Approved: 2-25-10
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 1, 2010, in Room 346-S of the Capitol.

All members were present except:
Representative Aaron Jack- excused

Committee staff present:
Jason Long, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Kathy Porter-Office of Judicial Administration
Representative Carlson
Jordan Austin-National Rifle Association
Carl Folsom-Kansas Association of Criminal Defense Lawyers
Brandon Flint-Individual
Ed Klumpp-Kansas Association of Chiefs of Police

Guest List Attached.

Chairman Kinzer advised the committee each committee member has been provided with a copy of additional information from Robert Waller, Executive Director of the Board of Emergency Medical Services with regard to **SB 223** heard on January 21st, 2010. (Attachment 1)

He also reminded the committee the minutes for January 13, 20 and 21 were emailed to all of the committee members and staff last Thursday and the same procedure would be used as last year, giving everyone three days to review the minutes and get back to the Committee Assistant with any corrections or changes; if none received by deadline shown on the email, the minutes will stand as approved.

Chairman Kinzer requested a committee bill be introduced for the work of the Criminal Code Recodification Commission.

Representative Whitham introduced a bill for the contingency necessary-joinder of parties.

Representative King introduced a bill to allow disabled hunter's helpers to be within one mile of the hunter.

Chairman Kinzer accepted the bills without objection.

Representative Morrison appeared before the committee requesting a bill to add to the existing driving license restrictions, if during a crime when someone damages property and the judge orders restitution and, if that person has not made a payment during the first six months, then a district or municipal court may enter an order restricting the person's driving privileges.

Representative Pauls made a motion to accept the new bill. Representative Brookens seconded the motion. Motion carried.

The hearing on **HB 2364 - Court procedure; time limitations for filing** was opened.

Jill Wolters, Office of the Revisor of Statutes, gave the committee a brief explanation of the bill. Under current law, when establishing dates or counting days for court action, in certain instances, Saturdays, Sundays and holidays are excluded. This bill would amend the statutes to also exclude days on which the court is not accessible. (Attachment 2)

Kathy Porter, Office of Judicial Administration, spoke to the committee in support of this bill and said it was

necessary in an attempt to avoid one of many serious consequences that could occur should the courts be forced to close for any period of time. She stated the requested amendments are consistent with those recommended by the Judicial Council Civil Code Advisory Committee in its revisions to chapter 60, which have been requested for introduction this session. The language used is also similar to that used in the Federal Code of Civil Procedure, which addresses "inaccessibility of the clerk's office."

She also requested the bill be amended to make its provisions effective upon publication in the Kansas Register so that its provisions would be of assistance to attorneys and litigants as soon as possible. (Attachment 3)

There were no opponents.

The hearing on **HB 2364** was closed.

The hearing on **HB 2432 - Criminal law; justified threat or use of force** was opened.

Jill Wolters, Office of Revisor of Statutes, presented an overview of the bill for the committee that amends several statutes relating to the justified use of force under the criminal code. She explained the bill addresses a Kansas supreme Court decision issued in October of 2009, in *State v. Hendrix,* the Court held that a defendant cannot claim justified use of force unless the defendant used actual physical force. The Court's rationale was that the phrase of "use of force' does not include threats or displays of force, but only actual physical force.

She stated the bill amends the status relating to justified use of force to include the phrase "threat or," or similar language, whenever the term "force" is used. In sections 1, 2 and 7 the phrase is added to statutory language pertaining to self-defense, defense of another or defense of one's home or occupied vehicle. The phrase is added to section 3 in the provisions describing when the use of force is not justified. Sections 4,5 and 6 pertain to actions during an arrest. The phase is added to these sections for justified use of force by law enforcement officers or private citizens making an arrest. It is also included in the provision that prohibits the use of force in resisting an arrest. Finally, the phrase is added in section 8 regarding the provisions on immunity from prosecution for justified use of force. (Attachment 4)

Representative Carlson appeared before the committee in support of the bill. He explained he introduced in 2005 - **HB 2577**, concerning the Castle Doctrine and the justified use of force against force. He provided the committee with the detail of the State v. Hendrix, and the Kansas Court opinion No. 97,323, (copy attached to his testimony), issued in October of 2009. In summary, the opinion of the majority of the Court held in the Hendrix case, that when force is not actually used but only the threat of force, the defendant in Judges jury's instruction could not use the "justified use of force" as a legal defense because he did not actually "use" force. In the actual trial, the defendant was charged with "criminal threat as one of the charges. The majority of the court held in interpreting a statute, the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. Quote: "An appellate court merely interprets the language as it appears: it is not free to speculate and cannot read into the statue language not readily found there. The dissenting opinion by Judge Davis stated in part–"and because I conclude that the legislature reasonably intended to incorporate both physical and constructive force within the self-defense statue, I cannot join in the majority opinion and must dissent." Representative Carlson stated as the sponsor of the original legislation, he agreed with Judge Davis's dissenting opinion and that this was not the intent of the legislature and therefore to correct the statute in view of the Court's majority opinion, this bill was drafted to further clarify the intent of the legislature by inserting the word "threat" each time the word "use" is present in the statute. He urged the committee to pass this bill as an uncomplicated fix to the statute. (Attachment 5)

Jordan Austin-National Rifle Association spoke in support of the bill on behalf of the National Rifle Association of America. He explained in 2006, members of Legislature passed a bill known as the Castle Doctrine and that bill gave Kansas citizens the right to protect themselves in their homes, cars and anywhere they have a legal right to be; it also made it clear that Kansas citizens have no "duty to retreat" when confronted by an attacker and finally, the bill provided protection from civil liability lawsuits, from criminals,

or their families, who are injured or killed.

Mr. Austin went on to explain they originally believed this new bill would sufficiently cover the problems caused by the Hendrix ruling, however, after further discussions and feedback, they now believe a more comprehensive solution is necessary and he diverted from his written testimony and verbally proposed some other amendments to **HB 2432** with the following three main issues:

1) To add a specific definition as to what force is and what deadly force is as follows: "Any actual or constructive force including but not limited to threats, displays or presentations of force or the means of force directed toward another person or the actual application of force upon another person."

2) To add an additional definition of deadly force as follows: "Actual force described in sub-section (a), which is likely to cause imminent death or great bodily harm, any threat to cause death or serious bodily harm including by the display or production of a weapon, shall not constitute deadly force so long as the actors purpose is limited to creating an apprehension that the actor will if necessary use in defense of himself or another.

3) He also indicated there is confusion as to what your rights are and what your limitations are and therefore other states have built a presumption into the statute as it applies to the first two sections of the self defense statute: "a person is presumed reasonably to believe deadly force is necessary to prevent imminent death or great bodily harm to such person or third person."

Mr. Austin apologized for not having the written amendment and will provide it to the committee as soon as possible. Chairman Kinzer also asked him to also provide specific case law where he referenced the "law enforcement/self defense" issue. (Attachment 6)

Chairman Kinzer turned the meeting over to Vice-Chairman, Representative Jeff Whitham as his presence was necessary at another meeting.

