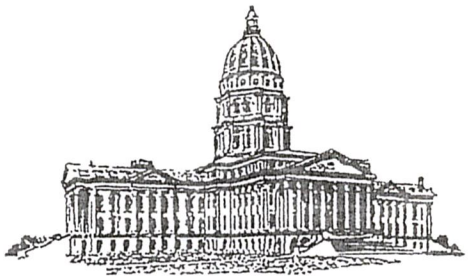
GORDON L. SELF, ATTORNEY
REVISOR OF STATUTES
JILL A. WOLTERS, ATTORNEY
FIRST ASSISTANT REVISOR



OFFICE OF REVISOR OF STATUTES
LEGISLATURE OF THE STATE OF KANSAS

Legislative Attorneys
transforming ideas into legislation

MEMORANDUM

To: Interested parties

From: JT Jason Thompson, Senior Assistant Revisor of Statutes

Date: August 16, 2013

Subject: Potential impact of *Alleyne v. United States* on Kansas law

Summary

In *Alleyne v. United States*, 570 U.S. _, 133 S.Ct. 2151 (2013), the United States Supreme Court held that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. In light of the *Alleyne* decision, certain provisions of the Kansas "hard 50" statute, K.S.A. 2012 Supp. 21-6620 (formerly K.S.A. 21-4635), may violate a defendant's Sixth Amendment constitutional rights by having the court, instead of the jury, determine the aggravating circumstances used to justify imposition of a mandatory minimum term of imprisonment of 50 years. The United States Supreme Court has already vacated the judgment in a Kansas hard 50 case and remanded the case to the Supreme Court of Kansas for further consideration in light of *Alleyne*. *Astorga v. Kansas*, 570 U.S. _, 133 S.Ct. 2877 (2013).

If certain provisions of the Kansas hard 50 statute are unconstitutional as a result of the *Alleyne* decision, the impact on hard 50 sentences imposed under the statute could vary based on the procedural status of the case—trial phase, sentencing phase, direct appeal, or collateral appeal. Further, an amendment to K.S.A. 2012 Supp. 21-6620 would be necessary. Whether any such amendment could be applied retroactively to a case and be found constitutional depends on a number of factors, including the nature of the amendment and the procedural status of the case.

300 SW TENTH AVE—STE 24-E, STATEHOUSE—TOPEKA, KS 66612-1592
PHONE (785) 296-2321 FAX (785) 296-6668 E-MAIL: RevisorsOffice@rs.ks.gov

Discussion

I. Summary of *Alleyne v. United States*

In *Alleyne v. United States*, 570 U.S. _, 133 S.Ct. 2151 (2013), the United States Supreme Court held that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. This overruled the United States Supreme Court's prior decision in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (2002), which held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment.

Petitioner Allen Ryan Alleyne had been charged with using or carrying a firearm in relation to a crime of violence, which is associated with a 5-year mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(A). If the firearm is "brandished", the sentence is increased to a 7-year minimum, and if the firearm is "discharged", the sentence is increased to a 10-year minimum. 18 U.S.C. §924 (c)(1)(A)(ii) and (iii). The Supreme Court emphasized that "because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury." *Alleyne*, *supra*, at Part III B, 133 S.Ct. 2162. The jury found that Alleyne had "used or carried a firearm during and in relation to a crime of violence...but not that the firearm was [b]randished." *Id.* at Part I, 133 S.Ct. 2156. Thus, the jury's verdict only supported a 5-year mandatory minimum sentence because it did not find that the firearm was brandished or discharged. Instead, the judge found that the firearm was brandished and increased Alleyne's penalty in violation of his Sixth Amendment constitutional rights.

II. Potential impact on Kansas law

In light of the *Alleyne* decision, certain provisions of the Kansas "hard 50" statute, K.S.A. 2012 Supp. 21-6620, may violate a defendant's Sixth Amendment constitutional rights by having the court, instead of the jury, determine the aggravating circumstances used to justify imposition of a mandatory minimum term of imprisonment of 50 years. On June 24, 2013, the United States Supreme Court vacated the judgment in a Kansas hard 50 case and remanded the case to the Kansas Supreme Court for further consideration in light of *Alleyne*. *Astorga v. Kansas*, 570 U.S. _, 133 S.Ct. 2877 (2013).

