

**Senate Judiciary Committee**

**February 20, 2019**

**Senate Bill 80**

**Testimony of Kansas Association of Criminal Defense Lawyers**

**Opponent**

**(With Proposed Amendment)**

Dear Chairman Wilborn and Members of the Committee:

My name is Clayton Perkins. I am an attorney in Kansas practicing in the field of criminal defense appeals. Today, I appear on behalf of the Kansas Association of Criminal Defense Lawyers. We oppose SB 80 because it disproportionately increases the severity level of the offense.

In addition, my testimony is to alert this committee about the problematic uses of K.S.A. 21-6304's "knife" provision, which negatively impacts the ability of felons to maintain employment after release from incarceration, and invites unexpected and arbitrary prosecution. I believe it is relevant for this committee to consider the scope with which that provision is being applied, and an amendment to get it back on track, as this committee considers increasing the severity level of the crime through SB 80.

**Background on K.S.A. 21-6304.**

Kansas, like many states, has long had a prohibition on felons possessing firearms for at least a set length of time following their convictions. Historically, K.S.A. 21-6304 was limited to the possession of "firearms." In 2013 and 2014, however, a lot of Kansas weapon laws changed as part of comprehensive reforms addressing issues such as the open and concealed carry of firearms and knives, and the preemption of local government regulation. For example, in 2013 Kansas ended its ban on the possession of switch-blade knives and removed other types of knives from K.S.A. 21-6302's prohibition on concealed carry of certain weapons including daggers, dirks, straight-edged razors, stilettos or "any other dangerous or deadly weapon or instrument of like character, except that an ordinary

pocket knife with no blade more than four inches in length shall not be construed to be a dangerous knife, or a dangerous or deadly weapon or instrument.”<sup>1</sup> Then in 2014, K.S.A. 21-6304 was amended from banning felons from possessing firearms to banning felons possessing a “weapon” defined as “a firearm or knife.”<sup>2</sup> Under the statute as it now exists a “knife” means “a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character[.]”<sup>3</sup> This appears to largely be the list of knives made legal through the 2013 legislation.

### **The problem with the knife provision**

The main problem with the knife provision, as it is being applied currently, is not with the list of types of knives themselves, but in the residual clause that expands the list to include “any other dangerous or deadly cutting instrument of like character[.]” As you look at that clause, you may be asking yourself what that even means. That, in a nutshell, is the problem. No one knows for sure what is included by that residual clause. In the absence of clear definition, however, the law is being interpreted as broadly as possible, to disastrous results.

The first problem is that, because no one can tell for sure what is covered by the residual clause, felons in the State of Kansas are not getting clear guidance on what knives they are not supposed to possess. For example, does that clause include an ordinary pocketknife? I do not know if it is supposed to. In one recent case before the Kansas Court of Appeals, a convicted felon was told by his parole officer that he could possess an ordinary pocketknife with a blade under 4 inches.<sup>4</sup> In fact, the KDOC Supervision Handbook even said that he could possess such a knife. Even so, that did not stop him from eventually being prosecuted and convicted under K.S.A. 21-6304 for having a “dangerous or deadly cutting instrument of like character[.]” The defendant in that case, and his parole office, thought he was complying with the law, and it is hard to tell with any definitiveness whether

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<sup>1</sup> See HB 2013 SB 246

<sup>2</sup> See 2014 HB 2578.

<sup>3</sup> K.S.A. 21-6304(c)(1).

<sup>4</sup> *State v. Harris*, 408 P.3d 1007, 2018 WL 473605, at \*5 (Kan. App. 2018), review granted (Nov. 30, 2018).

he should be right or wrong on that point. When there is a law that is so uncertain that people trying to comply with it cannot, there is a problem with the way the law is written.

This ambiguity in the residual clause is also having other negative effects on felons who are trying to have ordinary, lawful lives. For example, because no one can clearly tell what types of knives the residual clause applies to, some judges are warning felons at sentencing to not even eat a steak with a knife, because it may be covered under the law. I do not believe that the law was ever intended to prevent felons from eating food with knives, just like I do not believe it was meant to prevent them from preparing their own food or working in a kitchen. However, that is what is now happening under this ambiguous residual clause.

Beyond what would be an absurd example about eating steak, if it were not actually happening, the law negatively impacts felons' ability to maintain employment otherwise. Just think about the number of professions that utilize various types of knives as tools for everyday labor, such as landscaping, tree trimming, or working as a farmhand. Even as an attorney, I frequently use an ordinary pocket knife for many tasks like opening mail. Because the residual clause is susceptible to such broad meaning, however, felons are being prevented from doing that work, or, worse, prosecuted for having work knives they did not realize were prohibited. I do not believe that the 2014 amendment to K.S.A. 21-6304 were ever meant to prevent felons from having jobs that use knives as tools, but that is what is happening.

