House Judiciary Committee
Senate Judiciary Committee
September 3-4, 2013

Testimony of the Kansas Association of Criminal Defense Lawyers
Presented by Randall Hodgkinson and Jessica Glendening
Opponents of proposed amendments to K.S.A. 2012 Supp. 21-6620

Chairman Kinzer, Chairman King and Members of the Committees:

The Kansas Association of Criminal Defense Lawyers is a 350+ member organization dedicated to justice and due process for people accused of crimes. This testimony points out several potential constitutional risks and ramifications of the proposed bill. We chose to focus on the constitutional and other impacts of the proposed changes without going into the policy considerations concerning mandatory minimum sentences in general.

Our concerns with the proposal boil down to two categories: **1) the court directing the jury to find elements of a crime and 2) retroactive application of a sentencing fix and how it will play out.**

Issue 1: the court directing the jury to find elements of a crime

In subsections (b) and (c), the proposal directs that if an/the aggravating circumstance relied on by the State is that "the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment of death on another", then the district court shall instruct the jury that a certified journal entry is sufficient to find proof beyond a reasonable doubt. This approach has at least two constitutional problems: **having a trial court direct the jury to find elements of a crime may violate the Jury Trial Clause and probably violates the Due Process Clause.** Attached as Attachment A is the law and analysis on this concern.

The analysis summarized: 1) the proponents of the bill appear to be proceeding under the idea that *Apprendi* does not apply to findings regarding prior convictions (i.e. the "prior conviction exception"); 2) however, that exception has been called into doubt; 3) a U.S. Supreme Court case decided two months ago held that proof of facts *about a prior conviction* does not equate to proof of facts *of the prior conviction*; and 4) even if the prior conviction exception to the Jury Trial Clause applies, the Government cannot grant a person a right to a jury trial and then deprive them of Due Process in the exercise of that right.

Why risk it? Having a special procedure for a class of aggravating factors presents the risk the procedure will be found unconstitutional. In reality, it is not usually difficult for the prosecution to prove the prior conviction. The only cases where it would be an issue is in the small number of cases where there is a question regarding the nature of the prior conviction or the identity of the defendant. In those cases, the jury should find the facts, unfettered by judicial interference.

Issue 2: the retroactive application of this sentencing fix and how it will play out

A retroactive sentencing fix violates the U.S. Constitution. Subsection (c) is the proposed mechanism to deal with pending cases. Stating something is a "procedural rule" does not make it so. Rather the question is whether subsection (c) aggravates a crime, making it greater than it was when committed or changes the punishment to be greater than it was when committed. Again, Attachment B has the law and analysis on this concern.

This analysis summarized: 1) before *Alleyne*, aggravating factors were not elements of the offense; 2) now they are and subsection (c) essentially creates a new crime of "aggravated" first-degree premeditated murder; 3) no defendants whose crimes were committed before this proposal were charged with that element(s); and 4) applying (c) retroactively aggravates a crime and inflicts greater punishment for a crime than existed at the time it was committed. This is prohibited by the U.S. Constitution's Ex Post Facto Clause.

We have been down this road before. In 2000, the U.S. Supreme Court decided *Apprendi.* In 2001, the Kansas Supreme Court decided *State v. Gould.* One need look no further than Syllabus No. 6 to see what happened there:

> The holdings in this opinion as expressed in Syllabus ¶¶ 2, 3, 4, and 5 are mandated by *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). Our holding on the constitutionality of upward departures under the KSGA has no retroactive application to cases final as of June 26, 2000, the date *Apprendi* was decided. **However, the new constitutional sentencing rule established by *Apprendi* must be applied here and in all cases pending on direct appeal or which are not yet final or which arose after June 26, 2000.** (Emphasis provided.)

If we change the case cite to read *"Alleyne v. United States"* and change "upward departures" to "Hard 50 sentences", we believe we see what will happen.

