

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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August 28, 2013

THE HARD 50 SENTENCE

In cases where a defendant is convicted of premeditated first degree murder, Kansas' "Hard 50" sentence allows a court to impose a life sentence without eligibility for parole for 50 years, rather than 25 years, when it finds one or more aggravating factors are present. The validity of this law was called into question by a recent U.S. Supreme Court decision, *Alleyne v. U.S.*, 133 S.Ct. 2151, issued June 17, 2013, which held "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." The full text of that opinion is available at: http://www.supremecourt.gov/opinions/12pdf/11-9335_b8cf.pdf. Subsequently, on July 24, 2013, Kansas Attorney General Derek Schmidt formally requested that Governor Sam Brownback call the Kansas Legislature into special session "for the purpose of repairing" the Hard 50 sentence. In response, on August 6, 2013, the Governor issued a formal proclamation calling the Legislature into special session at 8 a.m., Tuesday, September 3, 2013, to enact legislation in response to *Alleyne* by 5 p.m. on Thursday, September 5, 2013. The full text of the formal proclamation follows this memorandum.

The Special Committee on Judiciary will meet in advance of the 2013 Special Session on August 26, 2013, at 10:00 a.m. in Room 346-S, and, if necessary, will meet again at 9:30 a.m. on August 27, 2013. The Committee will review *Alleyne* and its implications for the Hard 50 sentence, consider draft legislation proposed by the Attorney General, and receive testimony from interested parties. A copy of the draft legislation, as well as a letter addressed to legislators explaining the draft, are available on the Attorney General's website: <http://ag.ks.gov/media-center/special-session>. The website also includes letters of support from law enforcement associations and other documents related to this issue.

Additionally, the Office of Revisor of Statutes has prepared a memorandum summarizing *Alleyne* and discussing its potential impact on Kansas law, including amendments that would be necessary if the decision renders certain provisions of the Hard 50 sentence unconstitutional and whether those amendments could be applied retroactively. The memorandum is available at: http://www.ksrevisor.org/rpts/Memo_Alleyne_August16.pdf.

The Hard 50 sentence currently is codified at KSA 2012 Supp. 21-6620. Prior to the recodification of the criminal code in 2010, this language was in KSA 21-4635. In 1994, the Legislature amended the existing "Hard 40" sentence to allow judges, rather than juries, to determine whether to impose this 40-year sentence, and, in 1999, the Legislature increased the 40-year sentence to 50 years. A summary of those changes follows.

1994 HB 2778 (SL Ch. 341, § 6)

The Kansas Legislative Research Department's 1994 Summary of Legislation states HB 2778, in relevant part, "modifie[d] the 'Hard 40' to make it easier to impose on persons committing premeditated first degree murder." Specifically, the bill removed the bifurcated trial requirement and allowed the judge to determine aggravating and mitigating circumstances. The 40-year sentence would be imposed if the court found one or more of the aggravating circumstances existed and that the existence of such aggravating factors was not outweighed by any mitigating circumstances. The bill removed the requirement that this finding be made beyond a reasonable doubt.

Background – 1994 Change Allowing Judge to Impose “Hard 40” Sentence

In 1994, the law concerning the Hard 40 sentence was amended by adoption of HB 2788 and codified at KSA 21-4635, replacing KSA 21-4624, which was enacted in 1990 (SB 77; SL Ch. 99, § 4). Another bill passed in 1994, HB 2578, which reinstated the death penalty, amended KSA 21-4624 to apply to proceedings to determine whether the death penalty should be imposed. Consequently, the Hard 40 provisions enacted in HB 2778 were codified in KSA 21-4635.

The 1990 law required the county or district 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 trial jury to determine whether the 40-year sentence should be imposed. The 40-year sentence would be imposed if, by unanimous vote, the jury found beyond a reasonable doubt that one or more of the aggravating circumstances existed and that the existence of such aggravating factors was not outweighed by any mitigating circumstances.

The provisions in 1994 HB 2778 allowing the judge, rather than the jury, to determine whether the Hard 40 should be imposed originated in SB 701 and were added to HB 2788 in conference. SB 701 received a hearing in the Senate Judiciary Committee where Paul Morrison, then-Johnson County District Attorney, appeared in support of the bill. The minutes state Mr. Morrison indicated the purpose of the bill was to give the 40-year sentence statute broader use. A supplemental note prepared by the Legislative Research Department states, according to Mr. Morrison, the law was seldom used because it was too difficult, time-consuming, and cumbersome. The minutes also state Mr. Morrison said penalties needed to be expanded for premeditated murder. While the bill allowed the court to determine whether the 40-year sentence should be imposed, the bill as introduced continued to require that the county or district attorney file written notice of intent to seek such a sentence. Mr. Morrison suggested that requirement be removed. No written testimony for Mr. Morrison was attached to the minutes.