In sum, while K.S.A. 21-6304's knife provisions have a good goal in mind, to prevent felons from having any of the listed dangerous weapons, the residual clause goes far beyond that. Felons are being prosecuted for having pocketknives, told they cannot cut their own food, and having their work opportunities cut short. This needs a fix.

### **Proposing a solution**

While the residual clause of K.S.A. 21-6304(c)(1) is a problem, it is also susceptible to a simple solution. That solution is to exempt out the most absurd applications of the statute. I propose this be accomplished by adding the following subsection to K.S.A. 21-6304:

"(d) This section shall not apply to knives possessed for use as tools in connection with lawful employment, kitchen knives when used as intended for food preparation or consumption, or an ordinary pocket knife with a blade no longer than 4 inches. "

The proposed amendment is based on a few sources. The exemptions for work and kitchen knives is based upon the current standard conditions on post-release provided by KDOC.<sup>5</sup> The exemption for ordinary pocket knives under 4 inches in length is based upon an earlier KDOC handbook for community services operators<sup>6</sup> and the prior exemption in K.S.A. 21-6302.<sup>7</sup>

The proposed language is likely not a fix to every absurd application to K.S.A. 21-6304's knives prohibition. It does, however, help to limit the most absurd applications of the law, and prevent the prosecution of felons for seeking lawful work, preparing their own food, or carrying ordinary pocketknives that were allowed without issue in Kansas until 2014.

**The increase to severity level six is disproportionate with the offense.**

Finally, while this committee should fix the problem with the knife provision, changing K.S.A. 21-6304 from a severity level 8 nonperson felony to a severity level 6 nonperson felony is unnecessary, and disproportionate to the harm caused by the offense. This should first be clear from the foregoing discussion of the knife provision. A severity level 6 offense has a sentencing range from 17 to 46 months' imprisonment, and it is a presumptive prison sentence for all but the lowest criminal history categories. It would strike me as absurd to think that a Kansan should go to prison for 17 to 46 months for possessing a pocketknife that their parole officer thought they should have.

Beyond the knife provision, severity level 6 would be disproportionate to other Kansas offenses. For example, K.S.A. 21-6301(a)(2) criminalizes possessing with intent to use unlawfully against another many of the weapons covered by K.S.A. 21-6304, yet that is a class A misdemeanor.

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<sup>5</sup> Available as of 2/18/2019 at <https://www.doc.ks.gov/prb/conditions> (It is, of course, concerning that felons are being told these knives are ok to have, but could still be prosecuted because K.S.A. 21-6304 lacks such exceptions, as happened in Harris).

<sup>6</sup> Available as of 2/18/2019 at <https://www.doc.ks.gov/publications/CFS/offender-supervision-handbook/view>

<sup>7</sup> HB 2013 SB 246

Likewise, the crime of aggravated assault with a deadly weapon, which criminalizes placing someone in apprehension of immediate bodily harm with a deadly weapon, is a severity level 7 person felony.<sup>8</sup> Even further, aggravated battery committed by causing bodily harm to another person with a deadly weapon is a severity level 7 offense.<sup>9</sup> All this is to say that SB 80 would make it a more severe offense to be a felon in possession of the various weapons than it is to actually hurt another person with those weapons. That is disproportionate.

Finally, it may be useful to briefly talk about the bed-space impact this change would have, given the problems with overcrowding in Kansas Prisons. One of the biggest impacts SB 80's switch from severity level 8 to severity level 6 would likely have is to shift those in the criminal history C through G range from presumptive probation sentences to presumptive prison sentences (or border box, in the case of G). It appears from the information currently available that approximately 100 offenders are currently in that range, and on probation. Under SB 80, however, those offenders would be in the presumptive prison range, and likely serving prison sentences. It does not appear the current estimates are taking that bed-space impact into account.

### **Conclusion**

This committee should adopt the proposed amendment discussed above to ensure that prosecutions for felons in possession of knives are functioning as intended, and not preventing felons from functioning as ordinary lawful members of society. However, this committee should not adopt the increase in severity level proposed in SB 80.

Respectfully submitted,

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<sup>8</sup> K.S.A. 21-5412

<sup>9</sup> K.S.A. 21-5413(g)(1)(B)