

**SENATE BILL No. 255**

By Committee on Judiciary

1-13

1 AN ACT concerning crimes, punishment and criminal procedure; relating  
2 to capital murder; attempt; sentencing; amending K.S.A. 2013 Supp.  
3 21-5301, 21-5401 and 21-6620 and repealing the existing sections.  
4

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

6 Section 1. K.S.A. 2013 Supp. 21-5301 is hereby amended to read as  
7 follows: 21-5301.(a) An attempt is any overt act toward the perpetration of  
8 a crime done by a person who intends to commit such crime but fails in the  
9 perpetration thereof or is prevented or intercepted in executing such crime.

10 (b) It shall not be a defense to a charge of attempt that the  
11 circumstances under which the act was performed or the means employed  
12 or the act itself were such that the commission of the crime was not  
13 possible.

14 (c) (1) An attempt to commit an off-grid felony shall be ranked at  
15 nondrug severity level 1. An attempt to commit any other nondrug felony  
16 shall be ranked on the nondrug scale at two severity levels below the  
17 appropriate level for the underlying or completed crime. The lowest  
18 severity level for an attempt to commit a nondrug felony shall be a severity  
19 level 10.

20 (2) The provisions of this subsection shall not apply to a violation of  
21 attempting to commit the crime of:

22 (A) Aggravated human trafficking, as defined in subsection (b) of  
23 K.S.A. 2013 Supp. 21-5426, and amendments thereto, if the offender is 18  
24 years of age or older and the victim is less than 14 years of age;

25 (B) terrorism, as defined in K.S.A. 2013 Supp. 21-5421, and  
26 amendments thereto;

27 (C) illegal use of weapons of mass destruction, as defined in K.S.A.  
28 2013 Supp. 21-5422, and amendments thereto;

29 (D) rape, as defined in subsection (a)(3) of K.S.A. 2013 Supp. 21-  
30 5503, and amendments thereto, if the offender is 18 years of age or older;

31 (E) aggravated indecent liberties with a child, as defined in  
32 subsection (b)(3) of K.S.A. 2013 Supp. 21-5506, and amendments thereto,  
33 if the offender is 18 years of age or older;

34 (F) aggravated criminal sodomy, as defined in subsection (b)(1) or (b)  
35 (2) of K.S.A. 2013 Supp. 21-5504, and amendments thereto, if the  
36 offender is 18 years of age or older;

1 (G) commercial sexual exploitation of a child, as defined in K.S.A.  
2 2013 Supp. 21-6422, and amendments thereto, if the offender is 18 years  
3 of age or older and the victim is less than 14 years of age; or

4 (H) sexual exploitation of a child, as defined in subsection (a)(1) or  
5 (a)(4) of K.S.A. 2013 Supp. 21-5510, and amendments thereto, if the  
6 offender is 18 years of age or older and the child is less than 14 years of  
7 age; or

8 (I) *capital murder, as defined in K.S.A. 2013 Supp. 21-5401, and*  
9 *amendments thereto.*

10 (d) (1) An attempt to commit a felony which prescribes a sentence on  
11 the drug grid shall reduce the prison term prescribed in the drug grid block  
12 for an underlying or completed crime by six months.

13 (2) The provisions of this subsection shall not apply to a violation of  
14 attempting to commit a violation of K.S.A. 2013 Supp. 21-5703, and  
15 amendments thereto.

16 (e) An attempt to commit a class A person misdemeanor is a class B  
17 person misdemeanor. An attempt to commit a class A nonperson  
18 misdemeanor is a class B nonperson misdemeanor.

19 (f) An attempt to commit a class B or C misdemeanor is a class C  
20 misdemeanor.