Carl Folsom, spoke on behalf of the Kansas Association of Criminal Defense Lawyers (KACDL) in support of the bill. He explained KACDL is a 300-member nonprofit organization dedicated to justice and due process for people accused of crimes. He stated they support this bill because it protects the rights of Kansans to defend themselves, their families and third persons and the statutory rights to use or threaten to use force in self-defense of another is rooted in the Kansas and federal constitutions. In order to properly preserve these fundamental rights, the statutory codification of these rights must allow the use of force, but also the threat of force, for self-defense and the defense of another.

In its current form, this bill goes into effect upon its publication in the statute book. Mr. Folsom requested an amendment to this bill to apply the statutory changes retroactively so that ordinary Kansans are not made into felons simply because of the date of their need to use a threat of force for self-defense or defense of another. Since this bill is simply to clarify the intent of the legislature when it passed 2005 **HB 2577** in 2006 Legislative Session, he asks the committee to amend this bill retroactively so it applies to those Kansans who were in the unfortunate position of having to use a threat of force for protection before the amendments have been made.

Mr. Folsom told of the case of Brandon Flint, who is an Iraq War veteran, had no criminal history until he used the threat of force to defend his fiancee. Mr. Flint was convicted of aggravated assault because the trial court refused to instruct the jury on the affirmative defense of "defense of another." The Kansas Court of Appeals recently ruled that Mr. Flints conviction should be upheld because the court was required to follow the holding of *Hendrix*. Mr. Folsom attached to his testimony, a copy of the Court's opinion and the writing by Judge Richard Greene that stresses that Mr. Flint's case demonstrates the "urgent need for a legislative fix of K.S.A. 21-3211." (Attachment 7)

Brandon Flint, was introduced by Mr. Folsom, and proceeded to tell of his situation. He told the committee he is a mechanic, construction worker, college student, a father, an Iraq War veteran, and now a felon. He told of an evening that he and his fiancee went to a bar to play pool, have some drinks, talk and socialize with other patrons. His alleged victim tried to start a fight with him and so he and his fiancée left the bar. The alleged victim and his friend followed them out and words were exchanged, a shoving match and then everyone separated. He started walking to his car and turned around to see the alleged victim tackle his fiancée to the

ground and so he grabbed a gun out of his glove box and pointed it at the alleged victim and told him to get off of her. The alleged victim complied and he told his fiancée to get in the car, he saw the alleged victim was not armed and so he dropped the gun to his side, got in their car and left. He said now he is a felon because he protected the mother of his child from the alleged victim. He said he did not know what would have happened if he had not pulled the gun, but he knows that his fiancée made it away safely because he did.

He also told of a football player who was beaten to death and three men were charged and if he had done the same thing he had done, he would be alive, but he would be a felon like himself. He would have to register every four months as an offender, his drivers license would say "Registered Offender", the same words that appear on the licenses of registered pedophiles and rapists; and, he would have to attend community classes, have psychological evaluations done and attend a variety of meetings. At his trial, his entire defense was built around "defense of another" however the judge threw out the instructions to the jury and he was convicted. The Court of Appeals affirmed my conviction but Mr. Folsom told him this bill and the hearing of this bill has a direct bearing on his case. He asked the committee to make a favorable decision that would allow his case to be grand-fathered as it applies to the laws you are about to change with this bill. (Attachment 8)

Ed Klumpp, addressed the committee on behalf of the Kansas Association of Chiefs of Police in support of the bill which he agrees amends the use of force statutes in K.S.A., Chapter 21, Article 32 to remedy a gap left in the law after the Kansas Supreme Court ruling in State vs. Hendrix, decided in October 2009. He said after that ruling, the KACP worked with several other persons to develop a bill proposal to make their proposed corrections. He stated SB 481 was filed prior to their proposal and they elected not to introduce a separate bill however he attached a copy to his testimony for informational purposes. He said their proposal have simply added a statute to Article 32 and defined the terms "use of force" and "use of deadly force."

He also stated in regards to the verbal proposed amendments from Mr. Austin's testimony, he has not seen the amendment to see if there are revisions to statutes, 21-3217 and 21-3219, but if there are he advised the committee to be very cautious and he is sure law enforcement would be against changes to those statutes. (Attachment 9)

There were no opponents.

The hearing on HB 2432 was closed.

The next meeting is scheduled for February 2, 2010.

The meeting was adjourned at 4:20 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 2-1-10

NAME	REPRESENTING
Lane Walsh	Judicial Branch
Joseph Mobley	KY BAR ASSN.
Rob Merkle	Kennedy & Assoc.
Teri Clark	LRS
Anne Keller	TA
Todd Renyer	TA
Barry Greis	OFM
Jeff Bottenberg	State Farm
Kevin Brown	KRBBA
Sean Miller	Capitol Strategies

KANSAS

DENNIS ALLIN, M.D., CHAIR
ROBERT WALLER, EXECUTIVE DIRECTOR

MARK PARKINSON, GOVERNOR

BOARD OF EMERGENCY MEDICAL SERVICES

Briefing

Date: January 27, 2010

To: The Honorable Representative Lance Kinzer

From: Robert Waller, Executive Director

RE: 2009 Senate Bill 223

Resides:	House Judiciary	**Chairman:**	Representative Lance Kinzer	**Status:**	Proponent

LANGUAGE

Senate Bill 223, as introduced, expands the subpoena power currently held by the Kansas Board of Emergency Medical Services (amending K.S.A 65-6130).

COMMITTEE UPDATE

During testimony, there was concern raised regarding the "operation of a hearing" and securing patient information during a hearing open to the public.

All administrative hearings are operated under the *Kansas Administrative Procedures Act (KAPA)*. The reference to those sections are located in K.S.A. 77-512 (et seq). Any administrative hearing could be closed by the Investigation Committee to ensure patient confidentiality and maintain Health Insurance Portability and Accountability Act (HIPAA) standards.

Also provided is a copy of the KBEMS Investigation policy which outlines how the Investigation process is conducted, and references KAPA as the method by with hearing will be held.

IMPLEMENTATION

KBEMS wants to continue to ensure that the language included in SB 223 is already upheld by current law, and passage of the bill would not add additional burden to the agency, the respondent, nor amend current administrative law.

House Judiciary
Date 02-01-2010
Attachment # 1

Office of the Revisor of Statutes
300 S.W. 10th Avenue
Suite 24-E, Statehouse
Topeka, Kansas 66612-1592
Telephone (785) 296-2321 FAX (785) 296-6668

MEMORANDUM

To: House Committee on Judiciary
From: Jill Ann Wolters, Senior Assistant Revisor
Date: 1 February, 2010
Subject: HB 2364

Under current law, when establishing dates or counting days for court action, in certain instances, Saturdays, Sundays and holidays are excluded.

HB 2226 would amend the statutes which currently exclude Saturdays, Sundays and holidays to also exclude days on which the court is not accessible.

House Judiciary
Date 02-01-2010
Attachment # 2

State of Kansas
Office of Judicial Administration
Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507
(785) 296-2256

House Judiciary Committee

Monday, February 1, 2010

Testimony in Support of HB 2364

Kathy Porter

HB 2364 was requested for introduction in the 2009 legislative session to address concerns that the ability to meet filing deadlines would be affected if the Judicial Branch were forced to close for any period of time. It would amend provisions in current law that excuse filing and other deadlines on Saturdays, Sundays, and holidays to add, "days on which the court is not accessible." In other words, if the court is not open and accessible to receive filings, attorneys and litigants will not miss a filing deadline because they cannot access the court. This is an attempt to avoid one of many serious consequences that could occur should the courts be forced to close.

