retroactively

In *State v. Sutherland*, 248 Kan. 96 (1991), the Court laid out the following two-part test to apply when determining whether a statute should apply retroactively:

A fundamental rule of statutory construction is that a statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively. An exception to this fundamental rule is that, if the statutory change does not affect the substantive rights of the parties and is merely procedural or remedial in nature and is not prejudicial to the parties, it applies retroactively.

An analysis of the language used in HB 2170 shows an unambiguous legislative intent to apply the graduated sanctions, as prescribed in the amendments to K.S.A. 2012 Supp. 22-3716(c), retroactively and immediately upon the effective date of the bill.

It is fundamental that where a statute is designed to protect the public, the language must be construed in the light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out. *Johnson v. Killion*, 178 Kan. 154, 283 P.2d 433 (1955). In this case, K.S.A. 2012 Supp. 22-3716 as amended by 2013 House Bill 2170 is entitled to

a broad interpretation with great deference to the legislative intent. The foremost goal of HB 2170 is public protection. In regard to probationers, HB 2170 adopts best practices to impose swift and sure sanctions for their violations. Applying best practices is equally applicable to offenders on probation at the effective date of HB 2170 as it will be to probationers in the future. The legislature's intent was unquestionably the immediate implementation of all HB 2170 amendments except those otherwise given specific and express temporal qualifications.

The legislature chose its words in HB 2170 carefully and conscientiously. In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. *Matter of Marriage of Ross*, 245 Kan. 591, 783 P.2d 331 (1989). Surely this rule of construction would logically extend to different provisions within a single statute. One need look no further for evidence of the retroactivity of the graduated sanctions than the HB 2170 amendments to K.S.A. 2012 Supp. 22-3716(f). Contrasting the HB 2170 amendments to K.S.A. 2012 Supp. 22-3716(f), which require revoked probationers to serve postrelease supervision, with the graduated sanction amendments in 22-3716(c), it is clear how the legislature took express measures to limit retroactivity in circumstances which are substantive as opposed to those which are solely procedural. The HB 2170 amendment that imposes postrelease supervision upon completion of sentence after revocation in 22-3716(f) is undoubtedly punitive; it is a substantive change that increases the length of a defendant's supervision. For that reason, the legislature has added the qualifier "*For crimes committed on and after July 1, 2013...*" to 22-3716(f) in HB 2170. This was the intent, so that the courts would be relieved of the duty to trek through the analysis announced in *Sutherland* or unintentionally impose postrelease supervision on probation offenders prior to July 1, 2013, only to have it overturned on ex post facto grounds. With the graduated sanctions in 22-3716(c), there were no concerns about substantive changes or a prejudicial impact on offenders sentenced prior to July 1, 2013. In fact, any attenuated substantive change that could possibly be caused by the implementation of the graduated sanctions is specifically carved out in 22-3716(f), which the legislature took great care in specifying would not apply to those whose crime of conviction was committed prior to July 1, 2013. The legislature omitted this language from 22-3716(c) with the presumption that these procedures would go into effect immediately, without question or qualification as to who and when they should apply. Under

the court's rules of statutory construction, no express retroactivity language is necessary when an amendment is procedural in nature. *State v. Lamb*, 15 Kan.App. 2d 606 (1991).

The court must give effect to the legislature's intent even though words, phrases or clauses at some place in the statute must be omitted or inserted. *Ross*, 245 Kan. 591, 783 P.2d 331 (1989). In *State v. Noah*, 246 Kan. 291 (1990), the Kansas Supreme Court found that an extension of the statute of limitations is procedural in nature and should apply retroactively, regardless of the lack of express language of legislative intent to do so. An example of this principle in action can be seen in 2013 House Bill 2252, which amended K.S.A. 2012 Supp. 21-5107, pertaining to the statute of limitations for rape and aggravated criminal sodomy. There is no express language to indicate that the new, extended statute of limitations is meant to apply to people whose crimes were committed prior to the effective date (even though those whose statute of limitations had already run by the time of the enactment cannot have their period revived), however, that was surely the intent and interpretation of the legislators, courts and the prosecutors who are tasked with the enforcement of this provision. The similarities between HB 2252 and HB 2170 in this regard are unequivocal.

