
Preliminary Report of the 2013 Special Committee on Judiciary

CHAIRPERSON: Representative Lance Kinzer

VICE-CHAIRPERSON: Senator Jeff King

OTHER MEMBERS: Senators Terry Bruce, David Haley, Forrest Knox, Mary Pilcher-Cook, and Greg Smith; and Representatives John Barker, Ed Bideau, Mark Kahrs, Charles Macheers, Janice Pauls, Emily Perry, and John Rubin

STUDY TOPIC

The recent U.S. Supreme Court opinion in *Alleyne v. U.S.*, 133 S. Ct. 2151 (2013), and implications for Kansas sentencing requirements (the “Hard 50” sentence).

August 2013

Preliminary Report

Recommendations

The Committee agreed to:

- Recommend the bill language proposed by the Attorney General’s Office, as amended by the Committee, be introduced as a House bill in the upcoming Special Session; and
- Recommend the standing House Judiciary Committee introduce, and the Legislature pass, legislation during the 2014 regular Legislative Session that would change the Hard 50 sentence to a mandatory 50-year sentence, with a provision allowing a defendant to argue mitigating factors and the court to lower the sentence at its discretion, with a floor of 25 years.

Proposed Legislation: For the September 2013 Special Session, the Committee recommends a House bill containing an amended procedure for imposing the Hard 50 sentence. For the 2014 Regular Session, the Committee proposes a House bill changing the Hard 50 sentence to a mandatory 50-year sentence.

BACKGROUND

Since 1994, in cases where a defendant is convicted of premeditated first degree murder, Kansas’ Hard 50 sentence has allowed a court to impose a life sentence without eligibility for parole for 50 years, rather than 25 years, when the judge finds one or more aggravating factors are present. In *Alleyne v. U.S.*, 133 S. Ct. 2151, issued in June 2013, the U.S. Supreme Court held that any fact that increases a mandatory minimum sentence is an element that must be submitted to a jury and found beyond a reasonable doubt. In July 2013, Kansas Attorney General Derek Schmidt formally requested Governor Sam Brownback call the Kansas Legislature into Special Session “for the purpose of repairing” the Hard 50 sentence. On August 6, 2013, the Governor issued a proclamation calling the Legislature into Special Session starting September 3, 2013, to enact legislation in response to *Alleyne*.

Subsequently and pursuant to KSA 46-1205, the Legislative Coordinating Council (LCC) appointed 14 members of the Legislature to serve as members of the Special Committee on Judiciary. The LCC directed the Committee to

review the U.S. Supreme Court decision in *Alleyne* and its implications for Kansas sentencing requirements—specifically, the “Hard 50” sentence. The Committee was required to meet prior to the 2013 Special Session and receive testimony from interested parties, including the Kansas Attorney General and prosecutors, then report its preliminary findings to the House and Senate Judiciary Committees at the commencement of the 2013 Special Session. The LCC granted the Committee two days to complete this task.

History of the Hard 50 Sentence

In 1990, the Legislature established the “Hard 40” sentence. As originally implemented, the Hard 40 sentence required the prosecuting attorney to file written notice of intent to seek the mandatory 40-year sentence at the time of arraignment. Following conviction, a separate sentencing trial would be conducted before the trial judge and jury to determine whether the Hard 40 sentence should be imposed. Such sentence would be imposed if, by unanimous vote, the jury found beyond a reasonable doubt that one or more aggravating circumstances existed and that the existence of the

aggravating factors was not outweighed by any mitigating circumstances.

In 1994, the Legislature amended the Hard 40 sentence to allow the judge, instead of a jury, to determine whether the sentence should be imposed. To support this change, then-Johnson County District Attorney Paul Morrison testified that the bill would give the Hard 40 sentence broader use, as the original procedure was too difficult, time-consuming, and cumbersome. In addition to allowing the judge to make the determination, the amendments removed the notice requirement and the reasonable doubt standard. The statute also was updated to reflect the reinstatement of the death penalty.

In 1999, the Legislature increased the mandatory 40-year sentence to a 50-year sentence. This change was recommended by the Kansas Sentencing Commission and endorsed by then-Attorney General Carla Stovall.

COMMITTEE ACTIVITIES

The Special Committee on Judiciary met August 26, 2013. Staff from the Office of the Revisor of Statutes briefed the Committee on the *Alleyne* decision and its potential impact on the Kansas Hard 50 sentencing statute—specifically, that the statute may violate the holding of *Alleyne* because the court, instead of a jury, makes the determination as to whether aggravating factors exist to impose the Hard 50 sentence. This conclusion is supported by the fact that the U.S. Supreme Court, following *Alleyne*, reversed and remanded a Kansas case involving the Hard 50 sentence for further consideration in light of *Alleyne*. See *Astorga v. Kansas*, 570 U.S. ___, 133 S. Ct. 2877 (2013).