The requested amendments are consistent with those recommended by the Judicial Council Civil Code Advisory Committee in its revisions to Chapter 60, which have been requested for introduction this session. The language of HB 2364 is also similar to language used in the federal Code of Civil Procedure, which addresses "inaccessibility of the clerk's office."

I would request that the bill be amended to make its provisions effective upon publication in the *Kansas Register* so that its provisions would be of assistance to attorneys and litigants as soon as possible.

House Judiciary
Date 02-01-2010
Attachment # 3

MARY ANN TORRENCE, ATTORNEY
REVISOR OF STATUTES
JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR
GORDON L. SELF, ATTORNEY
FIRST ASSISTANT REVISOR

OFFICE OF REVISOR OF STATUTES
KANSAS LEGISLATURE

Legal Consultation—
Legislative Committees and Legislators
Legislative Bill Drafting
Legislative Committee Staff
Secretary—
Legislative Coordinating Council
Kansas Commission on
Interstate Cooperation
Kansas Statutes Annotated
Editing and Publication
Legislative Information System

Brief on HB 2432
Justified Use of Force

Jason B. Long
Assistant Revisor
Office of Revisor of Statutes

Jill Walters presented.

February 1, 2010

HB 2432 amends several statutes relating to the justified use of force under the criminal code. The bill addresses a Kansas Supreme Court decision issued in October of 2009. In *State v. Hendrix*, the Court held that a defendant cannot claim justified use of force unless the defendant used actual physical force. The Court's rationale was that the phrase "use of force" does not include threats or displays of force, but only actual physical force.

The bill amends the statutes relating to justified use of force to include the phrase "threat or," or similar language, wherever the term "force" is used. In sections 1, 2 and 7 the phrase is added to statutory language pertaining to self-defense, defense of another or defense of one's home or occupied vehicle. The phrase is added to section 3 in the provisions describing when the use of force is not justified. Sections 4, 5 and 6 pertain to actions during an arrest. The phrase is added to these sections for justified use of force by law enforcement officers or private citizens making an arrest. It is also included in the provision that prohibits the use of force in resisting an arrest. Finally, the phrase is added in section 8 regarding the provisions on immunity from prosecution for justified use of force.

House Judiciary
Date 02-01-2010
Attachment # 4

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STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIRMAN: TAXATION
MEMBER: FEDERAL AND STATE AFFAIRS
MEMBER: EDUCATION BUDGET

February 1, 2010

Chairman Kinzer
House Judiciary Committee

Testimony on HB 2432

Chairman Kinzer and members of the committee thank you for the opportunity to testidy before you today on HB 2432.

In 2005, I introduced HB 2577, concerning the Castle Doctrine and the justified use of force against force. The bill overwhelmingly passed the House, was adopted through conference committee and became law. The bill was patterned after Florida statutes and we were one of many states which adopted the Castle Doctrine with similar language in the last few years.

Late this summer, the Kansas Supreme Court issued opinion No. 97,323 in the case of the State versus Hendrix. This opinion is attached to my testimony, which you may read later.

To summarize the opinion, a majority of the Court held in the Hendrix case, that when force is not actually used, but only the treat of use of force, the defendant in the Judges jury's instruction could not use the "justified use of force" as a legal defense because he did not actually "use" force. In the actual trial, the defendant was charged with "criminal threat" as one of the charges.

The majority of the court held in interpreting a statute, the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. Quote: "An appellate court merely interprets the language as it appears: it is not free to speculate and cannot read into the statue language not readily found there."

The dissenting opinion by Justice Davis stated in part—"and because I conclude that the legislature reasonably intended to incorporate both physical and constructive force within the self-defense statue, I cannot join in the majority opinion and must dissent." Consider the following example. One evening, a large man approaches a woman in a menacing manner and threatens, I'm going to kill you! Worried for her life, the women takes a gun from her purse, points it at her assailant, and says, stay where you are! The assailant turns and runs. Assume for the sake of the example that the woman is

House Judiciary
Date 02-01-2010
Attachment # 5

subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may have very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by the legislature in its enactment of K>S>A. 21-3211. Justice Davis points out that in the Model Penal Code 3.04 is the same wording used in the Kansas statutes and numerous other states.

As the sponsor of the original legislation, I agree with Justice Davis's dissenting opinion that this was not the intent of the legislature. However, in order to correct the statute in view of the Court's majority opinion, I have had HB 2432 drafted to further clarify the intent of the legislature to insert the word "threat" each time the word "use" is present in statute. ie: A person is justified in the THREAT or use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's THREAT or use of unlawful force."

The addition of the word "threat" has been added to all applicable sections of statutes as deemed appropriate by the revisor's office.

This should be a rather uncomplicated fix to the statute in question.

Thank you for your time and your consideration on HB 2432 and I will stand for questions at the appropriate time.

Sincerely,

Richard Carlson
State Representative, 61st Dist.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 97,323

STATE OF KANSAS,
Appellee,

v.

RODNEY MAURICE HENDRIX,
Appellant.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Jury Instructions—Defendant Entitled to Instructions on Law Applicable to Theory of Defense—Sufficiency of Evidence to Support Instruction.* A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory.

2. STATUTES—*Interpretation —Legislative Intent—Court's Duty When Interpreting Unambiguous Statute.* In interpreting a statute, the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. The intent of the legislature is to be derived in the first place from the words used. In determining whether a statute is open to construction or in construing a statute, ordinary words are to be given their ordinary meaning and courts are not justified in disregarding the unambiguous language.

3. SAME—*Interpretation —Unambiguous Statute—Appellate Review.* When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there.

4. SAME—*Presumption Legislature Does not Intend to enact Meaningless Legislation.* There is a presumption that the legislature does not intend to enact useless or meaningless legislation.

5. LEGISLATURE—*Declaration of Public Policy.* Declaration of public policy is normally the function of the legislative branch of government.

6. CRIMINAL LAW—*Self-defense—Jury Instruction—Instruction Not Warranted unless Defendant Use Physical Force.* Under the plain language of K.S.A. 21-3211 (Furse 1995), a jury instruction on self-defense is not warranted unless the defendant has used actual physical force.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 19, 2008 Appeal from Johnson district court; JACQUELYN E. ROKUSEK, judge pro tem. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed. Opinion filed October 23, 2009.

Matthew J. Edge, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Steven J. Obermeier, assistant district attorney, argued the cause, and *Elizabeth J. Dorsey*, legal intern, *Phill Kline*, district attorney, and *Steve Six*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

NUSS, J.: The issue presented is whether a defendant must use actual force to justify a jury instruction on self-defense. We answer this question "yes." Accordingly, the judgment of the Court of Appeals is affirmed.