In *State v. Astorga*, 295 Kan. 339 (2012), the Kansas Supreme Court upheld the district court's imposition of a hard 50 sentence and rejected a challenge to the constitutionality of the hard 50 sentencing scheme, K.S.A. 21-4635, now K.S.A. 2012 Supp. 21-6620. Matthew Astorga plead guilty to criminal possession of a firearm and fleeing or attempting to elude a police officer, and was convicted by a jury of first-degree premeditated murder in the December 26, 2008, shooting death of Ruben Rodriguez. The sentencing court imposed a sentence of life imprisonment with no possibility of parole for 50 years and lifetime postrelease supervision for the murder conviction. Astorga argued, among other things, that the hard 50 sentencing scheme is unconstitutional because it imposes an aggravated presumptive sentence without requiring proof of aggravating circumstances to a jury beyond a reasonable doubt. K.S.A. 2012 Supp. 21-6620 read as follows (emphasis added):

> (a) Except as provided in K.S.A. 2012 Supp. 21-6618 and 21-6622, and amendments thereto, if a defendant is convicted of the crime of capital murder and a sentence of death is not imposed pursuant to subsection (e) of K.S.A. 2012 Supp. 21-6617, and amendments thereto, or requested pursuant to subsection (a) or (b) of K.S.A. 2012 Supp. 21-6617, and amendments thereto, the defendant shall be sentenced to life without the possibility of parole.
>
> (b) If a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years or for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years or sentenced as otherwise provided by law.
>
> (c) In order to make such determination, the court may be presented evidence concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 2012 Supp. 21-6624, and amendments thereto, and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing shall be admissible and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the time of sentencing shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.
>
> (d) If the court finds that one or more of the aggravating circumstances enumerated in K.S.A. 2012 Supp. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the

> defendant shall be sentenced pursuant to K.S.A. 2012 Supp. 21-6623, and amendments thereto; otherwise, the defendant shall be sentenced as provided by law. The court shall designate, in writing, the statutory aggravating circumstances which it found. The court may make the findings required by this subsection for the purpose of determining whether to sentence a defendant pursuant to K.S.A. 2012 Supp. 21-6623, and amendments thereto, notwithstanding contrary findings made by the jury or court pursuant to subsection (e) of K.S.A. 2012 Supp. 21-6617, and amendments thereto, for the purpose of determining whether to sentence such defendant to death.

If the Kansas Supreme Court finds that certain provisions of the hard 50 statute, K.S.A. 21-4635 or K.S.A. 2012 Supp. 21-6620, are unconstitutional as a result of the *Alleyne* decision, the impact on hard 50 sentences imposed under the statute could vary based on the status of the case. If the court follows the precedent of *State v. Gould*, 271 Kan. 394 (2001), the new rule established by *Alleyne*—any fact that increases a mandatory minimum sentence is an "element" that must be submitted to the jury—would be applied to cases pending on direct appeal (e.g., *State v. Astorga*), cases which are not yet final (trial level), and cases that arose after June 17, 2013, the date *Alleyne* was decided (including any crimes committed before a statutory change occurs). In *Gould* the court held that the constitutionality of upward departures under the Kansas sentencing guidelines act did not have retroactive application to cases finalized as of June 26, 2000, the date of the *Apprendi v. New Jersey* decision, 530 U.S. 466, 120 S.Ct. 2348 (2000), but that the *Apprendi* ruling applied to Gould, all cases pending on direct appeal, cases not yet finalized, and cases which arose after June 26, 2000.