Even recent history shows us what is at risk of happening. In 2012, we testified about SB 307, which did away with lesser included offenses in felony murder cases. We said this would not be a procedural change and would raise constitutional issues. (*See* House Corrections and Juvenile Justice Committee, 3/7/12, Testimony of Randall L. Hodgkinson and Jennifer C. Roth.)

As predicted, the Kansas Supreme Court rejected the retroactive application of that legislative response. The Court in *State v. Wells*, Appellate Court Case No. 104,092 (Kan. June 28, 2013) found:

> In this instance, we conclude that the amendment is not merely procedural or remedial. It effectively states that no felony-murder defendant is entitled to lesser included offense instructions on that charge. In contrast, both the pre-*Berry* rule and the rule under *Berry* recognized lesser degrees of felony murder. **The statutory extinguishment of these lesser included offenses is a substantive change, indeed, one that may have constitutional ramifications.** (Emphasis provided.)

There is currently no constitutional mechanism to impose Hard 40/50 sentences in pending cases; effectively, there are no constitutional Hard 40/50 sentences at this time. History shows us what happens when a retroactive fix is attempted.

A retroactive sentencing mechanism called into constitutional doubt by its own proponents will impact resources of local jurisdictions and the State. We do not know the exact number of cases to which this retroactive procedure would be applied. Whatever that number, all of those cases would have to undergo the proceeding set out in subsection (c). That means impaneling juries, calling witnesses, having judges, attorneys and other court personnel, etc. – just like a trial. In the event those sentences are found unconstitutional, then the defendants would have to be sentenced a second or third time.

Conclusion

Kansas used to have a bifurcated process where the jury would find a defendant guilty and then decide beyond a reasonable doubt whether aggravating factors existed to impose the Hard 40. But in 1994, the Legislature passed a bill changing the process so that judges would make the findings. The purpose was "to make it easier to impose [the Hard 40] on persons committing premeditated murder." The proponent's testimony was "the law was seldom used [by prosecutors] because it was too difficult, time-consuming, and cumbersome." (Memo on the Hard 50 Sentence, prepared by Kansas Legislative Research Department, dated August 19, 2013.)

Today you all are in the position of having to re-adopt this type of procedure. Even knowing history, the proponents say things such as the "going-forward approach also seeks to minimize administrative inefficiency in the operation of the criminal justice system." (Letter from Attorney General Schmidt to all Members of the Legislature, dated 8/16/13.)

As citizens of Kansas and this country, **it is disheartening to have the Jury Trial Right, the Due Process Clause and the Ex Post Facto Clause regarded as impediments creating "administrative inefficiencies" and "loopholes" to close.** (News Release from KCDAA dated July 26, 2013). Our country's highest court did not "damage" our sentencing scheme – our U.S. and Kansas Constitutions guarantee certain rights and our laws do not comply.

We respectfully urge you to consider the last time this body was called upon to address our Hard 40/50 sentencing process and to not let history repeat itself.

Respectfully submitted,

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Attachment A

Authority and Analysis for proposed changes to K.S.A. 2012 Supp. 21-6620
Prepared by Randall L. Hodgkinson

A. Directing the jury to find elements of a crime may violate the Jury Trial Clause and probably violates the Due Process Clause

In subsection (b) and (c), the proposed bill directs that "If the prosecuting attorney relies on subsection (a) of K.S.A. 2012 Supp. 21-6624, and amendments thereto, as an aggravating circumstance, and the court finds that one or more of the defendant's prior convictions satisfy such subsection, the jury shall be instructed that a certified journal entry of a prior conviction is sufficient to prove the existence of such aggravating circumstance beyond a reasonable doubt." Subsection (a) of K.S.A. Supp. 21-6624, in turn, defines an aggravating factor that "the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another." Essentially, this part of the proposed bill sets up a scheme where a defendant has a right to a jury trial on the existence of a certain fact, but then the district court directs the jury to reach a certain decision in certain circumstances. This approach has at least two possible constitutional problems.

