

SPECIAL SESSION OF 2013

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2002

As Amended by House Committee on Judiciary

Brief*

HB 2002 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 bill would add a new subsection setting forth the procedure to be followed for premeditated murders committed on or after the effective date of the bill. The bill also would amend the existing procedure for premeditated murders committed prior to the effective date of the bill. The procedure in each situation would be fairly similar.

Procedure for Crimes Committed On or After the Effective Date

The bill would add a new subsection establishing the procedure to be followed for premeditated murders committed on or after the bill's effective date. In such cases, after conviction and upon reasonable notice by the prosecuting attorney, the bill would require 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 bill would allow the court to conduct the proceeding before a jury ranging in size from 6 to 12 jurors. If the jury has

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

been discharged prior to the proceeding, the bill would require 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*. Additionally, the bill 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 presumed to prove the existence of such conviction beyond a reasonable doubt.

The bill 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 bill would require the jury to

designate in writing, signed by the foreman of the jury, 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 with a minimum 25-years imprisonment before being eligible for parole, which could not be 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.

Procedure for Crimes Committed Prior to the Effective Date

As previously noted, the bill 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 bill's effective date. Subsection (d) of the bill 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 the conviction or sentence has been vacated in a collateral proceeding. Using a procedure similar to that outlined in the new subsection, the bill 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 differ in the evidentiary portion of the proceedings, however. Current law allows evidence concerning any matter the court deems relevant to the

question of sentence, including aggravating and mitigating circumstances, to be presented. The bill 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 the bill 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.

Procedure for Cases on Appeal After the Effective Date

For all cases on appeal after the bill's effective date, 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 bill 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 bill 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. The bill also includes a severability clause, which states the invalidity of any provision or provisions of this section or the application thereof to any person or circumstances would not affect the other provisions or applications of this section.

Finally, the bill would amend the statute outlining aggravating circumstances to replace a reference to "the court" with "the trier of fact" to indicate the jury will consider the aggravating circumstances, rather than the court, unless the jury is waived.

The bill would be in effect upon publication in the *Kansas Register*.

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 June 17, 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, the Legislative Coordinating Council appointed 14 members of the Legislature to serve as members of the Special Committee on Judiciary and 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 Special Committee on Judiciary met August 26, 2013, to consider legislation proposed by the Office of the Attorney General and received testimony from proponents and opponents of the proposed legislation. The Committee agreed to recommend the proposed bill language, with some amendments, and that it be introduced as a House bill in the upcoming Special Session.

In the House Committee on Judiciary, Attorney General Derek Schmidt, representatives of the Kansas County and

District Attorneys Association and the Kansas Bureau of Investigation, and Senator Greg Smith appeared in support of the bill. The father of a victim and a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association also submitted written testimony in support of the bill. A representative of the Kansas Association of Criminal Defense Lawyers appeared as an opponent of the bill.

The Committee amended the bill to require a new jury to be impaneled if the jury has been discharged, rather than leaving this to the court's discretion. Additionally, the Committee amended the bill to clarify that 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, the court would instruct the jury that a certified journal entry of a prior conviction is presumed to prove the existence of such prior conviction beyond a reasonable doubt. The bill originally stated the journal entry would be sufficient to prove the existence of the aggravating circumstance beyond a reasonable doubt.

The fiscal note prepared by the Division of the Budget for the bill, as introduced, indicates passage of the bill would increase State General Fund expenditures by approximately \$335,395 across FY 2014 and FY 2015. The amount is applied to both years as it is unknown how many cases would be completed each year and includes \$218,740 incurred by the Judicial Branch and \$116,655 by the Board of Indigents' Defense Services (BIDS). The Kansas Sentencing Commission (KSC) estimates currently 106 offenders have already been convicted and are currently serving Hard 40 or Hard 50 sentences: 46 are serving a Hard 40 sentence and 60 are serving a Hard 50 sentence. The Attorney General estimates 35 persons await trial, sentencing, or both, and approximately 5 new first degree murder cases will arise annually in the future.

The Office of Judicial Administration (OJA) estimates \$172,501 would be required for judge time and pay for temporary help to conduct collateral sentencing proceedings for the 106 offenders who are currently serving Hard 40 or Hard 50 sentences, and \$46,239 for separate sentencing proceedings required for the 35 cases awaiting trial, sentencing, or both. Additionally, OJA provides that if through the appeals process it is determined that resentencing proceedings are required for those 106 offenders, the courts would incur additional costs for judge and clerk time of \$158,840 to conduct 46 proceedings for the Hard 40 cases and \$225,789 to conduct 60 proceedings for the Hard 50 cases. OJA also estimates future cases using the new sentencing procedure could increase yearly expenditures by \$2,609. Finally, OJA indicates the bill is likely to result in numerous appeals, which would require an additional appellate research attorney position, and would result in the collection of additional fees from the additional cases. OJA is unable to provide an estimate at this time, however, of the cost of the new position or of the amount of revenue generated.

BIDS estimates \$29,155 would be required for 20 additional hours of work for homicide-qualified public defenders for the 35 cases awaiting trial, sentencing, or both (\$833 per case) and \$87,500 for expert services from mental health professionals (\$2,500 per case). Beginning in FY 2015, BIDS also anticipates a cost of \$16,665 per year for the anticipated 5 additional cases, including expert costs of \$12,500 (\$2,500 per case) and \$4,165 for attorney hours (\$833 per case). BIDS estimates the cost of appeals annually would be \$20,830. Further, BIDS estimates appellate review of the cases currently in district court would require an additional 20 hours of appellate defender time; however, those cases would not be completed in FY 2014 or FY 2015.

The KSC estimates passage would have minimal impact on prison beds and would have no impact on admissions or the workload of the Commission. If all 106 sentences currently being served were reduced to 25 years, any

potential savings would not be realized until calendar year 2023.

The Kansas Attorney General indicates the bill could result in counties incurring additional costs as a result of extending the length of a jury's service, but the added expense would be negligible.

Any fiscal effect associated with this bill is not reflected in *The FY 2014 Governor's Budget Report*.