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Testimony in Support of 'Hard 50' Repair Legislation
Presented to the Senate Judiciary Committee
By Attorney General Derek Schmidt
September 4, 2013

Chairman King, Ranking Member Haley, members of the Committee. Thank you for considering legislation to conform the Kansas 'Hard 50' criminal sentencing law with the new constitutional requirements announced June 17 by the United States Supreme Court in *Alleyne v. United States,* ___ U.S.___, 2013 WL 2922116 (June 17, 2013).

The bill before you reflects the recommendations made last week by the Special Committee on the Judiciary. The Special Committee made several changes to the initially proposed legislation, all of which, in my view, strengthen and improve the bill.

For the past 14 years, the 'Hard 50' – which is a life prison sentence without the possibility of parole for 50 years – has been the penalty used by Kansas to ensure that the most heinous killers are removed from society for an extended period. During that time, at least 60 murderers have received the 'Hard 50' sentence, and our state is safer as a result. The Legislature made the right public policy decision in 1999 when it established the 'Hard 50', and I encourage you to reaffirm the state's commitment to that public policy by enacting legislation to conform our law with the newly identified requirements of the United States Constitution so that it can continue to be used with confidence.

The Problem

The situation in which Kansas finds itself as a result of the United States Supreme Court's *Alleyne* decision (which changed course and expressly overruled the prior constitutional interpretation upon which Kansas has relied to support our 'Hard 50' law) is well-known to this Committee. I described the matter in detail in my July 24, 2013, letter to Governor Brownback recommending that he convene the Legislature in special session to repair our 'Hard 50' statute rather than waiting until next year's regular legislative session. Rather than repeat that information, I am attaching a copy of that letter to my testimony today.

At its core, the problem is this: Previously, the Supreme Court had allowed judges to make the factual findings that support an increase in mandatory minimum sentences. That is the structure of our Kansas law, in which judges make the finding that an aggravating circumstance exists and outweighs any mitigating circumstances and, thus, the mandatory minimum sentence for a First Degree Premeditated Murder may be increased to 50 years from the usual 25 years.

But, in *Alleyne*, the Supreme Court ruled that juries, not judges, must make those factual findings if they support an increased mandatory minimum sentence. Thus, the Kansas procedure for imposing a 'Hard 50' sentence has been called into question. It is that *procedure* – not the *substance* of the law itself – that I ask you to amend.

The Solution

In the weeks since Governor Brownback announced his intention to convene a special session to address this problem, my office has worked with prosecutors throughout the state to develop a consensus on how to fix this problem. That consensus is reflected in the legislation we have proposed, which is supported by the Office of the Attorney General and also by the Kansas County and District Attorneys Association (KCDAA). I am grateful to the KCDAA and to many other individuals and organizations that have supported this effort, but I particularly want to thank the following for their extensive efforts: Johnson County District Attorney Steve Howe; Sedgwick County District Attorney Marc Bennett; Wyandotte County District Attorney Jerome Gorman; Shawnee County District Attorney Chad Taylor; and Riley County Attorney Barry Wilkerson. Their work on bringing this issue to the forefront and crafting the proposed legislation has been time consuming and extensive, but it has resulted in the consensus recommendation that is before you today.

The proposed bill has two parts:

First, it would adopt a new sentencing procedure for new crimes, committed on or after the effective date of this legislation, that conforms with the constitutional commands of *Alleyne* so that qualifying murders committed in the future can once again be subject to the certainty of a "Hard 50" sentence. This going-forward approach also seeks to minimize administrative inefficiency in the operation of the criminal justice system by collapsing the existing two-step process (finding existence of aggravator and weighing aggravating factors against mitigating factors) into a single step that would be performed by a jury rather than a judge. In an abundance of fairness to criminal defendants, judges would retain the discretion to impose a lesser mandatory minimum sentence but could not impose one greater than the jury. This proposed new procedure is contained in Subsection (1)(b) of the bill draft.

Second, it would make procedural changes to the existing process related to 'Hard 50' sentencing for crimes committed before the effective date of this legislation, including those currently in some stage of prosecution, in sentencing, or on direct appeal. We have identified approximately 29 'Hard 50' cases currently in prosecution or sentencing and another 13 currently on direct appeal. Of course, there may also be others arising out of crimes already committed but not yet charged, so those numbers are not rigid. In this retrospective provision, we recommend keeping the existing statutory structure and making minimal modifications to comply with *Alleyne's* command that juries, not judges, make certain findings. This retrospective approach seeks to comply with *Alleyne* while maximizing the likelihood that those 'Hard 50' sentences for crimes already committed can be preserved on appeal. I acknowledge that uncertainty over the fate of pending cases in which the 'Hard 50' has been imposed, or is to be sought, is certain to lead to additional litigation; however, that uncertainty was created by the *Alleyne* decision itself, not by this proposed legislation, and I encourage you to enact this legislation so that as litigation over pending cases proceeds the State of Kansas has taken all available steps in support of preserving those 'Hard 50' sentences in existing cases. I would point out that this proposed legislation makes no *substantive* changes whatsoever in the 'Hard 50' law – it only alters the *procedure* that must be used on and after the effective date of this

