

Senate Judiciary Committee
March 8, 2017
Senate Bill 128

Testimony of the
Kansas Association of Criminal Defense Lawyers
Neutral

Dear Chairman Wilborn and Members of the Committee:

We provide this testimony in order to bring some things to the Committee's attention. Current law has a "hate crime" provision in the departure statute. First, the State and/or the district court can give notice that it seeks an upward dispositional departure (i.e. an offender should go to prison even if he/she is presumptive probation) on the aggravating factor that "the offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim or the offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim whether or not the defendant's belief or perception was correct." See K.S.A. 21-6815(c)(2)(C); K.S.A. 21-6817(a)(1) and (3). Currently this finding does not have to be made by a jury. Second, the State can file a motion for an upward durational departure (i.e. an offender should be sentenced for more time than is provided in the applicable grid box), arguing the same factor. This applies to any type of felony grid offense (either person or nonperson). This type of finding has to be made by a jury. See K.S.A. 21-6817(b); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

SB 128 takes the existing language from the departure statute (as set forth above) and creates a sentencing "special rule" that would double the maximum duration of the applicable guidelines imprisonment term (including doubling life sentences) and turn an otherwise presumptive probation disposition into presumed imprisonment. This would apply to any type of felony offense (person or nonperson).

Although the special rule requires a finding be made by the "trier of fact," the reality is this would still require a proceeding like that in K.S.A. 21-6817. In other words, moving this language to a special rule does not eliminate the need for a jury to find, beyond a reasonable doubt, any fact that increases the penalty for a crime beyond the statutory maximum, unless the defendant waives his right to a jury determination on the rule.

In addition, the changes in SB 128 would limit prosecutors from exercising their discretion in seeking punishments for defendants. As explained above, current law allows for a prosecutor, who feels the case warrants it, to seek an upward departure. When that happens, the prosecutor can specify a particular number of months/years in prison in the departure motion and argument. On the other hand, SB 128 would eliminate the ability of a prosecutor to recommend a particular sentence length and instead would require a doubled sentence.

Thank you for your consideration,

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on behalf of the Kansas Association of Criminal Defense Lawyers
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