The Kansas Supreme Court Makes a Policy Determination in the Guise of Statutory Interpretation [*State v. Wetrich*, 412 P.3d 984, 986 (Kan. 2018)]

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The Kansas Supreme Court incorrectly interpreted K.S.A. § 21-6811(e)(1) [formerly K.S.A. § 21-4711(e)]. The court found that when determining a defendant's criminal history score, an out-of-state crime would only be "comparable" to a Kansas person felony if the elements of the out-of-state offense were identical to or narrower than the Kansas offense. The court incorrectly used statutory interpretation to come to this conclusion and did not adequately acknowledge Kansas precedent to determine that the identical-or-narrower test is required.

Editor's Note: A version of this Comment published on March 21, 2019 incorrectly asserted that the Conference Committee Report cited in Footnote 51 was published before the Kansas Supreme Court decided Wetrich. *This error has been corrected. — J.E.K.*

I. INTRODUCTION

The Revised Kansas Sentencing Guidelines Act ("RKSGA"),[1] created a common sense approach to sentencing defendants.[2] Although the RKSGA was enacted to help streamline the sentencing process, Kansas courts have had difficulty applying and interpreting the RKSGA.[3]

1. KAN. STAT. ANN. §§ 21-6801 to -6824 (2018).

2. *Kansas Legislator Briefing Book 2017*, KAN. LEGIS. RES. DEP'T 31–32 (2017), http://www.kslegresearch.org/KLRD-web/Publications/BriefingBook/2017Briefs/G-7-Sentencing.pdf [https://perma.cc/EF5F-6UYR]. In 1992, the Kansas Legislature adopted a determinative approach to sentencing defendants when it adopted the Kansas Sentencing Guidelines Act ("KSGA"). Terry Savely, *25 Years of the Kansas Sentencing Guidelines: Where We Were, Where We Are, and What's Next?*, J. KAN. B. ASS'N, Jul.-Aug. 2017, at 22, 23. In 2010, the Kansas State Legislature repealed and re-codified the Guidelines as the Revised Kansas Sentencing Guidelines Act ("RKSGA"). KAN. STAT. ANN. §§ 21-6801 to -6824 (2018). For the RKSGA, the Kansas Legislature "rewrote the criminal code (chapter 21 of the Kansas statutes), including restructuring substantive statutes and some sentencing provisions." Savely, *supra*, at 23 n.2. In this Comment any references to the RKSGA will also include a reference to the KSGA and the earlier version of the statute.

3. Savely, *supra* note 2, at 23. When determining a defendant's criminal history score the court must look at the severity level of the crime committed and the defendant's criminal history score. *Kansas Legislator Briefing Book 2017*, *supra* note 2, at 31–32. Particularly, Kansas courts have had

Under the RKSGA, a defendant's criminal history score can range from an "A" to an "I" based upon how many criminal convictions they have.[4] The Kansas Legislature labeled certain crimes as "person" felonies and "nonperson" felonies.[5] Person felonies have a greater effect on an individual's criminal history score because person felonies inflict physical or emotional harm upon individuals.[6]

When a court is calculating a defendant's criminal history score under K.S.A. § 21-6811(e)(1), the court will look at out-of-state convictions.[7] This has caused trouble for Kansas courts because when determining whether the out-of-state offense is a person or nonperson felony, "*comparable* offenses under the Kansas criminal code . . . shall be referred to. If the state of Kansas does not have a *comparable* offense in effect . . . the out-of-state crime shall be classified as a nonperson crime."[8]

Traditionally, the Kansas Supreme Court has held an out-of-state conviction would be "comparable" to a Kansas offense so long as it was the closest approximation or similar to a Kansas offense.[9] However, in *State v. Wetrich*,[10] the Kansas Supreme Court upended Kansas case law, and held that an out-of-state offense is "comparable" if the elements of the out-of-state offense are the same or narrower than the Kansas offense. Through a historical analysis of Kansas case law, an examination of current Kansas legislative history, and the application of statutory construction, this Comment's purpose is to demonstrate the Kansas Supreme Court should revisit this issue and overturn *Wetrich*. If the Kansas Supreme Court does not overturn *Wetrich*, the Court has limited the legislature's ability to control how defendants are sentenced and how their criminal history scores are calculated. Part II of this Comment explains what led to the Kansas Supreme Court upending judicial precedent and how the lower courts examined the case against Roy

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difficulty calculating what a defendant's criminal history score should be. Savely, *supra* note 2, at 28–29.