21 Sec. 2. K.S.A. 2013 Supp. 21-5401 is hereby amended to read as  
22 follows: 21-5401. (a) Capital murder is the:

23 (1) Intentional and premeditated killing of any person in the  
24 commission of kidnapping, as defined in subsection (a) of K.S.A. 2013  
25 Supp. 21-5408, and amendments thereto, or aggravated kidnapping, as  
26 defined in subsection (b) of K.S.A. 2013 Supp. 21-5408, and amendments  
27 thereto, when the kidnapping or aggravated kidnapping was committed  
28 with the intent to hold such person for ransom;

29 (2) intentional and premeditated killing of any person pursuant to a  
30 contract or agreement to kill such person or being a party to the contract or  
31 agreement pursuant to which such person is killed;

32 (3) intentional and premeditated killing of any person by an inmate or  
33 prisoner confined in a state correctional institution, community  
34 correctional institution or jail or while in the custody of an officer or  
35 employee of a state correctional institution, community correctional  
36 institution or jail;

37 (4) intentional and premeditated killing of the victim of one of the  
38 following crimes in the commission of, or subsequent to, such crime:  
39 Rape, as defined in K.S.A. 2013 Supp. 21-5503, and amendments thereto,  
40 criminal sodomy, as defined in subsections (a)(3) or (a)(4) of K.S.A. 2013  
41 Supp. 21-5504, and amendments thereto, or aggravated criminal sodomy,  
42 as defined in subsection (b) of K.S.A. 2013 Supp. 21-5504, and  
43 amendments thereto, or any attempt thereof, as defined in K.S.A. 2013

1 Supp. 21-5301, and amendments thereto;

2 (5) intentional and premeditated killing of a law enforcement officer;

3 (6) intentional and premeditated killing of more than one person as  
4 part of the same act or transaction or in two or more acts or transactions  
5 connected together or constituting parts of a common scheme or course of  
6 conduct; or

7 (7) intentional and premeditated killing of a child under the age of 14  
8 in the commission of kidnapping, as defined in subsection (a) of K.S.A.  
9 2013 Supp. 21-5408, and amendments thereto, or aggravated kidnapping,  
10 as defined in subsection (b) of K.S.A. 2013 Supp. 21-5408, and  
11 amendments thereto, when the kidnapping or aggravated kidnapping was  
12 committed with intent to commit a sex offense upon or with the child or  
13 with intent that the child commit or submit to a sex offense.

14 (b) For purposes of this section, "sex offense" means rape, as defined  
15 in K.S.A. 2013 Supp. 21-5503, and amendments thereto, aggravated  
16 indecent liberties with a child, as defined in subsection (b) of K.S.A. 2013  
17 Supp. 21-5506, and amendments thereto, aggravated criminal sodomy, as  
18 defined in subsection (b) of K.S.A. 2013 Supp. 21-5504, and amendments  
19 thereto, selling sexual relations, as defined in K.S.A. 2013 Supp. 21-6419,  
20 and amendments thereto, promoting the sale of sexual relations, as defined  
21 in K.S.A. 2013 Supp. 21-6420, and amendments thereto, commercial  
22 sexual exploitation of a child, as defined in K.S.A. 2013 Supp. 21-6422,  
23 and amendments thereto, or sexual exploitation of a child, as defined in  
24 K.S.A. 2013 Supp. 21-5510, and amendments thereto.

25 (c) Capital murder *or attempt to commit capital murder* is an off-grid  
26 person felony.

27 (d) *The provisions of subsection (c) of K.S.A. 2013 Supp. 21-5301,*  
28 *and amendments thereto, shall not apply to a violation of attempting to*  
29 *commit the crime of capital murder pursuant to this section.*

30 Sec. 3. K.S.A. 2013 Supp. 21-6620 is hereby amended to read as  
31 follows: 21-6620. (a) (1) Except as provided in *subsection (a)(2) and*  
32 *K.S.A. 2013 Supp. 21-6618 and 21-6622, and amendments thereto, if a*  
33 *defendant is convicted of the crime of capital murder and a sentence of*  
34 *death is not imposed pursuant to subsection (e) of K.S.A. 2013 Supp. 21-*  
35 *6617, and amendments thereto, or requested pursuant to subsection (a) or*  
36 *(b) of K.S.A. 2013 Supp. 21-6617, and amendments thereto, the defendant*  
37 *shall be sentenced to life without the possibility of parole.*