In *State v. Lamb*, the Kansas Court of Appeals held that an amendment which changed the intervals at which a person is eligible for a parole hearing did not have any express language as to when it should apply, but should nonetheless be applied retroactively because it was procedural in nature. Furthermore, the *Lamb* court held:

The legislature is aware of the appellate court's established rules of statutory construction and is, therefore, aware that procedural changes in the law operate retroactively. Sutherland, 248 Kan. at 106, 804 P.2d 970. K.S.A.1990 Supp. 22-3717(h) is clearly procedural. Therefore, it is clear the legislature intended the amendment to apply retroactively. Lamb at 610.

In determining legislative intent, courts are not limited to consideration of the language used in the statute, but may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. *Ross*, 245 Kan. 591 (1989). In the legislative hearings before the House Committee on Corrections and Juvenile Justice, one of the primary effects of the passage of HB 2170 was the prison bed space savings the bill would provide for the heavily burdened Kansas Department of Corrections. In gathering support for the bill, proponents offered figures and presentations showing that such bed space and costs savings would be attained by the immediate enactment of the legislation, assuming that such provisions would go into effect upon the effective

date of July 1, 2013. It is clear that the legislature relied on these figures and intended that the provisions of HB 2170 go into effect immediately upon enactment.

Since the legislature intended for this procedural amendment to apply retroactively, the only question that remains is whether or not the amendment would violate the Constitution's ex post facto clause. For reasons further discussed in the following pages, it is clear that there are no ex post facto concerns because probation violators will not have their substantive rights prejudicially affected.

The Graduated Sanctions Framework is Procedural Law

Even if the court cannot find sufficient evidence of legislative intent to apply the graduated sanctions retroactively within the construction of HB 2170, the legislative history accompanying its passage and other secondary sources, the exception to the presumption against retroactivity of *Sutherland* is applicable. This exception, as explained in *Sutherland*, reads:

An exception to this fundamental rule is that, if the statutory change does not affect the substantive rights of the parties and is merely procedural or remedial in nature and is not prejudicial to the parties, it applies retroactively.

The graduated sanction structure is procedural in how it amends the system in which the court handles probation violators. The procedural nature of probation itself is immediately evident within its statutory definition in K.S.A. 2012 Supp. 21-6603(g):

*"Probation" means a **procedure** under which a defendant, convicted of a crime, is released by the court after imposition of sentence, without imprisonment except as provided in felony cases, subject to conditions imposed by the court and subject to the supervision of the probation service of the court or community corrections. (emphasis added)*

The rule to apply in distinguishing procedural from substantive law was first announced in *State v. Augustine*, 197 Kan. 207, Syl. P 1, 416 P.2d 281 (1966):

*As related to criminal law and procedure, **substantive** law is that which declares what acts are crimes and prescribes the punishment therefor; whereas **procedural** law is that which provides or regulates the steps by which one who violates a criminal statute is punished. (emphasis added)*

When reviewing the purpose and effect of the graduated sanctions, it is clear that they do not declare what acts are crimes, nor prescribe punishment therefor. However, they do fit the description of a procedural law as defined in *Augustine*. Graduated sanctions are a textbook example of a law that "regulates the steps by which one who violates a criminal statute is

punished.” The types of punishments specifically authorized within HB 2170 were already well within the court’s authority pursuant to K.S.A. 2012 Supp. 22-3716 and K.S.A. 2012 Supp. 21-6604(a)(3) prior to July 1, 2013; HB 2170 merely refined this broad authority by providing a hierarchy of successive consequences, or “steps,” for violators.

To put it in terms used in *Sutherland* and subsequently addressed in *State v. Freeman*, 249 Kan. 768, 771, 822 P.2d 68 (1991):

In Sutherland, substantive criminal law was described as dealing with the “length of the sentence to be imposed and not merely how the sentence is to be served or how the length of the sentence is to be determined.”

In this case it is clear that the graduated sanctions do not alter the underlying prison sentence or in any other way increase the length of the sentence to be imposed. Probation is a procedural matter that entails how the sentence is to be served. By the *Augustine* and *Sutherland* definitions, the graduated sanctions are purely procedural law.

