

House Corrections and Juvenile Justice Committee
January 21, 2021

House Bill 2029
Testimony of the Kansas Association of Criminal Defense Lawyers (KACDL)
Presented by Jennifer Roth
Opponent

Dear Chairman Jennings and Members of the Committee:

HB 2029 would treat prior convictions (person *and* nonperson offenses) with a domestic violence designation (provided in K.S.A. 22-4616) as prior convictions for domestic battery, in order to enhance the punishment for people being sentenced for new domestic battery convictions. We oppose this bill for three reasons.

The domestic violence designation applies to nonperson crimes, yet would score them as person crimes. K.S.A. 21-5111(i) defines domestic violence broadly so that it “includes any other crime committed against a person *or against property*” when directed against a person the defendant had a qualifying relationship with. See also K.S.A. 22-4616(b) (the designation provision provides that this is the definition to use). This means that a prior conviction from a district or municipal court for criminal damage, theft, etc. that has a domestic violation designation would be scored as a person offense because that is what domestic battery is. See K.S.A. 21-5414. In other words, HB 2029 would treat designated nonperson offenses (i.e. crimes against property) as prior person offenses (i.e. domestic battery convictions) in determining how many prior convictions a person to be sentenced has.

HB 2029 is likely unconstitutional. Generally speaking, the Sixth Amendment to the United States Constitution requires that any fact that enhances the severity of punishment for a crime must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 495, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). However, there exists a narrow exception to that rule for the “fact of a prior conviction.” *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 (2002). That exception is how our sentencing system, which is heavily dependent upon prior convictions, continues to function.

The domestic violence designation is relatively unique because it is not part of the prior conviction itself, but rather a “designation” placed on the criminal case. See, e.g., *State v. Ochoa*, 429 P.3d 250, 2018 WL 5091856, at *11 (Kan. App. 2018) (the domestic violence finding is not an element of the charged offense). As the designation is not the “fact of a prior conviction” but an additional, unique designation, it is unlikely that the exception to the *Apprendi* rule will apply. Therefore HB 2029 is likely unconstitutional because it enhances the severity of punishment for a crime without a jury finding.

Attorneys and courts have not been treating the domestic violence designation as an enhancement to domestic batteries because the Legislature said that was not the purpose.

This conferee was also an opponent to 2009 HB 2335, which was the domestic violence designation bill heard in this Committee on February 16, 2009. HB 2335 was eventually referred to the Kansas Judicial Council, which later proposed language that became 2010 Sub. for HB 2517, which established the designation effective July 1, 2011.

At the hearing on HB 2335, this conferee raised *Apprendi* as a potential problem with the proposed domestic violation designation. The response was that the designation would not be a punishment, but rather a means to order evaluations and track domestic violence-related offenses. In fact, that is what is reflected in the Judicial Council's report:

It was agreed that the goals of the legislation are not punitive but rather, the goals are to provide a method by which we can monitor and track data that can eventually be used to provide meaningful information to policy-makers.

The committee understands that the goals of this legislation are 1) to provide a method for tracking and collecting data on all types of domestic violence related crimes so that better information may be provided to policy-makers in the future, and 2) to identify all domestic violence related crimes and require that domestic violence assessments and evaluations are done on those offenders in order to prevent escalation of the domestic violence.¹

HB 2029 adds a new collateral consequence to a conviction with an attached domestic violence designation -- one that was expressly rejected when the designation was passed. Defense counsel has a duty to inform their clients of the consequences of a conviction, including explaining what comes with having a domestic violence designation. Adding a new consequence retroactively may impact prior cases, subjecting them to additional litigation (such as motions to withdraw pleas) and jeopardizing the finality of those dispositions.

Sincerely,
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¹ Report of the Judicial Council Criminal Law Advisory Committee on 2009 HB 2335, approved December 4, 2009, accessible at <https://www.kansasjudicialcouncil.org/studies-and-reports>.