



Kansas County & District Attorneys Association

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To: Hon. Chairman Kinzer and
Members of the Special Committee on Judiciary

Submitted by: Marc Bennett, District Attorney, Sedgwick County
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On behalf of: The Kansas County and District Attorneys Association

Regarding: 2013 Special Session – Hard 50 Fix.

Honorable Chairman Kinzer and Members of the Special Committee on Judiciary:

Thank you for the opportunity to address this body regarding the Hard 50 fix. On behalf of the Kansas County and District Attorneys Association, we would like to make clear that Kansas prosecutors strongly support the long held public policy of this state to punish those who would commit the most heinous murders with a 50 year rather than 25 year parole eligibility.

The recent decision of the United State Supreme Court in Alleyene v. U.S., calls into question the existing Hard 50 sentencing scheme in Kansas. The Governor's decision to call a special session to expedite the passage of corrective legislation ensures the fewest number of cases will be exposed to an adverse ruling due to the Alleyene decision.

By way of explanation, the Alleyene decision requires that any fact that can be relied upon to enhance a mandatory minimum term of sentence must be proven beyond a reasonable doubt to a jury. Under current Kansas law, a judge alone decides whether a statutorily defined aggravator exists, whether mitigating factors exist and whether one outweighs the other. Because a jury is not involved, the Alleyene decision could render this current scheme unconstitutional.

The proposal submitted for the special session represents a consensus approach arrived at after lengthy discussion and analysis between the office of the Kansas Attorney General and the Kansas County and District Attorneys Association. The proposed bill represents a twofold approach to protect the Hard 50 sentencing scheme for Kansas prospectively and in a manner that gives us the best chance to protect pending cases retrospectively.

The prospective fix contained in §(1)(b) allows prosecutors to seek the Hard 50 for murders that occur after the effective date of the act. Moving forward, after a jury finds a defendant guilty of first degree premeditated murder, the jury will then be asked to conduct a second proceeding wherein they will determine whether one or more statutorily defined aggravating factors have been proven beyond a reasonable doubt. If so, the jury is released and the court will later sentence the defendant to the Hard 50. Defendants remain free to file a motion for a downward durational departure back to a 25 year parole eligibility at the time of sentencing, a process that ensures the protection of the rights of the defendant. Defendants would simply argue their motion before the judge at sentencing, and the judge could grant the motion on a finding that “substantial and compelling basis” exist to grant the downward departure. Alleyene does not require a jury to find mitigating factors, only facts that enhance or increase a sentence.

This procedure mirrors existing Kansas law for upward departure sentences in offenses that fall on the sentencing guidelines grid. Our current law was adopted after the United States Supreme Court decision over ten years ago in Apprendi, the precursor to Alleyene. The Apprendi decision required jury findings on any fact that increased the maximum sentence. In Kansas, we now have over ten years of positive case law from the appellate courts of Kansas to lend guidance to and support for this framework. The prospective change places Hard 50 sentences within the framework of a proven sentencing system that serves public safety, protects the rights of the accused, and does so in a responsible and Constitutional manner.

In §(1)(c), the bill sets forth the approach to a retrospective fix for the approximately 30 murders that occurred prior to the effective date of the act and are still pending either at the district court level or on direct appeal to the Kansas Supreme Court – a number that could rise to roughly 40 cases if no action were taken before the next legislative session. This approach takes the added approach of requiring the jury find both aggravating circumstances, mitigating circumstances raised by the defendant and then weighing the two. Because only “procedural” (not “substantive”) changes to law may be applied retroactively, this change is seen as providing the best chance to advance the argument that the manner set forth to fix pending cases is procedural in nature only and therefore available retroactively. In short, this retrospective approach

takes the current model which requires finding concerning aggravators, mitigators and weighing to be done by the court and simply hands it over to the jury.

The Kansas County and District Attorney's Association extends its gratitude to Governor Brownback for his willingness to take up this important matter of public safety and we urge the legislators to adopt the proposal submitted.

Thank you for your time, attention and consideration in this matter.