4. KAN. STAT. ANN. § 21-6809 (2018) [formerly KAN. STAT. ANN § 21-4709]. A defendant will have a criminal score of "A" if they have been found guilty of three person felonies. *Id.* A defendant will have a criminal score of "I" if they have one misdemeanor conviction or no criminal convictions. *Id.*

5. State v. Keel, 357 P.3d 251, 261 (Kan. 2015). Person felonies are crimes that inflicted or could have inflicted physical or emotional harm upon individuals. *Id.* Other felonies are labeled as "nonperson felon[ies]" when the individuals that commit these crimes have inflicted damage or could have inflicted damage to property. *Id.*

6. *Id.* Person felonies are seen as having the potential of causing more harm to the public and have a greater effect on a defendant's criminal history score. *Id.*

7. *See* KAN. STAT. ANN. § 21-6811(e)(1) (2018) [formerly KAN. STAT. ANN. § 21-4711(e)].

8. *Id.* § 21-6811(e)(3) [formerly KAN. STAT. ANN. § 21-4711(e)] (emphasis added). Yet, if the crime is "a felony in the convicting jurisdiction, it will be counted as a felony in Kansas." *Id.* § 21-6811(e)(2)(A) (2018) [formerly KAN. STAT. ANN. § 21-4711(e)].

9. State v. Williams, 326 P.3d 1070, 1074 (Kan. 2014); State v. Vandervort, 72 P.3d 925, 935 (Kan. 2003).

10. 412 P.3d 984, 991(Kan. 2018).

Wetrich. Part III describes the historical lead up to *Wetrich* and how the Kansas sentencing guidelines have developed over time. Part IV examines the Kansas Supreme Court's decision in *Wetrich* and scrutinizes the Courts legal analysis. Part V argues the Kansas Supreme Court inappropriately used tools of statutory interpretation to find the Kansas State Legislature intended sentencing judges to use the identical-or-narrower rule when analyzing a defendant's prior out-of-state convictions.

II. CASE DESCRIPTION

Roy D. Wetrich was found guilty of multiple crimes, and the sentencing court gave him a criminal history score of "C."[11] Wetrich's presentence investigation report found he had five prior nonperson felonies and one person felony, a 1988 Missouri burglary conviction.[12] Wetrich unsuccessfully argued the previous Missouri burglary conviction should be classified as a nonperson felony, instead of a person felony.[13]

The Kansas Court of Appeals found Wetrich could challenge his criminal history score.[14] On remand, the district court determined his prior second-degree Missouri burglary conviction was comparable to the Kansas burglary statute.[15] Wetrich appealed again, and subsequently, the Kansas Court of Appeals held Wetrich's prior Missouri burglary conviction was a nonperson felony.[16] The State of Kansas sought review of the appellate court's decision and the Kansas Supreme Court granted review of the case.[17]

III. LEGAL BACKGROUND

In 1992, the Kansas Legislature went from an indeterminate form of sentencing to a determinative form of sentencing by adopting the

11. State v. Wetrich, 412 P.3d 984, 986 (Kan. 2018). Wetrich was found guilty of kidnapping, two counts of aggravated assault, criminal possession of a firearm, possession of marijuana, violation of a protection order, domestic battery, and intimidation of a witness. *Id.* Whether the Missouri burglary conviction received a person or nonperson classification would have serious effects on Wetrich's criminal history score. State v. Wetrich, 304 P.3d 346, 353 (Kan. Ct. App. 2013). If the Missouri burglary conviction was determined to be a nonperson felony, Wetrich's criminal history score would change from a "C" to an "E." *Id.*

12. *Wetrich*, 304 P.3d at 350, 353.

13. *Id.* at 353. The district court determined that Wetrich was estopped from making this argument because the district court had rejected that same argument in an earlier case. State v. Wetrich, No. 112,361, 2016 Kan. App. LEXIS 35, at *2–3 (Kan. Ct. App. Jan. 15, 2016).