FACTS

The facts necessary to our determination are straightforward. While visiting their mother in her hospital room, Rodney Maurice Hendrix and his sister, Charlotte Brown, had a heated

confrontation. According to Brown, her brother entered the room and angrily approached her. Hendrix "shoved" a piece of paper in her face so severely that when he pulled the paper away it showed traces of her makeup. Brown testified that Hendrix backed away, then again came toward her and pulled a knife. He then threatened to kill Brown if she returned to their mother's home where Hendrix lived and where Brown had been staying during her visit. According to Brown, Hendrix then left.

Hendrix's story was considerably different. According to him, he entered the hospital room and knelt by his mother while holding a piece of paper that he wanted to show her. He testified that Brown approached him and stuck her hand in his face while loudly cussing him. Hendrix claimed he was afraid that Brown would slap him. He testified that to get her to back away, he told her he would "break her neck." One fact the siblings do agree upon is the complete absence of physical force by either one.

Hendrix was charged with the crimes of criminal threat and aggravated assault. The trial court denied his request for a self-defense jury instruction on the basis of insufficient evidence. Specifically, it ruled that Hendrix did not have a reasonable belief that his conduct was necessary to defend himself against the use of imminent force by his sister. The jury then convicted Hendrix of making a criminal threat under K.S.A. 21-3419(a) ("any threat to . . . [1] [c]ommit violence communicated with intent to terrorize another, or . . . in reckless disregard of the risk of causing such terror") and misdemeanor assault under K.S.A. 21-3408 ("intentionally placing another person in reasonable apprehension of immediate bodily harm").

The Court of Appeals held that Hendrix was not entitled to a self-defense instruction as a matter of law because no physical force was actually used. *State v. Hendrix*, No. 97,323, unpublished opinion filed September 19, 2008. The panel cited the statute and the standard jury instruction on self-defense: K.S.A. 21-3211 (Furse 1995) and PIK Crim. 3d 54.17. Accordingly, its rationale eliminated the need to consider the trial court's determination of insufficient evidence of Hendrix's reasonable belief that his conduct was necessary to defend himself against the threat of imminent force.

We granted Hendrix's petition for review under K.S.A. 22-3602(e).

ANALYSIS

We recently set forth our standard of review for determining when a defendant is entitled to a jury instruction on his or her theory of defense in *State v. Anderson*, 287 Kan. 325, 334, 197 P.3d 409 (2008):

> "'A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory.'"

The statute concerning Hendrix's theory of self-defense, K.S.A. 21-3211 (Furse 1995), in turn provided as follows:

> "A person is justified in the *use of force* against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's use of unlawful force." (Emphasis added.)

We begin by acknowledging that the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. *Steffes v. City of Lawrence*, 284 Kan. 380, Syl. ¶ 2, 160 P.3d 843 (2007). The intent of the legislature is to be derived in the first place from the words used. *Griffin v. Suzuki Motor Corp.*, 280 Kan. 447, 460, 124 P.3d 57 (2005). In determining whether a statute is open to construction or in construing a statute, ordinary words are to be given their ordinary meaning and courts are not justified in disregarding the unambiguous language. *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, Syl. ¶ 8, 132 P.3d 1279 (2006); see *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 822, 104 P.3d 378 (2005).

"When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there." *Steffes*, 284 Kan. 380, Syl. ¶ 2.

We agree with the State and the Court of Appeals panel that the phrase "use of force" contained in K.S.A. 21-3211 (Furse 1995) should be given its ordinary meaning—and that means actual force. "Use of force" does not mean "threat of force" or "display of force" or "presentation of force" or any interpretations which similarly dilute the actual use of force, *i.e.*, physical contact.

Even if the statutory language were somehow ambiguous and we looked to canons of construction to assist in determining the meaning of "use of force," we note that the legislature has been clear in other contexts to distinguish between the actual use of force and diluted variations. For example, the legislature has explicitly defined robbery as the taking of property from the person or presence of another either "by *force* or by *threat* of bodily harm" to any person. (Emphasis added.) K.S.A. 21-3426. The legislature has made the same type of explicit distinctions in the crime of kidnapping. It defines kidnapping as a taking or confining of another person "accomplished by *force, threat* or deception." (Emphasis added.) K.S.A. 21-3420.

Finally the legislative distinction is again clearly made in K.S.A. 21-3213 which concerns defense of property other than a dwelling. It provides:

> "A person who is lawfully in possession of property other than a dwelling is justified *in the threat or use of force* against another for the purpose of preventing or terminating an unlawful interference with such property. Only such degree of *force or threat* thereof as a reasonable man would deem necessary to prevent or terminate the interference may intentionally be used." (Emphasis added.)

Hendrix's take on the statutes would make the language of clear distinction superfluous. In short, there would be no need for the legislature to discern, on the one hand, "threats" or implied force from actual "force" and "use of force" on the other. See *Hawley v. Kansas Department of Agriculture*, 281 Kan. 603, Syl. ¶ 9, 132 P.3d 870 (2006) (there is a presumption that the legislature does not intend to enact useless or meaningless legislation).

Hendrix relies upon language contained in another unpublished Court of Appeals decision, *State v. Kincade*, No. 94,657, filed August 4, 2006. There the panel stated:

> "In the present case, the defendant offered no evidence which, if believed, would have supported a reasonable belief the defendant or another person was in imminent danger of the use of unlawful force. The use of force *or the threat of force* to protect another person is a defense only when such force is necessary to protect the third party from an aggressor's imminent use of force. K.S.A. 21-3211. The evidence in this case provides no basis from which to conclude that any person, other than the victim, was placed in imminent danger of the use of unlawful force justifying the defendant's protective use of force in response. The record simply fails to support an instruction on self-defense or defense of another." (Emphasis added.) Slip Op. at 4.

The italicized words upon which Hendrix relies are contrary to the plain language of the statute. More specifically, the *Kincade* panel inappropriately read into the statute words not found there. *Steffes*, 284 Kan. 380, Syl. ¶ 2. To the extent that *Kincade* is inconsistent with the holding of the instant case, it is overruled.

Hendrix primarily argues policy considerations. Among other things, he points out the alleged absurdity in *denying* self-defense to a defendant (purportedly like himself) who can defuse a violent situation with the mere threat of force, but then in *granting* the defense to one who instead chooses to actually apply force. He argues the statute—or at least our interpretation of it—promotes violence because defendants wanting to ensure their entitlement to the defense will use actual force instead of words.

We agree with the worthy goal of promoting de-escalation, *e.g.*, defusing a violent episode with some well chosen words. However, policy making is the province of the legislature. See *Bland v. Scott*, 279 Kan. 962, 966, 112 P.3d 941 (2005) ("'declaration of public policy is normally the function of the legislative branch of government'"); see also *State v. Prine*, 287 Kan. 713, 737, 200 P.3d 1 (2009) ("Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make [the statute] more workable."). It alone must decide whether to pursue this goal in the self-

defense statute. Consequently, it alone must decide to make the explicit distinctions there as it has in the other statutory enactments mentioned earlier.

Such an approach would also be consistent with the ones chosen by a number of other states in their self-defense statutes. See, *e.g.*, Ga. Code Ann. § 16-3-24.2 (2007) ("A person who uses threats or force . . . shall be immune from criminal prosecution therefor . . . ."); Tex. Penal Code Ann. § 9.04 (West 2003) ("The threat of force is justified when the use of force is justified by this chapter."); Wisc. Stat. § 939.48(1) (2005) ("A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person.").