Should the Kansas Supreme Court determine the existing Hard 50 sentencing statute is unconstitutional under *Alleyne*, the potential impact could vary based upon the status of related cases. Under existing Kansas precedent, the new rule likely would be applied to cases pending on direct appeal, cases which are not yet final (trial level), and cases arising after June 17, 2013, the

date of the *Alleyne* decision (including crimes committed before a statutory change occurs). The new rule apparently would not be applied to cases final as of June 17 or to cases on collateral appeal. For those cases on direct appeal, where the defendant has already been given a Hard 50 sentence, the appellate court would find the sentence unconstitutional, vacate the sentence, and remand to the district court for resentencing. For cases at the trial level, the district court would have to impose the sentence authorized by the Sentencing Guidelines Act and could not impose a Hard 50 sentence. It does not appear a plea agreement or new procedure could be used by a district court in the absence of a statutory change.

Potential amendments to the statute would include changing references to “the court” to references to “the trier of fact” or “the jury” so that the trier of fact would determine whether aggravating circumstances exist to warrant a Hard 50 sentence. This approach is not as thorough as the second option, which 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. Under either approach, another consideration is whether and to what extent any change should be made retroactive.

Following this overview, staff reviewed a copy of the proposed bill language prepared in conjunction with the Attorney General’s Office. The bill would follow the more comprehensive approach and institute a procedure to be followed by the jury in finding whether aggravating circumstances exist. The bill would create a new subsection setting forth the procedure to be followed for those cases arising on or after the effective date of the act, a procedure which would be drawn heavily from the existing procedure for upward departure sentences. The bill then would amend existing language in the statute to institute a similar procedure for crimes committed prior to the effective date of the act. Additional new subsections would specify the changes would apply retroactively, require resentencing for any sentence vacated prior to the amendment of the statute, require the maximum term of imprisonment be imposed at resentencing should

any sentence under the statute be held unconstitutional, and apply a severability provision. [Note: a more detailed description of this proposed bill language, as amended and recommended by the committee, is included later in this report.]

Staff then reviewed a balloon amendment incorporating several amendments that had been prepared at Representative Kinzer's request. Most of the proposed amendments were purely technical, to correct references or consistency. One amendment reworded the retroactivity clause to clarify that the amendments were not intended to retroactively apply to cases where the defendant's conviction and sentence were final prior to June 17, 2013 (the date *Alleyne* was decided), unless the conviction or sentence has been vacated in a collateral proceeding.

The Committee then received testimony from proponents of the proposed legislation, beginning with Attorney General Schmidt. He reviewed the events, beginning with the *Alleyne* decision, that had led to the Committee's meeting. He emphasized that the Kansas Legislature previously had made a policy choice to institute a Hard 50 sentence and this choice had been consistently upheld as constitutional until the *Alleyne* decision, and the intent of the proposed legislation was to reaffirm the policy choice and maximize the likelihood that the state will be able to prevail in challenges to the Hard 50 sentence based upon *Alleyne*. To that end, when drafting the legislation, the Attorney General's Office and those it worked with decided to separate the provisions for those crimes committed before the effective date of the act from those committed after and to draw from provisions found elsewhere in current law.

Next, the Committee heard from four representatives of the Kansas County and District Attorneys Association (KCDAA): Marc Bennett, Sedgwick County District Attorney; Jerry Gorman, Wyandotte County District Attorney; Steve Howe, Johnson County District Attorney; and Barry Wilkerson, Riley County Attorney. In their joint written testimony, the KCDAA representatives noted the proposed bill represented a consensus between the Attorney General's Office and the KCDAA that would protect the Hard 50 sentence going forward while giving the state the best

chance to protect pending cases retroactively. The representatives noted the retroactive fix provided by the bill would apply to about 30 murder cases that are still pending either at the district court level or on direct appeal to the Kansas Supreme Court. The prosecutors estimate this number could rise to about 40 cases if no action is taken before the next regular legislative session.

Mr. Bennett noted the state and prosecutors would be taking on a higher burden going forward, as proof beyond a reasonable doubt would be required of the aggravating factors, whereas under current law no specific burden of proof is required. He added that the retroactive provision would be difficult for some involved parties, but that it is important because of the seriousness of the cases involved. Mr. Bennett, Mr. Gorman, Mr. Howe, and Mr. Wilkerson all shared stories of cases in which they had utilized the Hard 50 statute. Mr. Gorman remarked that such cases were usually as heinous as death penalty cases but lacked one of the specific required factors for the death penalty. Mr. Howe said the procedure should be effective, based upon his use of a similar procedure in sentencing departure cases.

In response to a question, Mr. Bennett commented he did not anticipate the proposed bill's language regarding proof of previous convictions would be an issue, due to existing case law, except in exceptional circumstances.

