

Senate Corrections and Juvenile Justice Committee
January 22, 2015
Testimony of Jennifer Roth
on behalf of the Kansas Association of Criminal Defense Lawyers
Neutral - Senate Bill 1

The Kansas Association of Criminal Defense Lawyers is a 350+ member organization dedicated to justice and due process for people accused of crimes. On behalf of KACDL, I want to make sure the Committee is aware that SB 1 will not eliminate the need to have the hate crime finding submitted to a jury.

As you know (and can see in the bill on page 10, lines 30-35), the Kansas Sentencing Guidelines Act (KSGA) already includes a procedure for upward durational departures based on this aggravating factor: "The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim or the offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim whether or not the defendant's belief or perception was correct." (See K.S.A. 21-6815(c)(2)(C)). SB 1 would strike this aggravating factor from the departure statute and include the hate crime language in what we typically think of as the "special rules" section of the KSGA. SB 1 makes the "trier of fact" responsible for making the requisite finding to double the maximum sentence, but does not provide what that procedure would look like. (See SB 1, page 9, lines 19-25.)

If the enhancement proposed in SB 1 is not accompanied by a procedure, then SB 1 would violate the U.S. and Kansas Constitutions. Fifteen years ago, the U.S. Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a case about a hate crime finding made by a judge (after a full evidentiary hearing) rather than a jury. The Court held the facts around the finding (that increased Apprendi's sentence beyond the statutory maximum) must be submitted to a jury. This is why K.S.A. 21-6815(b) provides "any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt."¹

Respectfully submitted,

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¹ Just to brag on our state a bit: Kansas led the way in states making their sentencing guidelines acts constitutionally compliant after *Apprendi*. In 2001 in *State v. Gould*, our Supreme Court found the KSGA's handling of departure sentences violated *Apprendi*. Our Legislature fixed this problem in 2002 by amending what is now K.S.A. 21-6815 et seq. According to the National Association of Criminal Defense Lawyers' *amicus* brief in *Cunningham v. California*, 549 U.S. 270 (2007), "Kansas, of course, was the lone state to alter its determinate sentencing system after *Apprendi* but before *Blakely*."