If the court follows the precedent of *Whisler v. State*, 272 Kan. 864 (2001), the new rule established by *Alleyne* would not be applied to cases final as of June 17, 2013, the date *Alleyne* was decided, or to cases on collateral appeal (e.g., *habeas corpus* petitions). In *Whisler*, citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), the court held that "a new rule of constitutional criminal procedure is not applied retroactively on collateral review unless (1) it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prosecute, or (2) it is a watershed rule requiring the observance of those procedures that are implicit in the concept of ordered liberty." The court reviewed the new "rule of constitutional criminal procedure" prescribed by *Apprendi v. New Jersey* and found that it failed to meet either *Teague* exception. As a result, the court did not apply *Apprendi* retroactively to cases on collateral review. *Whisler* was later re-affirmed by *State v. Synoracki*, 280 Kan. 934

(2006) (holding that the *Apprendi* right to a jury trial did not apply retroactively to a sentence that had already been finalized when *Apprendi* was decided).

Procedurally, if the Kansas Supreme Court finds that certain provisions of K.S.A. 21-4635 or K.S.A. 2012 Supp. 21-6620 are unconstitutional as a result of the *Alleyne* decision, and the Kansas appellate courts follow the precedent of the post-*Apprendi* Kansas cases discussed above, the impact would vary based on the status of the case. Under this scenario, for cases on direct appeal now, where the defendant was sentenced under K.S.A. 21-4635 or K.S.A. 2012 Supp. 21-6620, the appellate court would find the defendant's sentence unconstitutional, vacate the sentence, and remand to the district court for resentencing. The district court could not use K.S.A. 21-4635 or K.S.A. 2012 Supp. 21-6620 if it is found unconstitutional, so the appropriate sentence would be the sentence authorized by the sentencing guidelines act and no hard 50 sentence could be imposed.

Under the scenario described above, for cases at the trial level now, or cases filed for crimes committed before any statutory change occurs, the district court could not use K.S.A. 2012 Supp. 21-6620 if it is found unconstitutional, so the appropriate sentence would be the sentence authorized by the sentencing guidelines act and no hard 50 sentence could be imposed. First, based on the precedent of *State v. Cullen*, 275 Kan. 56 (2003), and *State v. Santos-Garza*, 276 Kan. 27 (2003), it does not appear that a plea agreement can work around the statutory defect—a defendant may not submit by waiver to the application of an unconstitutional sentencing scheme. In *Cullen* the court held that an upward durational departure sentence was unconstitutional even though the defendant, in a plea agreement, recommended that the trial court impose an upward durational departure sentence, and in *Santos-Garza* the court held that an upward durational departure sentence was unconstitutional even though the defendant, as a part of his plea agreement, agreed to the upward durational departure and stipulated that, had the case gone to a jury trial, the jury would have found the specific aggravating circumstance of manifest brutality in the offense. Second, based on the precedent of *State v. Kessler*, 276 Kan. 202 (2003), and *State v. Horn*, 291 Kan. 1 (2010), it does not appear that the district court could just follow a new procedure consistent with the *Alleyne* rule to work around the defect—the court must follow the directive of the sentencing statute, but doing so in this scenario is constitutionally precluded. In *Kessler* the court held that a district court's authority to impose

sentence is controlled by statute, so where the statutory procedure for imposing upward durational departure sentences has been found unconstitutional, the district court has no authority to impose such a sentence, and in *Horn* the court held that the district court erred by impaneling a jury for an upward durational departure sentence proceeding and was constitutionally precluded from following the statutory mandate for a court-conducted proceeding.

III. Potential amendments

An amendment to K.S.A. 2012 Supp. 21-6620 would be necessary if certain provisions of the Kansas hard 50 statute are unconstitutional as a result of the *Alleyne* decision. One option would be to make certain references to "the court" references to "the trier of fact" or "the jury" so that the trier of fact (usually the jury) would determine whether aggravating circumstances exist to warrant a hard 50 sentence. This would follow the model used in K.S.A. 2012 Supp. 21-6804(t), relating to use of ballistic resistant material ("If the trier of fact makes a finding that…"), and K.S.A. 2012 Supp. 21-6805(g), relating to firearms and drug felonies ("if the trier of fact makes a finding that…"). This option would provide the jury the opportunity to make the finding of whether aggravating circumstances exist to warrant a hard 50 sentence and could satisfy the constitutional boundaries established by *Alleyne*, but it is not as thorough as the next option.