When asked whether a better approach would be to make a 50-year sentence without parole mandatory in the applicable cases and thereby eliminate the need for the proposed new procedure, Mr. Bennett responded that he would be in favor of such a policy choice during the regular Legislative Session, but the focus for the Special Session was implementing a procedural fix.

Kyle Smith, Deputy Director of the Kansas Bureau of Investigation and Assistant Attorney General, testified it was important to make the needed procedural changes as soon as possible to preserve the policy decision previously made by the Legislature to implement the Hard 50 sentence. He expressed concern that inaction would result in an incentive for individuals committing other crimes to kill their victims, as the punishment for

the murder could be less than for the original crime.

A representative of the Kansas Association of Chiefs of Police, Kansas Sheriffs Association, and Kansas Peace Officers Association submitted written testimony urging the Legislature to take action during the Special Session to implement procedural changes to ensure the Hard 50 sentence would remain viable but to save any consideration of substantive changes for the regular Legislative Session.

The Office of Judicial Administration (OJA) submitted neutral written testimony noting 46 persons currently are incarcerated under a Hard 40 sentence, 60 are incarcerated under a Hard 50 sentence, an estimated 35 currently are charged under the applicable statute, and an estimated 5 such cases per year are likely to be tried on an ongoing basis. OJA estimates the fiscal effect on the Judicial Branch in FY 2014, without clarifying the retroactivity clause, would be \$430,868. If the retroactivity clause were clarified to exclude resentencing offenders currently serving sentences, the fiscal effect would fall to about \$48,848.

The Judicial Branch fiscal information also was incorporated into a fiscal note on the proposed bill language by the Division of Budget that was distributed to Committee members. The total estimated fiscal effect for FY 2014 was \$874,408, including the OJA estimate. The remaining fiscal effect is from a Board of Indigents' Defense Services (BIDS) estimate of \$441,540, based upon costs for additional public defender hours, mental health experts, and appellate public defender hours. It appears the BIDS estimate does not include the anticipated lower cost from clarification of the retroactivity clause to exclude offenders currently serving sentences. The Kansas Sentencing Commission estimates an effect on prison beds would be negligible, and the Kansas Attorney General indicates any additional cost to counties due to increased jury service would be negligible. The fiscal effect is not reflected in *The FY 2014 Governor's Budget Report*.

Next, the Committee received opponent testimony from two representatives of the Kansas Association of Criminal Defense Lawyers (KACDL), Randall Hodgkinson and Jessica

Glendening. First, the representatives expressed concern with a provision of the bill allowing the district court to instruct the jury that a certified journal entry is sufficient to find proof beyond a reasonable doubt of the aggravating factor of the previous conviction of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another. In response to a question, Mr. Hodgkinson noted this concern could play out in a variety of situations, including where an out-of-state conviction with different elements than the Kansas equivalent is at issue or where identity of the previous perpetrator is at issue. Mr. Hodgkinson also asked the Committee to amend the proposed language to require the jury foreman to sign the jury's written finding.

Ms. Glendening addressed the KACDL's concern with the retroactivity provision, noting the proposed law will be challenged if it is made retroactive, which could require substantial additional proceedings and resentencing. The attempted retroactivity could be found unconstitutional as an *ex post facto* violation. The KACDL written testimony included a proposed version of the bill that would address the concerns raised.

RECOMMENDATIONS

The Committee agreed to amend the proposed bill language with Representative Kinzer's balloon amendments and the language requested by the KACDL related to the jury foreman's signature. The Committee then agreed to recommend that the proposed bill language, as amended, be introduced as a House bill in the upcoming Special Session.

Following further discussion, the Committee agreed to recommend the standing House Judiciary Committee introduce, and the Legislature pass, legislation during the 2014 regular Legislative Session that would change the Hard 50 sentence to a mandatory 50-year sentence, with a provision allowing a defendant to argue mitigating factors and the court to lower the sentence at its discretion, with a floor of 25 years.

BRIEF OF PROPOSED LEGISLATION

[The full text of the proposed legislation may be found online at <http://www.ksrevisor.org> or [http://www.kslegislature.org/li_2013s/.](http://www.kslegislature.org/li_2013s/)]

The proposed legislation would amend the procedure for imposing a life sentence with a mandatory minimum term of imprisonment of 50 years (the Hard 50 sentence), rather than 25 years, when a defendant is convicted of premeditated first degree murder.

The legislation would create a new subsection setting forth the procedure to be followed for premeditated murders committed on or after the effective date of the act. The legislation also would separately amend the existing procedure for premeditated murders committed prior to the effective date of the act. The procedure to be followed in each situation would be fairly similar.