14. *Wetrich*, 412 P.3d at 986. Wetrich had to prove by a preponderance of the evidence that he should have been an "E" instead of a "C." *Wetrich*, 304 P.3d at 353.

15. *Wetrich*, 2016 Kan. App. LEXIS 35, at *5.

16. *Id.* at *12. The holding changed Wetrich's criminal history score to an "E," instead of a "C."

17. *Wetrich*, 412 P.3d at 986.

KSGA.[18] In 2010, the Kansas State Legislature repealed and re-codified the Guidelines as the RKSGA.[19] The Kansas Legislature determined out-of-state offenses which are "comparable" to a particular Kansas offense would have the same effect on a defendant's criminal history score as an Kansas person felony.[20]

In *State v. Vandervort*,[21] which was decided in 2003, before the codification of the RKSGA, the Kansas Supreme Court stated an out-of-state conviction was "comparable" to a Kansas offense so long as the crimes were similar.[22] After the recodification of the sentencing guidelines in 2010, the Kansas Supreme Court reiterated the *Vandervort* rule in *State v. Williams*.[23] The Kansas Supreme Court found K.S.A. § 21-4711(e) was not ambiguous.[24] In addition, the court found the elements of the out-of-state crime and the Kansas offense did not need to be identical, the crimes only needed to be "comparable."[25]

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18. KAN. STAT. ANN. § 74-9101 (1998). In 1989, the Kansas Legislature created the Kansas Sentencing Commission ("Commission") and the Commission was tasked with developing a "sentencing guideline model or grid" that created "rational and consistent sentencing standards [that] reduce[d] sentence disparity." *Id.* The Commission issued its final report to the Kansas Legislature on January 15, 1991. Robert J. Lewis, Jr., *The Kansas Sentencing Guidelines Act*, 38 WASHBURN L.J. 327, 327 (1999). When the Commission issued its recommendations to the state legislature, the report marked a strong shift in sentencing philosophy. David J. Gottlieb, *A Review and Analysis of the Kansas Sentencing Guidelines*, 39 KAN. L. REV 65, 68 (1991). Instead of focusing on rehabilitation, Kansas sentencing would be focusing on retribution. Savely, *supra* note 2, at 23–24; Lewis, *supra* note 19, at 327–28. The focus under indeterminate sentencing was rehabilitation, and the idea was that each individual should receive a personalized sentence based upon their circumstances and rehabilitative potential. *See* Savely, *supra* note 2, at 23–24. However, in the 1980s, indeterminate sentencing came under fire and the federal government and multiple states switched to a more determinative form of sentencing which removed most judicial discretion from the process. *Id.* at 23. By 1991, Washington, California, and Minnesota adopted determinate sentencing, in addition, almost fifty percent of the other states were evaluating determinate sentencing at that time. *Id.*

19. KAN. STAT. ANN. § 74-9101 (1998).

20. *See* KAN. STAT. ANN. § 21-6811(e) (2018) [formerly KAN. STAT. ANN. § 21-4711(e)]; State v. Vandervort, 72 P.3d 925, 935–36 (Kan. 2003); State v. Hernandez, 944 P.2d 188, 192 (Kan. Ct. App. 1997). The Commission and the Kansas Legislature tried to focus on "produc[ing] equity by requiring that defendants who are convicted of the same crimes and *have similar prior criminal records* serve the same amount of time." Gottlieb, *supra* note 19, at 69 (emphasis added).

21. 72 P.3d 925 (Kan. 2003).

22. *Vandervort*, 72 P.3d at 935 (Kan. 2003). Even if one determines that this language in *Vandervort* was dicta, it is apparent that the Kansas Supreme Court held in *Williams*, that "comparable" only meant the closest approximation. *See* State v. Williams, 326 P.3d 1070, 1073 (Kan. 2014).

23. *Williams*, 326 P.3d at 1073–74 (Kan. 2014). In *Vandervort*, the defendant argued his conviction for indecent exposure under Virginia Code § 18.2-370 was not comparable to K.S.A. § 21-3508 because the Kansas statute required another element of "who has not consented thereto," but the Virginia statute did not. *Vandervort*, 72 P.3d at 935. However, the Kansas Supreme Court stated that "[f]or purposes of determining criminal history, the offenses need only be comparable, not identical." *Id.*

24. Williams, 326 P.3d at 1074.

25. *Id.* at 1073–74. The Kansas Supreme Court stated that a reviewing court did not need to review the identicalness of the elements of the out-of-state conviction and the Kansas offense, instead the court should only identify whether the crimes were comparable. *Id.* at 1074.

