

House Federal and State Affairs Committee
February 14, 2017
House Bill 2145

Testimony of the
Kansas Association of Criminal Defense Lawyers
prepared by Geoffrey Clark

Opponent
(written only)

Dear Chairman Barker and Members of the Committee:

I am an attorney in private practice in Fort Scott. I am providing this testimony as a member of the Kansas Association of Criminal Defense Lawyers, an organization made up of 350+ attorneys and other legal professionals across the state. HB 2145 adds four additional categories to K.S.A. 21-6301, criminal use of weapons. All new violations would be severity level 8 felonies. The language in HB 2145 is drawn from 18 USC 922(g)(8), which makes it a federal offense for a person to possess a firearm in the four categories set out in HB 2145. The wording and scope vary a little, but **essentially HB 2145 would create state crimes that mirror current federal offenses with regard to firearm possession.** We believe this is unnecessary and costly.

HB 2145 adds fugitives from justice from other states. To put this proposal in context, we look to existing federal law. If a person is under indictment (i.e. charged) with a felony, he/she is prohibited by federal law, 18 USC 922(n), from shipping or transporting a firearm or ammunition in interstate commerce. That is, they cannot personally move or ship a firearm or ammunition across state lines. The same section also prohibits a person under indictment for a felony from receiving a firearm or ammunition. So, in this scenario, a fugitive from another state who is charged with a felony in another state could neither lawfully come to Kansas with a firearm, or lawfully take possession of a firearm while here. 18 USC 922(g)(4) already prohibits a fugitive from justice from possessing a firearm or ammunition. "Fugitive from justice" is defined at 18 USC 921(a)(15): "[A]ny person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." The 922(g)(4) prohibition is not limited to felony cases.

In HB 2145, "fugitives from justice" are defined as people who are wanted in other states (the definition refers to K.S.A. 22-2713, which is part of the Uniform Criminal Extradition Act) for felonies. Depending on the fugitive's status in the other state, this law would either be duplicative of federal law or possibly lead to an unwarranted loss of the right to possess firearms.

If the person has been convicted of a felony in the other state and is facing a sentence or probation revocation, then it is already a crime in Kansas for that person to possess a firearm. If the person has not been convicted in the other state in the case at issue, but is already a felon for another reason, then it is already a Kansas crime for that person to possess a firearm. See K.S.A. 21-6304 and 21-6305.

If the accused has a warrant for a pending felony charge (i.e. no conviction in that case at this point), then it appears it is already against 18 USC 922(n) for that person to come to Kansas with a firearm or take possession of a firearm while here. It is unnecessary to make a new state crime.

Furthermore, it seems excessive to make it a severity level 8 felony to possess a firearm when the accused has no conviction for a felony at that point and may never be convicted of a felony. While at first blush we can see why the police and society would not want someone who has an active warrant for them to have a firearm, HB 2145 would needlessly turn people into felons who will not be convicted for a felony in the other state. In addition, it would seem that as soon as you know you have a warrant for a felony, even if you are in the process of turning yourself in, you are guilty of a felony if you are in possession of a firearm. HB 2145 does not say that it has to be on you or in your general vicinity. The statutory definition of "possession" that would be applied in the absence of a more specific one in K.S.A. 21-6301 would be the one in K.S.A. 21-5111(v): "'Possession' means having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control." This means that a person who is on his way to turn himself in on a felony warrant who has a gun at home could become a felon for possessing that firearm even if he is never convicted of the underlying felony in the other state. Another example would be if law enforcement comes to a person's home to execute the arrest warrant. If that person knew he had a warrant and there was a gun in the home, garage, or car - even if the arrest was peaceful and no gun involved - then he could be charged and convicted of a felony for possessing that firearm, even if he is never convicted of a felony in the other state who issued the warrant.

HB 2145 adds people illegally or unlawfully in the country. First, this is potentially duplicative of 18 USC 922(g)(5), which already makes it a federal crime for a person illegally or unlawfully in this country to possess a firearm. Second, HB 2145 does not define the terms "illegally or unlawfully" and doesn't seem to require that the person have knowledge that he/she is here "illegally or unlawfully." Immigration law is complex and ever-changing. Sometimes people think they are here illegally and they

aren't, or think they are here legally and they aren't. Even if there is no requirement that the person have knowledge of their status, it would be the prosecutor's burden to prove it. The prosecutor would have to prove an element of the crime where the law governing said element is not only complex and ever-changing, but dictated by federal law. This would require the State to incur costs for both prosecutors and defense counsel to work with experts in immigration law. Since the federal government is already dealing with these prosecutions, we fail to see the point of burdening the State with it. Third, if these terms are given an expansive reading, this would also encompass people who have inadvertently overstayed their visas or potentially a student who is working part-time in violation of his visa.

HB 2145 adds people subject to certain court orders. 18 USC 922(g)(8) already makes it a federal crime for a person subject to a protective order to possess a firearm. 18 USC 921(a)(32) defines "intimate partner" as "the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person." While the wording in HB 2145 appears to track 921(a)(32) for the most part, it still concerns me because in addition to criminal law, I practice domestic law. It is standard language in my temporary orders (issued at the start of cases) - as well as the temporary orders of many attorneys who handle divorces - to prohibit people from harassing, molesting, or abusing the other party. While the language was crafted to only include specific situations, I am concerned the language might be construed to keep people from having any firearms during a divorce when there has been no proof that they did anything or possess a danger to anyone.

Thank you for your consideration,

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