38 (2) *If a defendant is convicted of attempt to commit the crime of*  
39 *capital murder, the defendant shall be sentenced to imprisonment for life*  
40 *and shall not be eligible for probation or suspension, modification or*  
41 *reduction of sentence. In addition, the defendant shall not be eligible for*  
42 *parole prior to serving 25 years' imprisonment, and such 25 years'*  
43 *imprisonment shall not be reduced by the application of good time credits.*

1 *No other sentence shall be permitted.*

2 (b) The provisions of this subsection shall apply only to the crime of  
3 murder in the first degree based upon the finding of premeditated murder  
4 committed on or after ~~the effective date of this act~~ *September 6, 2013.*

5 (1) If a defendant is convicted of murder in the first degree based  
6 upon the finding of premeditated murder, upon reasonable notice by the  
7 prosecuting attorney, the court shall determine, in accordance with this  
8 subsection, whether the defendant shall be required to serve a mandatory  
9 minimum term of imprisonment of 50 years or sentenced as otherwise  
10 provided by law.

11 (2) The court shall conduct a separate proceeding following the  
12 determination of the defendant's guilt for the jury to determine whether  
13 one or more aggravating circumstances exist. Such proceeding shall be  
14 conducted by the court before a jury as soon as practicable. If any person  
15 who served on the trial jury is unable to serve on the jury for the  
16 proceeding, the court shall substitute an alternate juror who has been  
17 impaneled for the trial jury. If there are insufficient alternate jurors to  
18 replace trial jurors who are unable to serve at the proceeding, the court  
19 may conduct such proceeding before a jury which may have 12 or less  
20 jurors, but at no time less than six jurors. If the jury has been discharged  
21 prior to the proceeding, a new jury shall be impaneled. Any decision of the  
22 jury regarding the existence of an aggravating circumstance shall be  
23 beyond a reasonable doubt. Jury selection procedures, qualifications of  
24 jurors and grounds for exemption or challenge of prospective jurors in  
25 criminal trials shall be applicable to the selection of such jury. The jury at  
26 the proceeding may be waived in the manner provided by K.S.A. 22-3403,  
27 and amendments thereto, for waiver of a trial jury. If the jury at the  
28 proceeding has been waived, such proceeding shall be conducted by the  
29 court.

30 (3) In the proceeding, evidence may be presented concerning any  
31 matter relating to any of the aggravating circumstances enumerated in  
32 K.S.A. 2013 Supp. 21-6624, and amendments thereto. Only such evidence  
33 of aggravating circumstances as the prosecuting attorney has made known  
34 to the defendant prior to the proceeding shall be admissible and no  
35 evidence secured in violation of the constitution of the United States or of  
36 the state of Kansas shall be admissible. No testimony by the defendant at  
37 the time of the proceeding shall be admissible against the defendant at any  
38 subsequent criminal proceeding. At the conclusion of the evidentiary  
39 presentation, the court shall allow the parties a reasonable period of time in  
40 which to present oral argument.

41 (4) At the conclusion of the evidentiary portion of the proceeding, the  
42 court shall provide oral and written instructions to the jury to guide its  
43 deliberations. If the prosecuting attorney relies on subsection (a) of K.S.A.

1 2013 Supp. 21-6624, and amendments thereto, as an aggravating  
2 circumstance, and the court finds that one or more of the defendant's prior  
3 convictions satisfy such subsection, the jury shall be instructed that a  
4 certified journal entry of a prior conviction is presumed to prove the  
5 existence of such prior conviction or convictions beyond a reasonable  
6 doubt.

7 (5) If, by unanimous vote, the jury finds beyond a reasonable doubt  
8 that one or more of the aggravating circumstances enumerated in K.S.A.  
9 2013 Supp. 21-6624, and amendments thereto, exist, the jury shall  
10 designate, in writing, signed by the foreman of the jury, the statutory  
11 aggravating circumstances which it found. If, after a reasonable time for  
12 deliberation, the jury is unable to reach a unanimous sentencing decision,  
13 the court shall dismiss the jury and the defendant shall be sentenced as  
14 provided by law. In nonjury cases, the court shall designate, in writing, the  
15 specific circumstance or circumstances which the court found beyond a  
16 reasonable doubt.