For all of these reasons, the judgment of the Court of Appeals is affirmed.

* * *

DAVIS, C.J., dissenting: Under Kansas law, "[a] person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such force is necessary to defend himself or another against such aggressor's imminent use of unlawful force." K.S.A. 21-3211(a) (Furse 1995); accord *State v. Shortey*, 256 Kan. 166, 173, 884 P.2d 426 (1994). The majority determines that the plain language "use of force" means only the exertion of physical force. Because I find the language of K.S.A. 21-3211 (Furse 1995) to be ambiguous and because I conclude that the legislature reasonably intended to incorporate both physical and constructive force within the self-defense statute, I cannot join in the majority opinion and must dissent.

Consider the following example. One evening, a large man approaches a woman in a menacing manner and threatens, "I'm going to hurt you!" Worried for her life, the woman takes a gun from her purse, points it at her assailant, and says, "Stay where you are!" The assailant turns and runs.

Assume for the sake of the example that the woman is subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by the legislature in its enactment of K.S.A. 21-3211 (Furse 1995).

Although the majority recognizes the incongruity in this outcome from a policy perspective, it finds that its interpretation of K.S.A. 21-3211 (Furse 1995) is demanded by the plain language of that statute. I disagree that the plain language dictates such a result.

K.S.A. 21-3211(a) (Furse 1995) provides that, in certain instances, the "use of force" is justified when defending oneself or others. The statute does not define the terms "use" or "force." In my opinion, the failure to define these terms creates an ambiguity in the statute that must be resolved through statutory construction.

Notably, the majority assumes that the term "force" includes only "physical force." See slip op. at 5-6 (indicating that the "ordinary meaning" of "force" is "actual [or physical] force"). This interpretation is not based on the plain language of the statute, as K.S.A. 21-3211 (Furse 1995) is silent as to the types of force it encompasses. The generic term "force" may include both "actual force"—that is, physical force—and "constructive force"—that is, the threat of actual force. See Black's Law Dictionary 717 (9th ed. 2009) (distinguishing *actual force* ["(f)orce consisting in a physical act"] from *constructive force* ["(t)hreats and intimidation to gain control or prevent resistance"]).

Likewise, the majority opinion interprets the term "use" in K.S.A. 21-3211 (Furse 1995) to mean only *the exertion of physical force*. The majority reaches the blanket conclusion that "'[u]se of force' does not mean 'threat of force' or 'display of force' or 'presentation of force' or any interpretations which similarly dilute the actual use of force, *i.e.*, physical contact." Slip op. at 6. But contrary to the majority's interpretation, "use" is a general term that may include all of those other actions (threat, display, presentation, etc.). See Black's Law Dictionary 1681 (9th ed.

2009) (defining "use" in general terms as "[t]he application or employment of something" and listing 34 examples where "use" carries different meanings in the legal context).

It is a cardinal principle of statutory interpretation that a statute should not be read to add language that is not found in its text. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). Absent a definition of the terms "use" and "force" in K.S.A. 21-3211 (Furse 1995), we are left with the task of ascertaining the intent of the legislature in its including those undefined terms in the statute. In order to reach the majority's conclusion that it may resolve the question before us under the statute's plain language, one must first *assume* that the legislature intended to exclude constructive force to limit "force" to "physical force" only. The same is true if one limits "use" to describe only the "exertion of physical force." Contrary to the majority's conclusion, the language used in K.S.A. 21-3211 (Furse 1995) is not necessarily clear and, without some assumptions on the part of the reader, does not exclude constructive force from the ambit of self-defense.

When the language of a statute leaves the reader generally uncertain as to which of two or more reasonable interpretations is proper—as is the case here—courts must resort to maxims of construction. See *Weber v. Tillman*, 259 Kan. 457, 476, 913 P.2d 84 (1996). Most importantly, when ascertaining legislative intent, courts must interpret statutes in a reasonable manner as long as such an interpretation is consistent with a statute's language. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

The practical result of the majority's interpretation of "use of force" in K.S.A. 21-3211 (Furse 1995)—that a self-defense instruction is only warranted when actual physical force has been exerted—is to interpret the ambiguity in favor of physical violence. Instead of using words to deter harmful conduct, persons would be encouraged to escalate a situation by committing some kind of physical act that would justify acting in self-defense under the law. In the example described above, the woman would be encouraged to shoot her assailant instead of merely threatening him. As Hendrix argues in his petition for review, this result is truly "absurd."

The majority attempts to bolster its interpretation by turning to other examples in our statutes where the legislature has apparently differentiated between "threat" and "force." I do not find these distinctions persuasive in light of its unreasonable interpretation in favor of escalating already violent situations. Instead, I would resolve the ambiguity in favor of nonviolence and de-escalation.

I find the self-defense definition included in the Model Penal Code to be a particularly helpful example of a resolution of the question before us. Model Penal Code § 3.04(1) (1995) provides that "the *use of force upon or toward another person* is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." (Emphasis added.) Several states have adopted the exact language of the model code in their definition of self-defense. See Del. Code Ann. tit. 11, § 464 (2007); Guam Code Ann. tit. 9, § 7.84 (2008); Hawaii Rev. Stat. § 703-304 (2007); Neb. Rev. Stat. § 28-1409 (2003); N.J. Stat. Ann. § 2C:3-4 (West 2005); 18 Pa. Cons. Stat. Ann. § 505 (Purdon 1998).

Two important aspects of the model code are worth noting. First, the model code employs the same phrase—"use of force"—that is used in K.S.A. 21-3211 (Furse 1995). It does not distinguish between threats and physical force, nor does it specifically define "force" in that context. Second, the model code indicates that one may use force "upon or toward" another. In other words, the "use of force" does not necessarily require some physical force exerted on another; rather, it can involve force directed toward another to de-escalate a violent situation. Put simply, the Model Penal Code envisions self-defense to include constructive force.

The cases decided by the states employing the Model Penal Code definition are consistent with this interpretation. For example, in *Com. v. Rittle,* 285 Pa. Super. 522, 428 A.2d 168 (1981), the Pennsylvania Superior Court reversed and remanded an assault conviction for a new trial because the trial court failed to provide a self-defense instruction. In *Rittle,* the victim, who was much larger then the allegedly sickly defendant, approached the defendant's car and threatened to beat up the defendant. The defendant reached into his back seat, produced a gun, and pointed it at the victim; the victim walked away. No shots were fired. The trial court

refused to charge the jury on self-defense and the defendant was found guilty of simple assault. On appeal, however, the court held that the jury could have concluded that the victim was the initial aggressor who attempted to place the defendant in fear of imminent serious bodily injury and such could amount to simple assault. Therefore, the defendant was entitled to an instruction on the use of self-defense. 285 Pa. Super. at 525-26.