The doubtful and narrow prior conviction exception

First, given the responses in pending court cases, proponents of the proposed bill are probably proceeding under the idea that *Apprendi* does not apply to findings regarding prior convictions (i.e. the "prior conviction exception"). Proceeding under that assumption is potentially problematic for two reasons: first, the exception itself has been called into constitutional doubt, and second, the exception only relates to the proof of the fact of a prior conviction, not facts about the prior conviction.

In *Apprendi*, although the United States Supreme Court did explicitly call into question of the validity of the prior conviction exception, because the *Apprendi* case itself did not involve a prior conviction, it did not reach that issue. Justice Clarence Thomas, a critical vote on the issue, would have reached the issue and closed the prior conviction exception, but he apparently did not garner the support of a majority of the United States Supreme Court. And, in fact, he has never garnered the support of a majority of the United States Supreme Court (which is why we still have a prior conviction exception today). But that does not mean that he would not if the United States Supreme Court reached the issue in the future. As explained in *Apprendi* itself and in other subsequent cases, there is no logical reason to exclude proof of prior convictions from the Sixth Amendment Jury Trial Clause.

And, more recently, the United States Supreme Court has held that proof of facts *about a prior conviction* does not equate to proof of facts *of the prior conviction*. In

Descamps v United States, No. 11-9540 (U.S. June 20, 2013), the United States Supreme Court held that if a judge was looking beyond the terms of a statute to determine the nature of a prior conviction, it would violate the Sixth Amendment Jury Trial Clause. To the extent that, under the proposed bill, a judge was looking beyond the terms of a statute to determine whether it satisfies subsection (a), it would similarly violate the Sixth Amendment Jury Trial Clause.

Violation of Due Process Clause to direct a jury to make a certain finding

Finally, even if the prior conviction exception to the Jury Trial Clause fully applies, the Government cannot grant a person a right to a jury trial and then deprive the person of Due Process in the exercise of that right. In *State v. Brice*, 276 Kan. 75, 880 P.3d 1113 (2003), the Kansas Supreme Court cited *United States v. Gaudin*, 515 U.S. 506, 510 (1995) for the proposition that it violated the Due Process Clause to instruct the jury that a through-and-through bullet wound was great bodily harm as a matter of law. The Kansas Supreme Court affirmed the legal ruling that a through-and-through bullet wound was great bodily harm as a matter of law. But because *instructing the jury* in that regard illegally shifted the burden of proof and essentially directed a verdict on an element, it violated the Due Process Clause. That is exactly what the proposed bill would do with respect to prior convictions as aggravating factors. It would indicate that defendants have a right to a jury trial on alleged prior convictions, but then take away that decision from the jury.

The Kansas Constitution Bill of Rights section 5 also guarantees that the "right of trial by jury shall be inviolate." A sentencing scheme that purports to provide a right to a jury trial on a fact, but then requires the judge to direct the jury on that fact hardly seems to leave the right of trial by jury inviolate.

Is it worth the risk?

Of course, these are just arguments about possible constitutional outcomes. But it is clear that there is some risk associated with having a special procedure for a class of aggravating factors—the risk that that procedure will be found unconstitutional. In that situation, this Legislature would be back in a similar posture with regard to the cases that had been tried under that special procedure.

But in reality, proof of a prior conviction and its surrounding circumstances will not usually be difficult for the prosecution. Assuming there is no question regarding the nature of the conviction and the identity of the defendant, presentation of a certified journal entry will most likely be found to be proof beyond a reasonable doubt by the jury. The only cases in which this special procedure would matter would be in marginal cases where there was a question regarding the nature of the conviction and/or the identity of the defendant. And it is in those cases that the jury should find the facts, unfettered by judicial interference.

B. Subsection (c), applied retroactively, violates the Ex Post Facto Clause

The proposed bill asserts that the amendments to subsection (c) are a procedural rule to applied retroactively. Anytime the Government seeks to apply criminal laws retroactively, it raises the specter of a possible Ex Post Facto Clause violation.