The Graduated Sanctions Framework Does Not Prejudice the Defendant’s Substantive Rights

Once it is decided that the graduated sanctions are in fact procedural, the next step is showing that they do not prejudicially affect the defendant’s substantive rights. We know from the *Sullivan* and *Freeman* line of cases that even amendments that are procedural in nature can be deemed substantive if the amendment prejudicially affects the substantive rights of the defendant. In *Freeman*, the defendant challenged the retroactive application of an amendment to K.S.A. 1990 Supp. 22-3716 which was added after his crime of conviction was committed. The new provision gave the court an extra 30 days beyond the date of his probation termination date to prove any probation violations that may have occurred prior to termination. The *Freeman* court found that K.S.A. 22-3716 was a procedural statute, however they noted that the defendant would have, by virtue of the new expanded lookback period for probation violations, been subject to greater punishment. The *Freeman* court states:

*The application of K.S.A.1990 Supp. 22-3716 in the **present case** would have extended the period of his punishment from two years to at least four years. Thus, the statute prejudicially affected the substantive rights of defendant; therefore, it is substantive and operates prospectively and not retroactively. (emphasis added)*

The language in *Freeman* further emphasizes that the determination of whether a law is procedural or substantive requires a case by case analysis of whether or not the defendant’s substantive rights will be prejudiced. While the amendments to K.S.A. 1990 Supp. 22-3716 at issue

in *Freeman* may have impacted the defendant's substantive rights by lengthening the period of his punishment, the graduated sanctions amendments to K.S.A. 2012 Supp. 22-3716 as amended by 2013 House Bill 2170 do not, and therefore require retroactive application.

The argument that graduated sanctions will prejudice the defendant's substantive rights fails due to the fact that a defendant will not, under any circumstances, have their length of sentence altered or punishment enhanced by implementation of the graduated sanctions framework. As a matter of law, prior to July 1, 2013 the court could revoke an offender's probation for a single violation, no matter how slight. However, in order to revoke under K.S.A. 2012 Supp. 22-3716 as amended by HB 2170, the court must find that the defendant absconded or committed another crime, or make a special safety or welfare finding on the record. There is not a single instance in which the provisions of HB 2170 expand the authority of the court to revoke a probation violator. Rather, HB 2170 keeps this authority in check by allowing revocation under fewer circumstances.

A law is not made substantive by the mere fact it alters the court's discretionary authority to direct how the sentence will be served. The law at issue must affect the substantive rights of the defendant before retroactive application of the law is constitutionally impermissible. State v. Sutherland, 248 Kan. 96, 105, 804 P.2d 970, 976 (1991).

The same logic is applicable in the case of each new graduated sanction; offenders are given more opportunities to remain on probation after a violation, not less. Prior to July 1, 2013, the court previously had the ability to revoke probation and impose either the full underlying prison sentence or any lesser sentence for a probation violation. Even if a defendant brought the challenge that the 120 or 180 days sanction was an increase in punishment over *any lesser sentence* the court may have imposed, the defendant would have to argue that the graduated sanction of 120 or 180 days is somehow more prejudicial than the law in effect prior to July 1, 2013, when they could have been revoked or sentenced to jail for longer than 180 days. The 120 or 180 day prison sanctions in no way increase the length of the defendant's underlying prison sentence or the time which the defendant could potentially spend in incarceration. Furthermore, the Supreme Court's analysis in *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597 (1995), makes it clear that the retroactive application of procedural criminal law that creates "some remote risk of impact on a prisoner's expected term of confinement" is permissible.

Nor are the "quick dip" jail sanctions, as provided in the HB 2170 amendments to K.S.A. 2012 Supp. 22-3716(c)(1)(B), prejudicial. Again, all of the previous sanctions available to the court in K.S.A. 2012 Supp. 22-3716 provided for greater lengths of punishment. In addition, K.S.A. 2012 Supp. 21-6604(a)(3), which was in effect prior to the passage of HB 2170 and still remains in effect,

provides the court the ability to sentence an offender on probation to up to 60 days of jail time for each probation violation. The 2-3 day quick dip is merely a procedural refinement of this pre-existing authority. The fact that a court services or community corrections officer may now impose such a sentence is not a due process violation either; the defendant is not being stripped of his right to a violation hearing, rather the quick dip sanction depends on the offender's knowing and voluntary relinquishment of this right through a written waiver.