It is true that K.S.A. 21-3211 (Furse 1995) is not identical to the Model Penal Code's self-defense definition. Instead of stating that "the use of force *upon or toward* another person is justifiable" in limited circumstances (as Model Penal Code § 3.04[1] [1995] provides), K.S.A. 21-3211(a) (Furse 1995) states that "[a] person is justified in the use of force *against* an aggressor" when the other conditions of the statute are met. (Emphasis added.) I do not find this difference to be significant, however. The term "against" encompasses the same behavior that may be directed "upon or toward" another. Thus, it is consistent with the model code and likewise does not exclude from its ambit the use of constructive force in self-defense.

Statutes should be interpreted in a reasonable manner as long as such an interpretation is consistent with a statute's plain language. *Winnebago Tribe of Nebraska*, 283 Kan. at 77. Because it would be entirely consistent with the language of K.S.A. 21-3211 to interpret "use of force" to include both constructive and actual force, I would conclude that the legislature intended to include constructive force within its definition of self-defense. Thus, in the hypothetical example described above between the man and the woman, I would conclude that the woman's use of force to repel her assailant by pointing the gun fits the legislature's definition of self-defense.

LUCKERT, J., joins in the foregoing dissent.

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Chairman Lance Kinzer
House Judiciary Committee
346-S
State Capitol
Topeka, KS 66612

Dear Chairman Kinzer,

February 1, 2010

My name is Jordan Austin and I am a registered lobbyist speaking on behalf of the National Rifle Association. I come before you today to express our support for HB 2432. In 2006, the members of this legislature passed a bill known as the Castle Doctrine. This bill gave KS citizens the right to protect themselves in their homes, cars, and anywhere they have a legal right to be. This bill also made it clear that KS citizens have no "duty to retreat" when confronted by an attacker. Finally the bill provided protection from civil liability lawsuits from criminals or their families who are injured or killed.

HB 2432 is attempting to address a court ruling handed down by the Kansas Supreme Court. In State v. Hendrix, the court determined that the threat of force is not covered under the Castle Doctrine law and therefore, simply threatening to use force does not entitle you to a self defense jury instruction. The courts ruling states that, "the "use of force" contained in K.S.A. 21-3211 should be given its ordinary meaning—and that means actual force. "Use of force" does not mean "threat of force" or "display of force" or "presentation of force" or any interpretations which similarly dilute the actual use of force."

So, according to the court, if you shoot someone in self defense in your home you are protected under the law and get a self defense jury instruction. If you threaten some one in your home and tell them to leave or you will shoot them, you could be charged with criminal threat and aggravated assault and if/when you go to court, the jury would not be given a self defense jury instruction.

It was originally determined that HB 2432 would sufficiently cover the problems caused by the Hendrix ruling, but upon a more thorough analysis of the Kansas statute concerning self defense, it was determined that a more comprehensive solution was necessary and thusly a committee substitute is being proposed.

The NRA supports the proposed amendment to HB 2432 and we strongly believe that the new language is a necessary fix based on the Hendrix ruling. This legislature overwhelmingly passed the original castle doctrine bill in 2006. This bill and the proposed amendment does very little to change the substance of what Kansas citizens can do in self defense, it simply makes is more clear. We again urge your support.

Sincerely,

Jordan A. Austin

Kansas State Lobbyist
NRA-ILA

House Judiciary
Date 02-01-2010
Attachment # 6

To the House Judiciary Committee

Testimony of Carl Folsom
Kansas Association of Criminal Defense Lawyers
Proponent of SB 2432

February 1, 2010

KACDL is a 300-member nonprofit organization dedicated to justice and due process for people accused of crimes. KACDL supports HB 2432 to protect the rights of Kansans to defend themselves, their families, and third persons. The statutory right to use or threaten to use force in self-defense or defense of another is rooted in the Kansas and federal constitutions. In order to properly preserve these fundamental rights, the statutory codification of these rights must allow the use of force, but also the threat of force, for self-defense and defense of another. Furthermore, KACDL urges this Committee to adopt an amendment to HB 2432, explained below.

HB 2432 should be applied retroactively.

The statutory changes proposed in HB 2432 should not be denied to those Kansans who use the threat of force in self-defense or defense of another before the changes in HB 2432 go into effect. Because of the holding of State v. Hendrix, 289 Kan. 859 (2009), ordinary Kansans have become felons when their only crime was using the threat of force to defend themselves or their families. HB 2432 should be applied retroactively so it applies to those persons who were in the unfortunate position of having to use a threat of force for protection before any amendment to the applicable statutes.

Today, you will hear the testimony of Brandon Flint. Mr. Flint is an Iraq War veteran who had no "criminal history" until he used the threat of force to defend his fiancée one night in Emporia. After leaving a bar, Mr. Flint observed his fiancée in a scuffle with two men; she was on her back, on the ground, and under the two men. Mr. Flint got his handgun from his car and subsequently pointed the gun at the men so his fiancée could get to her feet and get away.

Mr. Flint was convicted of aggravated assault because the trial court refused to instruct the jury on the affirmative defense of "defense of another." The Kansas Court of Appeals recently ruled that Mr. Flint's conviction should be upheld because the court was required to follow the holding of Hendrix. Judge Richard Greene wrote separately to stress that Mr. Flint's case demonstrates the "urgent need for a legislative fix of K.S.A. 21-3211." The Court's opinion in Mr. Flint's case is attached to this testimony.

Mr. Flint should be allowed to get relief from HB 2432. Under current law, Mr. Flint is a convicted felon because he used a threat of force to protect his fiancée instead of

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using actual force to defend his fiancée. In its current form, HB 2432 will not apply to Mr. Flint's case because his offense was committed before the change in the applicable statutes. See State v. Sutherland, 248 Kan. 96, Syl. ¶ 4 (1991) ("[A] statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively.").

HB 2432 should be amended so it clearly indicates that it applies retroactively. A retroactive change to K.S.A. 21-3211 to allow for the threat of force for self-defense or defense of another might guarantee that Mr. Flint gets his day in court to assert "defense of another" to a jury. By making HB 2432 apply retroactively, the Legislature can also assure the rights of Kansans until the bill goes into effect. A copy of a proposed amendment is attached.

In its current form, HB 2432 goes into effect upon its publication in the statute book. If this bill is passed during this legislative session, the bill would still not take effect for several months. KACDL is generally in favor of this bill, but asks this committee to amend the bill to apply the statutory changes retroactively so that ordinary Kansans are not made into felons simply because of the date of their need to use a threat of force for self-defense or defense of another.

Respectfully submitted,

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NOT DESIGNATED FOR PUBLICATION

No. 101,583

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

Appellee,

v.

BRANDON FLINT,

Appellee.

MEMORANDUM DECISION

Appeal from Lyon District Court; JEFFRY J. LARSON, judge. Opinion filed January 29, 2010. Affirmed.

Carl Folsom, III, of Kansas Appellate Defender Office, for appellant.

Vernon E. Buck, first assistant county attorney, *Marc Goodman*, county attorney, and *Steve Six*, attorney general, for appellee.

7-3

Before HILL, P.J., ELLIOTT and GREENE, JJ.

Per Curiam: This is Brandon Flint's direct appeal of his aggravated assault conviction. This court issued a Show Cause Order on December 10, 2009, to both parties to decide the effect of the recent holding of our Supreme Court in *State v. Hendrix,* 289 Kan. 859 (2009), on the only issue raised in this appeal. After considering this matter, we hold that *Hendrix* controls this case.