17 (6) If one or more of the aggravating circumstances enumerated in  
18 K.S.A. 2013 Supp. 21-6624, and amendments thereto, are found to exist  
19 beyond a reasonable doubt pursuant to this subsection, the defendant shall  
20 be sentenced pursuant to K.S.A. 2013 Supp. 21-6623, and amendments  
21 thereto, unless the sentencing judge finds substantial and compelling  
22 reasons, following a review of mitigating circumstances, to impose the  
23 sentence specified in this paragraph. If the sentencing judge does not  
24 impose the mandatory minimum term of imprisonment required by K.S.A.  
25 2013 Supp. 21-6623, and amendments thereto, the judge shall state on the  
26 record at the time of sentencing the substantial and compelling reasons  
27 therefor, and the defendant shall be sentenced to imprisonment for life and  
28 shall not be eligible for probation or suspension, modification or reduction  
29 of sentence. In addition, the defendant shall not be eligible for parole prior  
30 to serving 25 years' imprisonment, and such 25 years' imprisonment shall  
31 not be reduced by the application of good time credits. No other sentence  
32 shall be permitted.

33 (c) The provisions of this subsection shall apply only to the crime of  
34 murder in the first degree based upon the finding of premeditated murder  
35 committed prior to ~~the effective date of this act~~ *September 6, 2013*.

36 (1) If a defendant is convicted of murder in the first degree based  
37 upon the finding of premeditated murder, upon reasonable notice by the  
38 prosecuting attorney, the court shall conduct a separate sentencing  
39 proceeding in accordance with this subsection to determine whether the  
40 defendant shall be required to serve a mandatory minimum term of  
41 imprisonment of 40 years or for crimes committed on and after July 1,  
42 1999, a mandatory minimum term of imprisonment of 50 years or  
43 sentenced as otherwise provided by law.

1       (2) The sentencing proceeding shall be conducted by the court before  
2 a jury as soon as practicable. If the trial jury has been discharged prior to  
3 sentencing, a new jury shall be impaneled. Any decision to impose a  
4 mandatory minimum term of imprisonment of 40 or 50 years shall be by a  
5 unanimous jury. Jury selection procedures, qualifications of jurors and  
6 grounds for exemption or challenge of prospective jurors in criminal trials  
7 shall be applicable to the selection of such jury. The jury at the sentencing  
8 proceeding may be waived in the manner provided by K.S.A. 22-3403, and  
9 amendments thereto, for waiver of a trial jury. If the jury at the sentencing  
10 proceeding has been waived, such proceeding shall be conducted by the  
11 court.

12       (3) In the sentencing proceeding, evidence may be presented  
13 concerning any matter that the court deems relevant to the question of  
14 sentence and shall include matters relating to any of the aggravating  
15 circumstances enumerated in K.S.A. 2013 Supp. 21-6624, and  
16 amendments thereto, or for crimes committed prior to July 1, 2011, K.S.A.  
17 21-4636, prior to its repeal, and any mitigating circumstances. Any such  
18 evidence which the court deems to have probative value may be received  
19 regardless of its admissibility under the rules of evidence, provided that  
20 the defendant is accorded a fair opportunity to rebut any hearsay  
21 statements. Only such evidence of aggravating circumstances as the  
22 prosecuting attorney has made known to the defendant prior to the  
23 sentencing proceeding shall be admissible and no evidence secured in  
24 violation of the constitution of the United States or of the state of Kansas  
25 shall be admissible. Only such evidence of mitigating circumstances  
26 subject to discovery pursuant to K.S.A. 22-3212, and amendments thereto,  
27 that the defendant has made known to the prosecuting attorney prior to the  
28 sentencing proceeding shall be admissible. No testimony by the defendant  
29 at the time of sentencing shall be admissible against the defendant at any  
30 subsequent criminal proceeding. At the conclusion of the evidentiary  
31 presentation, the court shall allow the parties a reasonable period of time in  
32 which to present oral argument.