For premeditated murders committed on or after the effective date of the act, the following procedure would be established. In such cases, after conviction and upon reasonable notice by the prosecuting attorney, the proposed legislation would add a new subsection requiring the court to conduct a separate proceeding as soon as practicable for the jury to determine whether one or more aggravating circumstances outlined in statute exist for the purpose of imposing the 50-year sentence. If any person who served on the trial jury is unable to serve on the jury for the proceeding, the court would be required to substitute an alternate juror who had been impaneled for the trial jury. If there are not enough alternate jurors, the proposed legislation would allow the court to conduct the proceeding before a jury ranging in size from 6 to 12 jurors. If the jury has been discharged prior to the proceeding, the proposed legislation would allow a new jury to be impaneled. Jury selection procedures, qualifications of jurors, and grounds for exemption or challenge of prospective jurors in criminal trials would apply to the selection of such jury. The jury can be waived according to a procedure set out in statute, and the court then would conduct the proceeding.

In the proceeding, evidence could be presented concerning any matter relating to the aggravating

circumstances; however, the evidence would not be admissible if the prosecuting attorney had not made the evidence known to the defendant prior to the proceeding or the evidence was secured in violation of the *Kansas Constitution* or *U.S. Constitution*. The proposed legislation would specify the defendant's testimony at the time of the proceeding shall not be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the parties would have a reasonable period of time in which to present oral argument. At the conclusion of the evidentiary portion of the proceeding, the court would provide oral and written instructions to the jury to guide its deliberations. Specifically, if as an aggravating circumstance the prosecuting attorney relies on a defendant's prior conviction of a felony in which the defendant inflicted great bodily harm, disfigurement, or death of another, and the court finds one or more of the defendant's prior convictions satisfy those criteria, the jury would 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.

The proposed legislation would specify any decision of the jury regarding the existence of an aggravating circumstance must be beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a unanimous sentencing decision, the court would be required to dismiss the jury and sentence the defendant as provided by law. If by unanimous vote the jury finds one or more of the aggravating circumstances exist, the proposed legislation would require the jury to designate in writing which specific circumstance or circumstances it found. In nonjury cases, the court likewise would designate which specific circumstance or circumstances it found. If one or more of the aggravating circumstances were found to exist beyond a reasonable doubt, the Hard 50 sentence would be imposed unless, following a review of mitigating circumstances, the sentencing judge finds substantial and compelling reasons to impose a life sentence without a possibility of probation, suspension, modification, or reduction or sentence, and a minimum 25-years imprisonment before being eligible for parole, which could not reduced by application of good-time credits. No other

sentence would be allowed, and the judge would be required to state on the record at the time of sentencing the substantial and compelling reasons for imposing this 25-year sentence.

As previously noted, the proposed legislation also would modify the existing procedure for imposing the Hard 50 sentence if a defendant is convicted of premeditated first degree murder for a crime committed prior to the effective date of this proposed legislation. Subsection (d) states these amendments would establish a procedural rule for sentencing proceedings, and as such would be construed and applied retroactively to all crimes committed prior to the effective date, except for those cases in which the conviction and sentence were final prior to June 17, 2013, unless such conviction or sentence has been vacated in a collateral proceeding. Using a procedure similar to that outlined in the new subsection, the proposed legislation would require the court, upon reasonable notice by the prosecuting attorney, to conduct a separate sentencing proceeding allowing a jury to determine whether to impose the 50-year sentence unless the jury is waived.

The procedure for crimes committed prior to the effective date would be distinct in a few ways, however. If there are not enough alternate jurors to replace trial jurors who are unable to serve at the sentencing proceeding, in addition to allowing the court to conduct a proceeding before a jury of at least 6 and no more than 12 jurors, the proposed legislation would allow the court to summon a special jury of 12 persons. Additionally, in the evidentiary portion of the proceedings, current law

allows evidence concerning any matter that the court deems relevant to the question of sentence, including aggravating and mitigating circumstances, to be presented. The proposed legislation would clarify that evidence of aggravating circumstances would be admissible only if the prosecuting attorney, rather than the state, has made it known to the defendant prior to the proceeding and would add that evidence of mitigating circumstances would be admissible only if the defendant has made it known to the prosecuting attorney prior to the proceeding.

For all cases on appeal after the effective date of the proposed legislation, if a Hard 50 sentence imposed pursuant to the law prior to these amendments is vacated for any reason other than sufficiency of the evidence as to all aggravating circumstances, the proposed legislation would require resentencing under the law as amended, unless the prosecuting attorney chooses not to pursue such a sentence.

If any Hard 50 sentence is held to be unconstitutional, the proposed legislation provides the court having jurisdiction over the person previously sentenced would cause the person to be brought before the court to sentence the person to the maximum term of imprisonment otherwise provided by law.

Finally, the proposed legislation includes a severability clause and would take effect upon publication in the *Kansas Register*.