Subsequently, a subcommittee was formed for further discussion of SB 701. No subcommittee report was found; however, the minutes for March 22 include a balloon amendment recommended by the subcommittee, which the committee adopted. The subcommittee's balloon amendment removed the provisions requiring the county or district attorney to file written notice and revised the provisions governing the findings required for the court to impose the 40-year sentence.

The conference committee for HB 2778 added the Hard 40 provisions from SB 701, added capital murder to the section to reflect the reinstatement of the death penalty, and removed the provision requiring the finding to be "beyond a reasonable doubt."

1999 SB 149 (SL Ch. 164, § 15)

SB 149 increased the mandatory 40-year sentence to 50 years.

Background – 1999 Change from 40- to 50-Year Sentence

The provisions in 1999 SB 149 increasing the 40-year sentence to 50 years originated in SB 131 and were added to SB 149 in conference. At a hearing on SB 131 in the Senate Judiciary Committee, the Kansas Sentencing Commission testified the bill reflected the Commission's discussions and deliberations over the previous months relating to the underlying intent and goals of the Sentencing Guidelines. In the area of sentence enhancements, the Commission expressed its opinion that off-grid offenders, representing the most serious of all offenders whose intentional actions result in the loss of a human life, should remain incarcerated for a considerably long period of time, regardless of the number of prison beds required to accommodate these offenders. Further, the Commission stated, of all criminal actions, those that deprive an individual of his or her life must be viewed as the greatest threat to public safety. Consequently, the Commission recommended the change from 40 to 50 years, saying it is more representative of a "true life sentence," and, because the sentence is imposed as an alternative to the death penalty, a 50-year sentence provides a significant period of incarceration and enhances public safety. Carla Stovall, then-Kansas Attorney General, also expressed support for the change. The Senate Committee removed the increase from 40 to 50 years from the bill; however, the House Judiciary Committee restored it following a hearing on the bill. The House Judiciary Committee recommended the bill favorably, but no vote was taken on SB 131 in the House of Representatives.

The conference committee for SB 149 added the provisions of SB 131 concerning the increase from 40 to 50 years and were ultimately passed into law through that bill.

For more information, please contact:

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STATE OF KANSAS



PROCLAMATION
BY THE
GOVERNOR

PROCLAMATION CALLING THE LEGISLATURE INTO SPECIAL SESSION TO
PROTECT THE SAFETY OF THE CITIZENS OF KANSAS

TO THE PEOPLE OF KANSAS, GREETINGS:

WHEREAS, Public Safety is one of the primary roles of state government; and

WHEREAS, K.S.A. 21-6620 through 21-6625, the "Hard 50" law, is an important tool used by Kansas prosecutors to protect the public from many of the most vicious murderers; and

WHEREAS, Experts in the field believe the United States Supreme Court's ruling in *Alleyne v. United States* renders the "Hard 50" law unconstitutional and will, according to the Attorney General of Kansas "virtually guarantee" that dozens of violent offenders will receive significantly weaker sentences; and

WHEREAS, The Attorney General of Kansas has requested the Governor call a Special Session of the Legislature; and

WHEREAS, As Governor, I have a responsibility to the victims, their families, and their communities to see that justice is served and the citizens of Kansas are protected from violent criminals, now and in the future:

NOW, THEREFORE, I, Sam Brownback, GOVERNOR OF THE STATE OF KANSAS, by the authority vested in me by the Constitution of the State of Kansas, do hereby call the

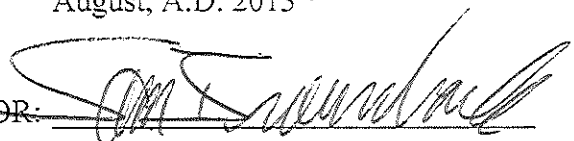
*Legislature of the State of Kansas into Special Session to
Protect the Safety of the Citizens of Kansas*


at the Capitol in Topeka, Kansas, on the 3rd day of September, 2013, at the hour of 8:00 o'clock a.m., to enact legislation by 5:00 o'clock p.m. on the 5th day of September 2013 to respond to the ruling of the United States Supreme Court in *Alleyne v. United States*.

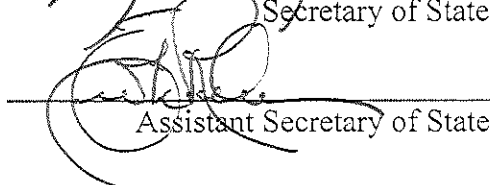
DONE: At the Capitol in Topeka
under the Great Seal of the
State this 6th day of
August, A.D. 2013



BY THE GOVERNOR:





Secretary of State


Assistant Secretary of State