IV. COURT DECISION

In *Wetrich*, the Kansas Supreme Court took a sharp turn from the precedent set forth in *Vandervort*.[26] The court declared that the legislature intended sentencing courts to use the identical-or-narrower test when analyzing a defendant's out-of-state offense.[27] The court avoided any constitutional issues brought about under *Apprendi v. New Jersey*,[28] and instead, the court's ruling primarily focused on statutory interpretation.[29] By focusing on the common meaning of the word "comparable" and legislative history, the court purported it had identified the legislature's intent behind using the word "comparable" in K.S.A. § 21-6811(e)(3).[30]

The court analyzed multiple definitions of the word "comparable" and stated the word was ambiguous with two different meanings.[31] The court reasoned that the adjective "comparable" could be defined broadly, meaning offenses which were "the closest approximation" to the Kansas offense could be considered comparable.[32] The court argued that "comparable" could alternatively be defined narrowly, meaning only offenses that had identical or narrower elements to the Kansas offense would be considered comparable.[33] Thus, the court stated the word "comparable" was ambiguous and next looked at legislative history to ascertain the meaning of the word "comparable."[34]

When examining legislative history, the court examined the broad rationales for transitioning from an indeterminate sentencing model to a determinative sentencing model.[35] The court emphasized the equal

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26. State v. Wetrich, 412 P.3d 984, 989–90 (Kan. 2018).

27. *Id.* at 991.

28. 530 U.S. 466 (2000). In *Apprendi*, the Supreme Court held that only facts submitted to the fact-finder could be used to enhance a defendant's sentence, except for previous criminal convictions. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

29. *Wetrich*, 412 P.3d at 988.

30. *Id.* at 989.

31. *Id.* at 990.

32. *Id.* at 989 (quoting State v. Vandervort, 72 P.3d 925, 935 (Kan. 2003)).

33. *Id.*

34. *Id.*

35. *Wetrich*, 412 P.3d at 991. The court identified six core principles behind the passage of the KSGA including:

> 1. Prison space should be reserved for serious/violent offenders who present a threat to society.
> 2. The degree of sanctions imposed should be based on the harm inflicted.
> 3. Sanctions should be uniform and not related to socioeconomic factors, race, or geographic location.
> 4. Penalties should be clear so everyone can understand exactly what has occurred once sentence is imposed.
> 5. The State has an obligation to rehabilitate those incarcerated, but persons should not be sent to prison solely to gain education or job skills, as these programs should be available in the community.
> 6. The system must be rational to allow policy makers to allocate resources.

treatment of defendants and removing racial and geographical discrepancies from the sentencing process.[36] The court stated that the identical-or-narrower rule furthers this objective by not allowing judges to utilize an "imprecise" rule to identify comparable offenses.[37]

V. Analysis

Under, K.S.A. § 21-6811(e)(1), the court properly identified the issue: how similar does the out-of-state crime have to be to a Kansas person felony to be comparable?[38] However, the court's analysis was faulty. Specifically, the Kansas Supreme Court incorrectly characterized Kansas case law and incorrectly applied the tools of statutory interpretation in order to come to its conclusion.

A. Kansas Case Law

Before *Wetrich*, it is difficult to find a Kansas opinion where a Kansas court utilized the identical-or-narrower test.[39] It was firmly established that an out-of-state offense was "comparable" if it was in close proximity or was similar to a Kansas offense.[40] Yet, the court never stated it was overturning Kansas case law.[41] Instead, the court tried to skirt *stare decisis* by upending a clearly accepted rule without any appreciation for judicial precedent.[42]

The court's decision to use an identical or narrower approach would make more sense if the court decided *Wetrich* based upon on constitutional grounds under the Supreme Court's holding in *Mathis v. United States*,[43] which was decided in 2016.[44] Yet, the Kansas Supreme

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State v. Grady, 900 P.2d 227, 239 (Kan. 1995). These principles were ascertained from the 1992 Report to the Senate Committee on the Judiciary and the Kansas Sentencing Guidelines Implementation Manual. *See id.*

36. *Wetrich*, 412 P.3d at 990.