bill, even for crimes previously committed, in order to comply with the newly announced requirements of *Alleyne*. This proposed modification to existing procedure is contained in Subsection (1)(c) of the bill draft.

Other Provisions

In its drafting, this bill draft draws heavily from existing statutes, especially the departure statutes, in order to minimize the introduction of new legal concepts. It seeks to restore the substance of the 'Hard 50' law to the position it was in prior to June 17 and does so by conforming the law's procedures with the newly identified requirements of *Alleyne*.

The bill draft also contains a severability clause in anticipation of the litigation over pending cases that is sure to come, whether or not this legislation is adopted. It also contains clear language to state the intent of the Legislature that the retrospective changes are intended to be solely procedural in nature, and not substantive, and therefore may be applied to pending cases.

Conclusion

Finally, let me make what may be an obvious point but is worth emphasizing: Until June 17, when *Alleyne* was announced, the Kansas 'Hard 50' law was constitutionally sound, both procedurally and substantively. This is ***not*** a situation where the state had reason to believe our law was procedurally defective but had failed to act. To the contrary, our 'Hard 50' law had repeatedly been challenged and had repeatedly been upheld as constitutional through reliance upon the United States Supreme Court precedent in *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). In Harris, the Supreme Court had allowed judges to make the findings that support an increased mandatory minimum sentence, such as our 'Hard 50.' On June 17, the Supreme Court changed the rules and, through *Alleyne*, expressly overruled *Harris*. We are now moving quickly to again bring our law's procedures into compliance with the new constitutional requirements in order to minimize the period of uncertainty, and I am grateful for your work on this matter.

Thank you for your time and effort in thoughtfully considering this proposal. I would stand for questions.

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July 24, 2013

Honorable Sam Brownback
Governor of Kansas
State Capitol, Room 241-S
300 SW 10th Avenue
Topeka, Kansas 66612

Dear Governor Brownback:

I write to ask you to call the Legislature into special session to repair the serious potential damage done to the Kansas "Hard 50" law by a recent United States Supreme Court decision. Waiting until January is not advisable because the passage of time will increase the likelihood that convicted killers who, under Kansas law as it has existed for many years, would have been incarcerated and safely removed from society for not less than 50 years will instead become eligible for parole after only 25 years. It is within the state's ability to fix this problem by an act of the Legislature, and I am recommending that we ask the Legislature to do so soon.

"Hard 50" Background

The Kansas Legislature enacted the "Hard 50" law in 1999. It is codified at K.S.A. 21-6620 through 21-6625 and provides that in certain cases where a defendant is convicted of premeditated first degree murder and one or more aggravating factors are present, the sentencing court may impose a life sentence without eligibility for parole for 50 years rather than the parole eligibility after 25 years that otherwise would apply. The aggravating factors set forth in Kansas law that can trigger the "Hard 50" sentence are: (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; (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. In other words, the

"Hard 50" is a vital public safety tool enacted by the Legislature more than a decade ago to remove the "worst of the worst" killers from society for at least 50 years.

Examples of the type of heinous conduct that has been resulted in a "Hard 50" sentence include the following, all of which are drawn from cases in which the defendant was convicted by a jury, a Hard 50 sentence was imposed by the Court, and the case currently is on appeal:

- A 16-year-old victim was strangled to death; the defendant raped and desecrated her dead body by cutting her neck with a knife and burning portions of her body before throwing her body into a dumpster.
- The victim was robbed while working as a clerk at a retail store. Despite being cooperative with the robbery, she was shot and then savagely beaten to death.
- An 18-month-old victim was choked and beaten for wetting her pants, tied in plastic bags, and left in an attic to die of asphyxiation over a period of hours.
- The two victims were stalked prior to their death and then ambushed while sleeping and shot numerous times but did not die instantly.
- The victim was shot three times in front of her child, once in the back of her head while on her knees, in a murder-for-hire. It was a case of mistaken identity, and the victim was not the killer's intended target.