33       (4) At the conclusion of the evidentiary portion of the sentencing  
34 proceeding, the court shall provide oral and written instructions to the jury  
35 to guide its deliberations. If the prosecuting attorney relies on subsection  
36 (a) of K.S.A. 2013 Supp. 21-6624, and amendments thereto, or for crimes  
37 committed prior to July 1, 2011, subsection (a) of K.S.A. 21-4636, prior to  
38 its repeal, as an aggravating circumstance, and the court finds that one or  
39 more of the defendant's prior convictions satisfy such subsection, the jury  
40 shall be instructed that a certified journal entry of a prior conviction is  
41 presumed to prove the existence of such prior conviction or convictions  
42 beyond a reasonable doubt.

43       (5) If, by unanimous vote, the jury finds beyond a reasonable doubt

1 that one or more of the aggravating circumstances enumerated in K.S.A.  
2 2013 Supp. 21-6624, and amendments thereto, or for crimes committed  
3 prior to July 1, 2011, K.S.A. 21-4636, prior to its repeal, exist and, further,  
4 that the existence of such aggravating circumstances is not outweighed by  
5 any mitigating circumstances which are found to exist, the defendant shall  
6 be sentenced pursuant to K.S.A. 2013 Supp. 21-6623, and amendments  
7 thereto; otherwise, the defendant shall be sentenced as provided by law.  
8 The sentencing jury shall designate, in writing, signed by the foreman of  
9 the jury, the statutory aggravating circumstances which it found. The trier  
10 of fact may make the findings required by this subsection for the purpose  
11 of determining whether to sentence a defendant pursuant to K.S.A. 2013  
12 Supp. 21-6623, and amendments thereto, notwithstanding contrary  
13 findings made by the jury or court pursuant to subsection (e) of K.S.A.  
14 2013 Supp. 21-6617, and amendments thereto, for the purpose of  
15 determining whether to sentence such defendant to death. If, after a  
16 reasonable time for deliberation, the jury is unable to reach a unanimous  
17 sentencing decision, the court shall dismiss the jury and the defendant  
18 shall be sentenced as provided by law. In nonjury cases, the court shall  
19 designate in writing the specific circumstance or circumstances which the  
20 court found beyond a reasonable doubt.

21 (d) The amendments to subsection (c) by ~~this act~~ *chapter 1 of the*  
22 *2013 Session Laws of Kansas (Special Session)*:

23 (1) Establish a procedural rule for sentencing proceedings, and as such  
24 shall be construed and applied retroactively to all crimes committed prior  
25 to the effective date of this act, except as provided further in this  
26 subsection; (2) shall not apply to cases in which the defendant's conviction  
27 and sentence were final prior to June 17, 2013, unless the conviction or  
28 sentence has been vacated in a collateral proceeding, including, but not  
29 limited to, K.S.A. 22-3504 or 60-1507, and amendments thereto; and (3)  
30 shall apply only in sentencing proceedings otherwise authorized by law.

31 (e) Notwithstanding the provisions of subsection (f), for all cases on  
32 appeal on or after ~~the effective date of this act~~ *September 6, 2013*, if a  
33 sentence imposed under this section, prior to amendment by ~~this act~~  
34 *chapter 1 of the 2013 Session Laws of Kansas (Special Session)*, or under  
35 K.S.A. 21-4635, prior to its repeal, is vacated for any reason other than  
36 sufficiency of the evidence as to all aggravating circumstances,  
37 resentencing shall be required under this section, as amended by ~~this act~~  
38 *chapter 1 of the 2013 Session Laws of Kansas (Special Session)*, unless the  
39 prosecuting attorney chooses not to pursue such a sentence.

40 (f) In the event any sentence imposed under this section is held to be  
41 unconstitutional, the court having jurisdiction over a person previously  
42 sentenced shall cause such person to be brought before the court and shall  
43 sentence such person to the maximum term of imprisonment otherwise

1 provided by law.

2 (g) If any provision or provisions of this section or the application  
3 thereof to any person or circumstance is held invalid, the invalidity shall  
4 not affect other provisions or applications of this section which can be  
5 given effect without the invalid provision or provisions or application, and  
6 to this end the provisions of this section are severable.

7 Sec. 4. K.S.A. 2013 Supp. 21-5301, 21-5401 and 21-6620 are hereby  
8 repealed.

9 Sec. 5. This act shall take effect and be in force from and after its  
10 publication in the statute book.