37. *Id.* at 991.

38. *See* KAN. STAT. ANN. § 21-6811(e)(1) (2018) [formerly KAN. STAT. ANN. § 21-4711(e)]; *Wetrich*, 412 P.3d at 988.

39. *See, e.g.*, State v. Williams, 326 P.3d 1070, 1074 (Kan. 2014); State v. Vandervort, 72 P.3d 925, 935–36 (Kan. 2003); State v. Moore, 377 P.3d 1162, 1167 (Kan. Ct. App. 2016); State v. Riolo, 330 P.3d 1120 (Kan. Ct. App. 2014); State v. Barajas, 230 P.3d 784 (Kan. Ct. App. 2010); State v. Thomas, No. 115,990, 2018 Kan. App. LEXIS 84, at *22 (Kan. Ct. App. Feb. 9, 2018).

40. *See, e.g.*, *Williams*, 326 P.3d at 1074.

41. *Wetrich*, 412 P.3d at 991. The Kansas Supreme Court first established the closest approximation rule in *Vandervort*, and then upheld that rule in *Williams*, finding comparability only requires the out-of-state offense to be the closest-approximation to a Kansas person felony. *See Williams*, 326 P.3d at 1074; *Vandervort*, 72 P.3d at 935–36.

42. *See, e.g.*, *Williams*, 326 P.3d at 1074. It appears the Kansas Supreme Court tried to insinuate that the judges in *State v. Moore*, 377 P.3d 1162 (Kan. Ct. App. 2016), were alone in their use of the closest approximation test. *See Wetrich*, 412 P.3d at 988–89. However, the Kansas Court of Appeal's decision in *Moore* was based upon a well-founded rule in Kansas case law. *See Williams*, 326 P.3d at 1074; *Vandervort*, 72 P.3d at 935–36.

43. 136 S. Ct. 2243 (2016).

44. *See* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); *See also Wetrich*, 412 P.3d at 990–91.

Court decided the case on statutory interpretation, which is the same grounds the Kansas Supreme Court utilized when it decided *Vandervort* in 2003, and *Williams* in 2014, which upheld the use of the close approximation test.[45] The Kansas Supreme Court downplayed its own precedent and overturned a firmly established rule without any real discussion about how *Vandervort* or *Williams* were incorrectly decided.[46]

B. Statutory Interpretation

Kansas courts routinely utilize different tools of statutory interpretation to ascertain the meaning of a statutory term.[47] Generally, Kansas courts give ordinary terms their ordinary meaning.[48] If the court determines the term is ambiguous, the court will look at legislative intent to ascertain the meaning of the term.[49] "The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained."[50] Even if one believes the term "comparable" is ambiguous, after looking at the history behind K.S.A. § 21-6811(e)(1) and the word "comparable," it is apparent what the legislature meant when it used the adjective "comparable" in K.S.A. § 21-6811(e)(1).[51]

The court cited broad principles established by the Kansas Supreme Court to demonstrate that the legislative history pointed to the identical-or-narrower rule.[52] The court ignored clear precedent to the contrary and the Kansas State Legislatures silence on the issue since *Vandervort* and *Williams*.[53] Also, the Kansas Sentencing Commission stated in the 2016 Kansas Sentencing Guidelines Desk Reference Manual, that "[a] comparable offense need not contain elements identical to those of the out-of-state crime, but must be similar in nature and cover a similar type of criminal conduct."[54]

Further, just two months after the Court decided *Wetrich*, the Senate Committee on Judiciary stated, "comparability of an out-of-jurisdiction offense to a Kansas offense shall be liberally construed to allow