The Recent United States Supreme Court Decision

Since its enactment, the Kansas "Hard 50" law has been challenged repeatedly, and it has repeatedly been upheld as constitutional by the Kansas appellate courts. In upholding our Hard 50 law, Kansas state courts have consistently relied upon *Harris v. United States*, 536 U.S. 545, 122 S.C5. 2406, 153 L.Ed.2d 524 (2002), in which the United States Supreme Court allowed imposition of mandatory minimum sentences (such as our "Hard 50") based on findings by a *judge*. However, on June 17 of this year, the United States Supreme Court in *Alleyne v. United States*, ___ U.S. ___, 2013 WL 2922116 (June 17, 2013), expressly overruled *Harris* and instead ruled that the United States Constitution requires any fact that increases the minimum sentence for a crime must be found by a *jury*, not a judge. That is not the process that our Hard 50 statute provides.

Days later, on June 24, 2013, the United States Supreme Court remanded a pending Kansas case in which the Kansas Supreme Court had once again upheld the constitutionality of our Hard 50 law and the defendant had appealed. The United States Supreme Court instructed the Kansas Supreme Court to reconsider that case in light of the *Alleyne* decision. See *Astorga v. Kansas*, ___ U.S. ___, 2013 WL 3155235 (June 24, 2013). In other words, it appears that the United States Supreme Court viewed its *Alleyne* decision as being relevant to resolving future constitutional challenges to the Kansas Hard 50 law.

Prosecutors throughout Kansas intend to continue to fight hard to preserve the Kansas Hard 50 law even in light of the *Alleyne* decision, but it is clear that serious issues about the continued viability of our statute inevitably will be raised. This plain-English description of the

circumstance in which our state now finds itself was offered by a leading defense attorney: "The hard 50 is dead as far as it exists in Kansas right now.[1]"

The Remedy

To fix this problem for future cases and to strengthen the state's ability to continue applying the Hard 50 in pending cases, I believe Kansas statute must be amended to conform our sentencing procedure in Hard 50 cases to the United States Supreme Court's ruling in *Alleyne*. Only a statutory amendment will maximize the state's ability to protect many of the existing sentences and to ensure the viability of the Hard 50 sentence going forward. Of course, only the Legislature can enact a statutory amendment.

The timing of this matter has been unfortunate. The *Alleyne* decision was announced on June 17, just three days before the *sine die* adjournment of the 2013 regular session of the Legislature. The subsequent *Astorga* decision was announced on June 24, 2013, after the Legislature had adjourned *sine die*. Because of that timing, there was no opportunity for this matter to be addressed during the 2013 regular session of the Legislature.

With each passing day, the loophole that has been created in Kansas law grows wider and the opportunity for more killers to slip through it – and obtain a 25-year minimum sentence rather than a 50-year minimum sentence – grows greater. Upon initial review, my office has identified approximately two dozen cases statewide that are potentially affected by this ruling, and it is likely there are more. Because these are the "worst of the worst" homicides, I believe the interests of public safety require us to act swiftly. Waiting until January 2014 to address this matter would virtually guarantee that some number of those cases will result in a lesser minimum sentence than the defendant would receive if we act swiftly to repair the law. In other words, waiting until January almost certainly will increase the number of convicted killers who will be eligible for parole after only 25 years instead of after 50 years.

Conclusion

Governor, thank you for your serious consideration of this request. I am well aware of the weight of what I am recommending, but I believe bringing the Legislature back soon to address this problem rather than waiting until January is the right thing to do for public safety. In my view, the timing of the United States Supreme Court's action in the *Alleyne* case, coupled with the potentially serious consequences of that decision for Kansas public safety, has truly created an "extraordinary occasion" as contemplated by Article I, Section 5, of the Kansas Constitution. For that reason, I encourage you to bring the Legislature back into special session as soon as practicable for the specific purpose of amending Kansas law to conform with the procedural requirements of the *Alleyne* decision, thereby maximizing the number of convicted killers who will not be eligible for parole for 50 years.

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[1] Richard Ney, as quoted in the Wichita Eagle, July 13, 2013, http://www.kansas.com/2013/07/13/2886344/supreme-court-ruling-threatens.html#storylink=cpy (last visited July 24, 2013).

My office stands ready to assist in this matter as needed. We have begun discussions to prepare specific language for a bill that could be considered by the Legislature whenever it next convenes. If you agree that a special legislative session should be called in this circumstance, I would be happy to work with you on scheduling matters. I would encourage that several weeks be allowed before any special session to permit time for the drafting and airing of proposed statutory language; at the same time, time is of the essence, and in no event would I favor delaying this matter later than the middle of September.

Thank you for your consideration.

Sincerely,

Derek Schmidt
Kansas Attorney General

cc: All Legislators