A second option would be to specify that the jury shall make the finding of whether aggravating circumstances exist to warrant a hard 50 sentence and codify the procedure to be followed. One variation of this option would allow the court to determine whether the evidence concerning aggravating circumstances will be presented to a jury and proved beyond a reasonable doubt during the trial of the matter or submitted to the jury in a separate sentencing hearing following the determination of the defendant's innocence or guilt. This would follow the upward durational departure sentencing procedures and jury requirements model in K.S.A. 2012 Supp. 21-6817. Another variation of this option would require a separate sentencing proceeding by the trial jury, similar to the separate sentencing proceeding required for persons convicted of capital murder pursuant to K.S.A. 2012 Supp. 21-6617. In either case, the proceeding would be conducted by a trial judge before a trial jury, and if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances exist and, further, that the existence of such

aggravating circumstances is not outweighed by any mitigating circumstances that are found to exist, the defendant shall be sentenced to a mandatory term of imprisonment of 50 years. The amendment could allow the jury requirement to be waived in the manner provided by K.S.A. 22-3403 for waiver of a trial jury. This option would provide the jury the opportunity to make the finding of whether aggravating circumstances exist to warrant a hard 50 sentence and could satisfy the constitutional boundaries established by *Alleyne*, and it would follow procedures already established in Kansas law.

IV. Retroactive application of amendments

Whether any amendment to K.S.A. 2012 Supp. 21-6620 could be applied retroactively to a case and be found constitutional depends on a number of factors, including the nature of the amendment and the procedural status of the particular case—trial phase, sentencing phase, direct appeal, or collateral appeal. Our office will continue to evaluate this issue, but the general rules are set forth below.

"It is a well-established rule that a statute operates prospectively unless its language clearly indicates a legislative intent to apply it retrospectively or the statutory change is procedural or remedial in nature and does not prejudicially affect the parties' substantive rights." *State v. Jaben*, 294 Kan. 607, 612-13 (2012). In the criminal law context, "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. [citing *State v. Hutchison*, 228 Kan. 279, 287, 615 P.2d 138 (1980)]." *Tonge v. Werholtz*, 279 Kan. 481, 487 (2005). Even when the legislative intent for retroactive application is clear, in the criminal law context, any retroactive application of substantive law would violate the *ex post facto* clause of the United States Constitution (U.S. Const. art. I, § 10, cl. 1.).

The Kansas Supreme Court analyzed the *ex post facto* clause recently and noted that it prohibits the enactment of any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. [citing *Weaver v. Graham*, 450 U.S. 24, 28 (1981)]." *State v. Jaben*, *supra*, at 612. The Court also cited a two-part test for whether a criminal law or penal law is *ex post facto*: the

law "must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [citing *Weaver*, 450 U.S. at 29]." *Id.*

Thus, if an amendment to K.S.A. 2012 Supp. 21-6620 is written to clearly indicate a legislative intent to apply it retrospectively, one key issue will be whether the law disadvantages the offender and therefore constitutes a "punishment" within the meaning of the *ex post facto* clause. An analysis of this issue clearly depends, in part, on the nature of the amendment and the procedural status of the particular case when the amendment is applied.

whether the defendant is a person with intellectual disability.

(c) At the hearing, the court shall determine whether the defendant is a person with intellectual disability. The court shall order a psychiatric or psychological examination of the defendant. For that purpose, the court shall appoint two licensed physicians or licensed psychologists, or one of each, qualified by training and practice to make such examination, to examine the defendant and report their findings in writing to the judge within 14 days after the order of examination is issued. The defendant shall have the right to present evidence and cross-examine any witnesses at the hearing. No statement made by the defendant in the course of any examination provided for by this section, whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding.

