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**Testimony in Support of Senate Bill 42
Clarifying criminal sentencing for certain persons
subject to a mandatory minimum term of imprisonment**

**Presented to the House Committee on Corrections and Juvenile Justice
By Melissa Johnson, Assistant Attorney General**

March 13, 2017

Chairman Jennings and Members of the Committee:

Thank you for the opportunity to testify on behalf of Attorney General Derek Schmidt. I appear today in support of SB 42. This bill addresses an ambiguity that currently exists within the sentencing provisions of K.S.A. 21-6620, 21-6623 and 21-6627. We believe it is necessary to clarify the sentencing structure of these statutes so that persons convicted of these most serious crimes are punished appropriately and consistently with their actions and criminal history. We believe SB 42 merely clarifies the original intent of the Legislature.

Current Statutes

K.S.A. 21-6620 and K.S.A. 21-6623

K.S.A. 21-6620 is the sentencing statute for capital murder and murder in the first degree. It provides that a person who is convicted of attempted capital murder shall be sentenced to imprisonment for life and shall not be eligible for release until they have served at least 25 years. In subsection (a)(2)(B), it also specifies that the mandatory provisions of a 25 year minimum term of imprisonment do not apply if 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 300 months. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range.”

A similar structure is used for persons convicted of murder in the first degree that occurs during an inherently dangerous felony, or what is commonly referred to as “felony murder.” The statute requires a person convicted of felony murder serve a mandatory 25 year term of imprisonment under subsections (b)(1) and (2).

The same sentencing scheme is in place under subsections (c)(1)(A) and (B) for persons convicted of premeditated murder in the first degree. Those persons are required to be sentenced pursuant to K.S.A. 21-6623, which proscribes a sentence of 40 or 50 years before parole. The exception to that minimum sentence is if the defendant's criminal history classification would subject them to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range exceeds 600 months. In that situation, the statute again requires the person to serve "a mandatory minimum term equal to the sentence established pursuant to the sentencing range." Sentencing under this statute narrows the Court's choice to someone with an A or B criminal history and a severity level 1 offense, but again, this statute also does not specifically state that the Court should use a severity level 1 to determine that person's required minimum sentence.

The question then becomes what severity level on the nondrug sentencing grid a court should use to determine if the mandatory minimum exceeds the 300 or 600 month threshold. It appears the legislative intent would have been that the defendant should be sentenced as a severity level 1, but the statutes do not explicitly state such. The sentencing guidelines, which are included with this testimony, show that currently, only a person with a criminal history score of an A or B and a level 1 or 2 felony on the nondrug grid, could reach the threshold level of a 300-month sentence, and only a criminal history score of an A or B and a level 1 felony on the nondrug grid could reach the 600-month benchmark. However, current Kansas law defines attempted capital murder, premeditated murder in the first degree and felony murder as off-grid crimes. So, the Court is faced with the situation of guessing what was meant by the "sentence established pursuant to the sentencing range" to determine the punishment for a crime, which by definition, is not included in the sentencing range.

The practical effect is that a person with an A or B criminal history score that is convicted of attempted capital murder or felony murder could potentially be released in less time than the same person would be if he or she was convicted of a charge of Murder in the Second Degree, whether intentional or reckless, because they are "on-grid" severity level 1 and 2 offenses, respectively. Additionally, a person convicted of premeditated murder in the first degree could serve less time than if they were convicted of intentional murder in the second degree if they had a criminal history score of A or B.

K.S.A. 21-6627

K.S.A. 21-6627 is the sentencing statute for what are commonly referred to as "Jessica's Law" offenses. More specifically, they are sexually-related offenses where the victim is less than fourteen years of age and the defendant is eighteen years of age or older at the time of the offense. This statute presents a related question as to the statutory interpretation. While each of the enumerated offenses would have an "on-grid" severity level, there currently is no specific language in the statute that directs the Court to what severity level they should use. The Court is faced with the decision of whether a severity level 1 should be used in determining if the sentence exceeds 300 months.

The most closely analogous guidance involving this statute comes from *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011). In *Spencer*, the question was related to the departure from the mandatory minimum term of a Jessica's Law sentence. That court found that the severity level that should be assigned to the crime was that dictated by the level of the crime when the element of the defendants' age was removed. Assuming similar logic were applied to a defendant's placement "on-grid" to determine the severity levels, only severity level 1 crimes would be able to implicate the increased mandatory minimum provision based on the offender's criminal history.

Proposed Change

The clarifications we are asking the Legislature to make to these three statutes would give additional guidance to the Court on how it should determine what sentence to impose on persons who have an extensive criminal history and have been convicted of committing very serious crimes. We seek to ensure that these offenders are not required to serve a shorter minimum sentence by committing off-grid crimes than they would be required to serve for a lower severity level offense. Additionally, it provides further clarification that persons sentenced under these provisions are not eligible for parole prior to serving the mandatory minimum sentence, that good time credit should not be applied, and that no other sentences are permitted, except those specifically enumerated under K.S.A. 21-6627.

Conclusion

The passage of this bill will provide clarity for Kansas courts in determining the sentences for some of the most serious offenses in Kansas, and we believe that it would clarify the original legislative intent. In turn, that will help ensure the safety of Kansas citizens. We ask the Legislature to remove any potential ambiguity in this sentencing structure. Additionally, we are proposing that the Legislature clarify that the person would not be eligible for parole prior to serving the proscribed mandatory minimum sentences and that no good time credit or other departures should apply in the case of convictions for attempted capital or premeditated murder in the first degree.

I would be happy to answer any questions that you may have.