As the analysis indicates, the defendant's substantive rights are in no way prejudiced by the immediate and retroactive implementation of graduated sanctions. Thus, this distinguishes the present situation from that at issue in *Freeman*, where the court found that retroactive application would have extended the defendant's punishment.

The Court of Appeals' Dreier Decision is Not Applicable

Opponents of the retroactivity of the graduated sanctions argue that K.S.A. 22-3716 has been deemed a substantive statute in prior cases, notably *State v. Dreier*, 29 Kan. App.2d 958 (2001), and that therefore, amendments thereto cannot be applied retroactively. However, the opponents of retroactivity overlook the fact that the *Dreier* court undertakes only a brief analysis of substantive and procedural law before hedging its position with the holding that, "even if K.S.A. 2000 Supp. 22-3716(b) did apply, the district court did not err." The holding in *Dreier* did not hinge upon the court's analysis of whether K.S.A. 22-3716 was retroactive, therefore the court's discussion of retroactivity is purely dicta and should not control in a subsequent case or controversy. The Kansas Court of Appeals wrote in *Matter of Fortney's Estate*, 5 Kan.App.2d 14 (1980):

Moreover, the Court's reasoning in Shannep is dicta since, the Court there plainly held that the statute did not apply and its limited discussion of intent hinged on the hypothetical assumption that the statute applied. Dictum which goes beyond the points decided in a particular case may be respected, but it should not control a subsequent case when the precise point is presented, argued and considered by the court.

The *Dreier* court made several assumptions as to the nature of an amendment as either substantive or procedural that are simply not supported by prior case law. A statute itself is rarely either "substantive" or "procedural", but contains elements of both. For that reason it is necessary to analyze the particular set of circumstances created by the amendments to HB 2170 and how they will affect the defendant, not rely on the fact that the court has found certain aspects of previous versions of the same statute, K.S.A. 22-3716, to be substantive in past cases. Furthermore, K.S.A.

22-3716 is not a substantive criminal statute in the context intended by the prior case law to which the *Dreier* court refers. The *Dreier* court wrote:

*In State v. Freeman, 249 Kan. 768, 771, 822 P.2d 68 (1991), our Supreme Court considered a previous amendment to K.S.A. 22–3716(b) and held “[a]pplication of the amended version of 22–3716 in the circumstances of the present case would **alter** the punishment itself” and, thus, the statute was substantive, not procedural. This same reasoning applies to K.S.A.2000 Supp. 22–3716(b) because the statute in effect at the time of Dreier’s crime, K.S.A. 22–3716(b) (Furse 1995), does not mandate the district court assign a defendant to a community corrections program before ordering that the defendant serve the original sentence imposed. (emphasis added)*

However, this represents an erroneous parsing of two separate passages within *Freeman*, resulting in a broader expansion of the concept of what constitutes a “substantive change” than previously considered in Kansas jurisprudence. In *Freeman*, the court stated:

Application of the amended version of 22-3716 in the circumstances of the present case would alter the punishment itself in that it would result in lengthening his penalty.

The *Freeman* court later stated:

*Thus, if the statute prejudicially affects the substantive rights of defendant, it operates prospectively. The statute is not a prescription for the length of the penalty. Nevertheless, it effectively **enhances** the punishment itself. (emphasis added)*

The Sentencing Commission does not dispute the *Freeman* court’s interpretation of the difference between substantive and procedural law. However, the *Dreier* court’s reliance on fastidiously chosen phrases within the *Freeman* holding, as quoted above, puts forth the notion that a statute that merely alters any element of a punishment in any way is to be considered substantive. *Freeman* found substantive rights are affected only when a punishment is enhanced, not merely altered or somehow diminished. Without any showing of prejudice to the appellant, the *Dreier* court had no basis to presume that any procedural change concerning the probation of the defendant suffices to satisfy the *Sutherland* test.