The United States Constitution prohibits any State from passing an "ex post facto Law." U.S. Const. Art. I, § 10. The contours of this provision seem simple on its face, but can be confusing in application. The most recent pronouncement regarding this provision from the United States Supreme Court is found in *Carmell v. Texas*, 529 U.S. 513, 521-25 (2000). " The *Carmell* Court utilized Justice Chase's description of ex post facto laws found in *Calder v. Bull*, a 1798 United States Supreme Court case:

> "I will state *what laws* I consider *ex post facto laws*, within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Id.*, at 390 (emphasis in original).
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> *Calder's* four categories, . . . were, in turn, soon embraced by contemporary scholars. Joseph Story, for example, in writing on the *Ex Post Facto* Clause, stated:
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> "The general interpretation has been, and is, ... that the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or whereby the act, if a crime, is aggravated in enormity, or punishment; or whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed." 3 Commentaries on the Constitution of the United States § 1339, p. 212 (1833).
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> James Kent concurred in this understanding of the Clause:
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> "[T]he words *ex post facto laws* were technical expressions, and meant every law that made an act done before the passing of the law, and which was innocent when done, criminal; or which aggravated a crime, and made it greater than it was when committed; or which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed; or which altered the legal rules of evidence, and received less or different testimony than the

> law required at the time of the commission of the offence, in order to convict the offender." 1 Commentaries on American Law 408 (3d ed. 1836) (Lecture 19).
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> This Court, moreover, has repeatedly endorsed this understanding, including, in particular, the fourth category (sometimes quoting Chase's words verbatim, sometimes simply paraphrasing).

So the question is whether the amendments to subsection (c) of the proposed bill "*aggravates* a *crime,* or makes it *greater* than it was, when committed, " or "*changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed." If so, it makes no difference whether it is labeled procedural or substantive, it would be prohibited.

Aggravated murder

Until *Alleyne,* for purposes of the premeditated first-degree murder, aggravating factors have never been elements of the offense. But under the proposed amendments to subsection (c), aggravating factors and the weighing of aggravating factors against mitigating factors will be elements of an essentially new crime of "aggravated" first-degree premeditated murder.

Because they were not elements, these elements have not been charged against any person who committed an offense prior to the effective date of the proposed bill as a part of the elements of the offense. If the provisions of the amendments to subsection (c) were applied to cases involving offenses occurring prior to the effective date of the proposed bill, it will involve making the crime greater than it was when committed (and/or previously prosecuted).

It was on a similar basis that the Kansas Supreme Court recently rejected retroactive application of a legislative response to a ruling regarding lesser-included offense instructions in felony murder cases. *State v. Wells,* Appeal No. 104,092 (Kan. June 28, 2013)("In this instance, we conclude that the amendment is not merely procedural or remedial. It effectively states that no felony-murder defendant is entitled to lesser included offense instructions on that charge. In contrast, both the pre-*Berry* rule and the rule under *Berry* recognized lesser degrees of felony murder. The statutory extinguishment of these lesser included offenses is a substantive change, indeed, one that may have constitutional ramifications.")

Greater punishment

Furthermore, because the existing hard 40/50 sentencing scheme allows for increased sentences without jury findings, it is unconstitutional on its face. In *State v. Gould,* the Kansas Supreme Court held that, after *Apprendi,* because there was no constitutional mechanism for imposition of upward durational departures, all upward durational departures (even those agreed upon in plea agreements) were

void. Similarly, there is currently no constitutional mechanism for imposition of hard 40/50 sentences in pending cases; effectively, there are no constitutional hard 40/50 sentences at this time. To the extent that the proposed bill would purport to authorize hard 40/50 sentences against persons with pending cases, it would increase the available punishment in those cases in violation of the Ex Post Facto Clause.

In summary, because the amendments to subsection (c) of the proposed bill purport to retroactively aggravate a crime and inflict greater punishment for a crime, it is prohibited under the Ex Post Facto Clause.

Respectfully submitted,

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