(d) If, at the conclusion of a hearing pursuant to subsection (a), the court determines that the defendant is not a person with intellectual disability, the defendant shall be sentenced in accordance with K.S.A. 2012 Supp. 21-6617, 21-6619, 21-6624, 21-6625, 21-6628 and 21-6629, and amendments thereto.

(e) If, at the conclusion of a hearing pursuant to subsection (b), the court determines that the defendant is not a person with intellectual disability, the defendant shall be sentenced in accordance with K.S.A. 2012 Supp. 21-6620, 21-6623, 21-6624 and 21-6625, and amendments thereto.

(f) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is a person with intellectual disability, the court shall sentence the defendant as otherwise provided by law, and no sentence of death, life without the possibility of parole, or mandatory term of imprisonment shall be imposed hereunder.

(g) Unless otherwise ordered by the court for good cause shown, the provisions of subsection (b) shall not apply if it has been determined, pursuant to a hearing granted under the provisions of subsection (a), that the defendant is not a person with intellectual disability.

(h) As used in this section, "intellectual disability" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01, and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

History: L. 2010, ch. 136, § 262; L. 2011, ch. 30, § 71; L. 2012, ch. 91, § 16; July 1.

Source or Prior Law:
21-4623, 21-4634.

21-6623. Imposition of sentence of mandatory imprisonment of 40 or 50 years. When it is provided by law that a person shall be sentenced pursuant to this section, such person shall be sentenced to imprisonment for life and shall not be eligible for probation or suspension, modification or reduction of sentence. Except as otherwise provided, in addition, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 40 years' imprisonment, and such 40 years' imprisonment shall not be reduced by the application of good time credits. For crimes committed on and after July 1, 1999, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 50 years' imprisonment, and such 50 years' imprisonment shall not be reduced by the application of good time credits. For crimes committed on or after July 1, 2006, a mandatory minimum term of imprisonment of 50 years shall not apply if the court finds that the defendant, because of the defendant's criminal history classification, is subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range exceeds 600 months. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range. Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced pursuant to K.S.A. 2012 Supp. 21-6623, and amendments thereto.

History: L. 2010, ch. 136, § 263; July 1, 2011.

Source or Prior Law:
21-4638.

21-6624. Aggravating circumstances. Aggravating circumstances shall be limited to the following:

(a) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

(b) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

(c) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(d) The defendant authorized or employed another person to commit the crime.

(e) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(f) The defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. Conduct which is heinous, atrocious or cruel may include, but is not limited to:

(1) Prior stalking of or criminal threats to the victim;

(2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;

(3) infliction of mental anguish or physical abuse before the victim's death;

(4) torture of the victim;

(5) continuous acts of violence begun before or continuing after the killing;

(6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or

(7) any other conduct the court expressly finds is especially heinous.

(g) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

(h) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

History: L. 2010, ch. 136, § 264; July 1, 2011.

Source or Prior Law:
21-4625, 21-4636.

21-6625. Mitigating circumstances. (a) Mitigating circumstances shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under extreme distress or under the substantial domination of another person.

(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(7) The age of the defendant at the time of the crime.

(8) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.

(b) Pursuant to hearing under K.S.A. 2012 Supp. 21-6617, and amendments thereto, mitigating circumstances shall include circumstances where a term of imprisonment is found to be sufficient to defend and protect the people's safety from the defendant.

History: L. 2010, ch. 136, § 265; July 1, 2011.

Source or Prior Law:
21-4626, 21-4637.

21-6626. Aggravated habitual sex offender; sentence to imprisonment for life without parole. (a) An aggravated habitual sex offender shall be sentenced to imprisonment for life without the possibility of parole. Such offender shall spend the remainder of the offender's natural life incarcerated and in the custody of the secretary of corrections. An offender who is sentenced to imprisonment for life without the possibility of parole shall not be eligible for parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence.

(b) Upon sentencing a defendant to imprisonment for life without the possibility of parole, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole.

(c) As used in this section:

(1) "Aggravated habitual sex offender" means a person who, on and after July 1, 2006: (A) Has