Dreier also erred in its overly broad reading of *State v. Mayberry*, 248 Kan. 369 (1991). The *Dreier* court concluded that *Mayberry* supported the finding that criminal penalties in effect at the time of the offense control, as opposed to those statutes in effect at the time of the conduct giving rise to the revocation or sanction for the violation of the terms of probation. However, this reliance on a single sentence within *Mayberry* requires further examination of the context within which it was used. The *Mayberry* court said:

Criminal statutes and penalties in effect at the time of the criminal offense are controlling. See State v. Sylva, 248 Kan. 118, Syl. ¶ 4, 804 P.2d 967 (1991); State v.

Ramos, 240 Kan. 485, 490, 731 P.2d 837 (1987); *State v. Armstrong*, 238 Kan. 559, 566, 712 P.2d 1258 (1986).

In *Mayberry*, the defendant would have been sentenced to a greatly increased prison sentence pursuant to the habitual criminal statute that was enacted subsequent to the commission of his crime. One must also examine the cases to which *Mayberry* cites in order to gain an understanding of what is meant in this one pivotal sentence. In each of these cases, there is some element pertaining to: 1) criminal conduct that has already been committed and 2) the passage of a statutory amendment that in one way or another alters the characterization of the crime or the penalty associated with the criminal conduct, particularly the length of the criminal sentence, prior to sentencing. These cases all stand for the fundamentally settled rule that “the penalty for a criminal offense is the penalty provided by statute at the time of the commission of the offense.” Under the framework of these cases and the narrow and settled rule for which they stand, it is obvious that the *Mayberry* court did not intend to lend a definition of “criminal statutes” that would even begin to encompass the provisions of K.S.A. 22-3716, a statute that deals exclusively in the realm of providing the procedure by which the court handles probation violators. It is doubtful that the *Mayberry* court would have considered a procedural law dealing with those offenders who may prospectively commit a violation of their probation to be a criminal penalty. Probation is, by statutory definition, a procedure, and further evidence that probation itself is separate and distinct from the criminal sentence is found in *State v. Dubish*, 236 Kan. 848 (1985). Furthermore, under the HB 2170 graduated sanctions, the underlying sentence, or “criminal penalty” remains completely unchanged.

Nonetheless, the *Dreier* holding would indicate that not only is every criminal statute in place at the time of a particular offense controlling, but every criminal *procedure* statute in place at the time of the criminal offense is controlling as well. While this is a tidy rule of construction, it ignores the holding of *State v. Augustine* and subsequent case law which carves out the extremely important and well-settled rules regarding retroactive application of procedural statutes. The *Dreier* expansion finds no support in state or federal case law, and could in fact prove devastating or utterly nonsensical within our criminal justice system. In *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597 (1995), the Supreme Court held that a procedural amendment that did not increase the punishment of the defendant could be applied retroactively and was not violative of the Ex Post Facto clause. In *Morales*, Justice Thomas wrote:

Respondent's approach would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact

on a prisoner's expected term of confinement. Under respondent's approach, the judiciary would be charged under the Ex Post Facto Clause with the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures, including such innocuous adjustments as changes to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor. These and countless other changes might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for ex post facto purposes.

Applying the rule announced in *Dreier* would lead to similarly unworkable consequences.

Therefore, the argument that the court has previously found K.S.A. 22-3716 to be a substantive statute is supported only by *Dreier*, a case that unduly expands the definition of both “criminal law” and “substantive law” beyond what any Kansas court had previously intended, and also ignores the fact that the question of substantive vs. procedural is a case-by-case analysis that must take into account the specific effect the amendments will have upon the defendant. See *Freeman*. For that reason, the *Dreier* opinion is not applicable to the facts in this instance.

The Kansas Sentencing Commission believes that the legislative intent to have the graduated sanctions go into effect immediately is well-documented by the legislative history and apparent in light of the public safety purpose for which it was enacted. Furthermore, the legislature chose their language carefully in specifically mandating prospective application of any statutory amendments that would potentially affect the substantive rights of any defendant. However, even if legislative intent cannot be ascertained, the graduated sanctions are procedural and do not prejudice the substantive rights of the defendant, therefore they should be given retroactive application to all probation violators on and after July 1, 2013.

Respectfully submitted,

HB 2170 Subcommittee