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45. *Id.*; *Vandervort*, 72 P.3d at 935–36; *Moore*, 377 P.3d at 1170 (referencing *Williams*, 326 P.3d at 1074).
46. *Wetrich*, 412 P.3d at 988–89.
47. State v. Keel, 357 P.3d 251, 259–60 (Kan. 2015); State v. Urban, 239 P.3d 837, 839 (Kan. 2010).
48. *Keel*, 357 P.3d at 259.
49. *Id.* at 260.
50. *Id.* at 259 (citing State v. Arnett, 223 P.3d 780, 784 (Kan. 2010)).
51. *See* State v. Williams, 326 P.3d 1070, 1074 (Kan. 2014); *Conference Comm. Report Brief: House Substitute for S. Bill No. 374*, 2018 Leg., 87th Sess. 1 (Kan. 2018); KAN. SENT'G COMMISSION, KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 43 (2016).
52. *See Wetrich*, 412 P.3d at 990 (citing State v. Gonzales, 874 P.2d 612, 616 (Kan. 1994)).
53. *See* State v. Jones, No. 117,808, 2018 Kan. App. Unpub. LEXIS 750, at *23–26 (Kan. Ct. App. Sept. 28, 2018).
54. KAN. SENT'G COMMISSION, KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 43 (2016).

comparable offenses, regardless of whether the elements are identical to or narrower than the corresponding Kansas offense, for the purposes of determining a person's criminal history."[55] This language was utilized to define what comparable meant under K.S.A. § 8-1567, the Kansas DUI statute.[56] K.S.A. § 8-1567(j) requires sentencing courts to look at three factors to determine comparability, and states that "[f]or the purposes of determining whether an offense is comparable, the following shall be considered: **(1)** The name of the out-of-jurisdiction offense; **(2)** the elements of the out-of-jurisdiction offense; and **(3)** whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense."[57] Although no panel of the Kansas Court of Appeals or the Kansas Supreme Court has interpreted this language it would appear the Kansas State Legislature intended to adopt the close approximation test.[58]

This use of the term "comparable" by the Kansas State Legislature would seem to be at odds with the Kansas Supreme Court's interpretation of the term "comparable" in *Wetrich*, under K.S.A. § 21-6811(e)(1). However, as stated by the Kansas Supreme Court, "[s]tatutes should be read as consistent with one another whenever it is possible to do so."[59] Thus, if presented with this issue in the future the Kansas Supreme Court should overturn *Wetrich* and should adopt the closest approximation test as intended by the Kansas State Legislature.[60]

VI. CONCLUSION

The Kansas Supreme Court has determined that the elements of an out-of-state conviction must be the same or narrower than a Kansas person felony in order for that past conviction to count as a person felony under K.S.A. § 21-6811(e)(1). The court's opinion will cause a defendant's criminal history score to be lower than prosecutors expected and will treat those that commit serious dangerous crimes in other states

55. *See Conference Comm.*, *supra* note 51, at 1.

56. KAN STAT. ANN. § 8-1567 (2018).

57. KAN. STAT. ANN. § 8-1567. Further the Kansas State Legislature has introduced legislation that adopts this same test for K.S.A. § 21-6811, and defines "comparable" broadly. H.R. 2048, 2019 Leg., 89th Sess. (Kan. 2019). Yet, the Kansas State Legislature goes even further to demonstrate what it means when it uses the term comparable, and states, "[t]he legislature intends that this provision related to comparability of an out-of-state offense to a Kansas offense shall be liberally construed to allow comparable offenses, regardless of whether the elements are identical to or narrower than the corresponding Kansas offense, to be used in classifying the offender's criminal history." *Id.*

58. KAN STAT. ANN. § 8-1567; *Conference Comm.*, *supra* note 51, at 1.

59. Stanley v. Sullivan, 336 P.3d 870, 875 (Kan. 2014).

60. *See Conference Comm.*, *supra* note 51, at 1; Kan. Stat. Ann. § 8-1567 (2018); *See also* Univ. of Kan. Hosp. Auth. v. Bd. of Cty. Comm'rs, 348 P.3d 602, 606–07 (2015) (reiterating the common principle that a court will presume the legislature acts with knowledge of current case law when dealing with legislation).

differently than those who commit them in Kansas. In making their determination, the court ruled that through statutory interpretation the legislature intended courts to use the identical-or-narrower test. However, this reasoning upends solid Kansas case law and now clear legislative intent pointing towards the closest approximation test. Based upon these flaws, it is clear the Kansas Supreme Court when presented with this issue in the future, should overturn *Wetrich*, and give effect to clear legislative intent pointing towards the closest approximation test.