Briefly repeated, the facts reveal that after leaving a bar in Emporia where Flint's fiancée and another man exchanged angry words, Flint walked to his car. Outside, Flint's fiancée and two men continued to talk in a heated fashion. Flint's fiancée fell to the ground during the scuffle. At this point, Flint got his gun, walked back across the street, and pointed the gun at the chest of one of the men; both men immediately backed away. Flint's fiancée got up, she and Flint walked back to Flint's car, and they drove away.

The State charged Flint with aggravated assault, and the jury convicted him. Flint requested an instruction for defense of another under K.S.A. 21-3211(a), but the district court denied his request, ruling Flint's use of force was greater than reasonably necessary to resist the attack. The court cited the ruling in *State v. Marks*, 226 Kan. 704, 602 P.2d 1344 (1979), as authority. Flint asks us to reverse based on this issue alone.

7-4

A majority of the Supreme Court held in *Hendrix* that K.S.A. 21-3211 created a defense of self or defense of another only when there is "use of force." The majority decided actual physical contact rather than a mere threat or display of force is necessary to raise this defense. See 289 Kan. 589, Syl. ¶ 6. Since Flint merely threatened the use of his gun and there was no actual force applied, he was not entitled to the defense of another.

This court is duty bound to follow Supreme Court precedent, without some suggestion the court is departing from its previous position. *State v. Merrills*, 37 Kan. App. 2d 81, 83, 149 P. 3d 869, *rev. denied* 284 Kan. 949 (2007). In addition, if a trial court reaches the right result, its decision will be upheld even though the trial court assigned erroneous reasons for its decision. *State v. Murray*, 285 Kan. 503, 533, 174 P. 3d 407 (2008). We are not persuaded by Flint's argument that *Hendrix* does not control here because *Hendrix* fails to consider Flint's right to bear arms as pronounced by the United States Supreme Court in *District of Columbia v. Heller*, ___ U.S. ___, 171 L.Ed. 2d 637, 128 S. Ct. 2783 (2008). Therefore, the trial court's decision is affirmed according to Supreme Court Rule 7.041 (2009 Kan. Ct. R. Annot. 56) based on the holding in *Hendrix*.

Affirmed.

7-5

GREENE, J, concurring: I agree that the outcome here is controlled by *State v. Hendrix*, 289 Kan. 859, 218 P.3d 40 (2009), but I write separately to note that the factual scenario in this case is very much like the hypothetical scenario depicted by Chief Justice Davis' dissent in *Hendrix*. The fact that Flint has been deprived of self-defense here demonstrates the wisdom of the Chief Justice Davis' dissent and the urgent need for a legislative fix of K.S.A. 21-3211.

7-6

Session of 2010

HOUSE BILL No. 2432

By Representative Carlson

1-12

AN ACT concerning crimes, punishment and criminal procedure; relating to justified threat or use of force; amending K.S.A. 21-3211, 21-3212, 21-3214, 21-3215, 21-3216, 21-3217, 21-3218 and 21-3219 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 21-3211 is hereby amended to read as follows: 21-3211. (a) A person is justified in the *threat or* use of force against another when and to the extent it appears to such person and such person reasonably believes that such *threat or use of* force is necessary to defend such person or a third person against such other's imminent use of unlawful force.

(b) A person is justified in the *threat or* use of deadly force under circumstances described in subsection (a) if such person reasonably believes *that such threat or use of* deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

(c) Nothing in this section shall require a person to retreat if such person is *threatening or* using force to protect such person or a third person.

Sec. 2. K.S.A. 21-3212 is hereby amended to read as follows: 21-3212. (a) A person is justified in the *threat or* use of force against another when and to the extent that it appears to such person and such person reasonably believes that such *threat or use of* force is necessary to prevent or terminate such other's unlawful entry into or attack upon such person's dwelling or occupied vehicle.

(b) A person is justified in the *threat or* use of deadly force to prevent or terminate unlawful entry into or attack upon any dwelling or occupied vehicle if such person reasonably believes *that such threat or use of* deadly force is necessary to prevent imminent death or great bodily harm to such person or another.

(c) Nothing in this section shall require a person to retreat if such person is *threatening or* using force to protect such person's dwelling or occupied vehicle.

Sec. 3. K.S.A. 21-3214 is hereby amended to read as follows: 21-3214. The justification described in sections 21-3211, 21-3212, and 21-

KACDL - proposed amendment
(language on p. 4)

3213, *and amendments thereto,* is not available to a person who:

~~(1)~~ *(a)* Is attempting to commit, committing, or escaping from the commission of a forcible felony; or

~~(2)~~ *(b)* Initially provokes the use of force against ~~himself~~ *such person* or another, with intent to use such force as an excuse to inflict bodily harm upon the assailant; or

~~(3)~~ *(c)* Otherwise initially provokes the use of force against ~~himself~~ *such person* or another, unless:

~~(a) He~~ *(1) Such person* has reasonable ~~ground~~ *grounds* to believe that ~~he~~ *such person* is in imminent danger of death or great bodily harm, and ~~he~~ *such person* has exhausted every reasonable means to escape such danger other than the *threat or* use of force which is likely to cause death or great bodily harm to the assailant; or

~~(b)~~ *(2)* In good faith, ~~he~~ *such person* withdraws from physical contact with the assailant and indicates clearly to the assailant that ~~he~~ *such person* desires to withdraw and terminate the *threat or* use of force, but the assailant continues or resumes the use of force.

Sec. 4. K.S.A. 21-3215 is hereby amended to read as follows: 21-3215. ~~(1)~~ *(a)* A law enforcement officer, or any person whom such officer has summoned or directed to assist in making a lawful arrest, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Such officer is justified in the *threat or* use of any force which such officer reasonably believes to be necessary to effect the arrest and ~~of~~ *the threat or use of* any force which such officer reasonably believes to be necessary to defend the officer's self or another from bodily harm while making the arrest. However, such officer is justified in *threatening or* using force likely to cause death or great bodily harm only when such officer reasonably believes that such *threat or use of* force is necessary to prevent death or great bodily harm to such officer or another person, or when such officer reasonably believes that such *threat or use of* force is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit a felony involving great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that such person will endanger human life or inflict great bodily harm unless arrested without delay.

~~(2)~~ *(b)* A law enforcement officer making an arrest pursuant to an invalid warrant is justified in the *threat or* use of any force which such officer would be justified in *threatening or* using if the warrant were valid, unless such officer knows that the warrant is invalid.

Sec. 5. K.S.A. 21-3216 is hereby amended to read as follows: 21-3216. ~~(1)~~ *(a)* A private person who makes, or assists another private person

in making a lawful arrest is justified in the *threat or* use of any force which ~~he~~ *such person* would be justified in *threatening or* using if ~~he~~ *such person* were summoned or directed by a law enforcement officer to make such arrest, except that ~~he~~ *such person* is justified in the *threat or* use of force likely to cause death or great bodily harm only when ~~he~~ *such person* reasonably believes that such *threat or use of* force is necessary to prevent death or great bodily harm to ~~himself~~ *such person* or another.

~~(2)~~ *(b)* A private person who is summoned or directed by a law enforcement officer to assist in making an arrest which is unlawful, is justified in the *threat or* use of any force which ~~he~~ *such person* would be justified in *threatening or* using if the arrest were lawful.

Sec. 6. K.S.A. 21-3217 is hereby amended to read as follows: 21-3217. A person is not authorized to *threaten or* use force to resist an arrest which ~~he~~ *such person* knows is being made either by a law enforcement officer or by a private person summoned and directed by a law enforcement officer to make the arrest, even if the person arrested believes that the arrest is unlawful.

Sec. 7. K.S.A. 21-3218 is hereby amended to read as follows: 21-3218. (a) A person who is not engaged in an unlawful activity and who is attacked in a place where such person has a right to be has no duty to retreat and has the right to stand such person's ground and meet force with *the threat or use of* force.

(b) This section shall be part of and supplemental to the Kansas criminal code.

Sec. 8. K.S.A. 21-3219 is hereby amended to read as follows: 21-3219. (a) A person who *threatens or* uses force which, subject to the provisions of K.S.A. 21-3214, and amendments thereto, is justified pursuant to K.S.A. 21-3211, 21-3212 or 21-3213, and amendments thereto, is immune from criminal prosecution and civil action for the *threat or* use of such force, unless the person against whom force was *threatened or* used is a law enforcement officer who was acting in the performance of such officer's official duties and the officer identified the officer's self in accordance with any applicable law or the person *threatening or* using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, "criminal prosecution" includes arrest, detention in custody and charging or prosecution of the defendant.

(b) A law enforcement agency may use standard procedures for investigating the *threat or* use of force as described in subsection (a), but the agency shall not arrest the person for *threatening or* using force unless it determines that there is probable cause for the arrest.

(c) A county or district attorney or other prosecutor may commence a criminal prosecution upon a determination of probable cause.

Sec. 9. This act shall apply retroactively.

10

Sec. ~~9.~~ K.S.A. 21-3211, 21-3212, 21-3214, 21-3215, 21-3216, 21-3217, 21-3218 and 21-3219 are hereby repealed.

Sec. ~~10.~~ 11. This act shall take effect and be in force from and after its publication in the statute book.

7-10

Testimony on HB 2432 (Proponent)

House Judiciary Committee on February 1, 2010

Testimony of Brandon Flint

My name is Brandon Flint. I'm a mechanic, construction worker, college student, a father, a Veteran, and a felon.

One night, I took my fiancée to the bar to play some pool. We had some drinks, talked and socialized with other patrons. My alleged victim tried to start a fight with me and we left the bar. He and his friend followed us out.

There were words being exchanged, I saw a shoving match and then everyone separated. I turned around and started walking to my car. Mr. Mitchell got in his truck for a few seconds; I turned around to see him sprint at Nicole and tackle her to the ground. It was dark, the two guys were bigger than me and I was by my car, so I grabbed my Glock out of my glove box, ran over, pointed it as his chest and yelled "Get the FUCK off of her." I told Nicole to get in the car. Mr. Mitchell complied and Nicole got up from underneath him. I saw Mr. Mitchell was not armed, Nicole got past me and I dropped the gun to my side. Mr. Mitchell got up and we got in our car and left.

I'm now a felon because I protected the mother of my child from Mr. Mitchell. I don't know what would have happened if I hadn't pulled a gun on Mr. Mitchell, but I know that Nicole made it away safely because I did.

About eight years ago, there was a football player, in Emporia, beat to death; three men were charged. If he had done the same thing I did, he would be alive, but would be a felon like me. He would have to register every four months as an offender, his driver's license would say "Registered Offender", the same words that appear on the licenses of registered pedophiles and rapists. He would also have to attend community classes, have psychological evaluations done and attend a variety of meetings.

At my trial, my entire defense was built around "defense of another." However, the judge threw out the instructions to the jury and I was convicted, because I "stuck by my guns," so to speak, and stated that I believed I had done the right thing.

I served two separate tours in Iraq with the United States Army. I hauled jet fuel and was shot at with everything from AK-47's to RPG's and rockets. Roadside bombs hit our convoys constantly. I went through all of that to help keep our great nation safe, only to find that the same great nation I protected does not allow me to protect myself or my loved ones.

On Friday, the Court of Appeals affirmed my conviction. I was told by Mr. Folsom that these proceedings today have a direct bearing on my case. I hope that a favorable decision will be made and will allow my case to be grandfathered, as it applies here into the laws you are about to change. Thank you for your time.

House Judiciary
Date 02-01-2010
Attachment # 8

Testimony to the House Judiciary Committee
In Support of HB 2432

February 1, 2010

Mr. Chairman and Committee Members,

The Kansas Association of Chiefs of Police supports HB2432 which proposes amending the use of force statutes in K.S.A. Chapter 21, Article 32. This action is necessary to remedy a gap left in the law after the Kansas Supreme Court ruling in State vs. Hendrix, decided in October 2009.

After this ruling, the KACP worked with several other persons, including prosecutors and law enforcement legal advisors to develop a bill proposal to make this correction. However, SB481 was filed prior to our proposal and we elected not to introduce a separate bill. I have attached a copy of the bill draft for informational purposes. Our proposal would have simply added a statute to Article 32 and defined the terms "use of force" and "use of deadly force." Our reasons for this approach were:

1. We thought it would be better to stay away from making any changes in the core statute language and simply make the fix by defining the words creating difficulty for the court.
2. The case law includes a statement, "The statute does not define the terms "use" or "force." In my opinion, the failure to define these terms creates an ambiguity in the statute. . ." (Page 8, ¶3)
3. The case law also includes a statement, ""Use of force" does not mean "threat of force" or "display of force" or "presentation of force". . ." leaving the possibility the court sees each of these terms with a different meaning or application. (Page 5, ¶1)
4. The dissenting opinion in the Hendrix case also includes a statement, "The generic term "force" may include both "actual force"—that is, physical force—and "constructive force"—that is, the threat of actual force. See Black's Law Dictionary 717 (9th ed. 2009) (distinguishing *actual force* ["(f)orce consisting in a physical act"] from *constructive force* ["(t)hreats and intimidation to gain control or prevent resistance"])." (Page 8, ¶4)

The attached draft includes all of the above issues from the case law: constructive force; defining "use of force" and "use of deadly force"; and including in those definitions "display", "presentation", and "threat" of force, not just the threat of force.

We urge you to recommend this bill favorably for passage regardless of which approach is taken.

Ed Klumpp
Legislative Committee Chair
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Phone: (785) 235-5619
Cell: (785) 640-1102

House Judiciary
Date 02-01-2010
Attachment # 9

2010 9rs1364

SENATE BILL NO. ____

By

AN ACT concerning crimes, punishment and criminal procedure; defining "use of force" and "use of "deadly force".

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in article 32 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto:

(a) "Use of force" means any actual or constructive force, including, but not limited to, threats, displays or presentations of force directed toward another person or the actual application of force upon another person.

(b) "Use of deadly force" means any actual or constructive force described in subsection (a) which is likely to cause imminent death or great bodily harm.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.