

HOUSE BILL No. 2299

By Representatives Holscher, Concannon, Ellis, Horn, Howard, Karleskint, Probst,
S. Ruiz, Stogsdill, Warfield, Weigel, Whipple and Woodard

2-13

1 AN ACT concerning crimes, punishment and criminal procedure; relating
2 to sentencing; departure sentence; mitigating factors; amending K.S.A.
3 2018 Supp. 21-6815 and repealing the existing section.

4
5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. K.S.A. 2018 Supp. 21-6815 is hereby amended to read as
7 follows: 21-6815. (a) Except as provided in subsection (b), the sentencing
8 judge shall impose the presumptive sentence provided by the sentencing
9 guidelines unless the judge finds substantial and compelling reasons to
10 impose a departure sentence. If the sentencing judge departs from the
11 presumptive sentence, the judge shall state on the record at the time of
12 sentencing the substantial and compelling reasons for the departure.

13 (b) Subject to the provisions of K.S.A. 2018 Supp. 21-6817(b), and
14 amendments thereto, any fact that would increase the penalty for a crime
15 beyond the statutory maximum, other than a prior conviction, shall be
16 submitted to a jury and proved beyond a reasonable doubt.

17 (c) (1) Subject to the provisions of subsections (c)(3) and (e), the
18 following nonexclusive list of mitigating factors may be considered in
19 determining whether substantial and compelling reasons for a departure
20 exist:

21 (A) The victim was an aggressor or participant in the criminal
22 conduct associated with the crime of conviction, *except that a victim of a*
23 *sex offense described in article 55 of chapter 21 of the Kansas Statutes*
24 *Annotated, and amendments thereto, or K.S.A. 2018 Supp. 21-6419*
25 *through 21-6422, and amendments thereto, human trafficking or*
26 *aggravated human trafficking as defined in K.S.A. 2018 Supp. 21-5426,*
27 *and amendments thereto, or incest or aggravated incest as defined in*
28 *K.S.A. 2018 Supp. 21-5604, and amendments thereto, who is under the age*
29 *of 16 shall not be considered an aggressor or participant in the criminal*
30 *conduct.*

31 (B) The offender played a minor or passive role in the crime or
32 participated under circumstances of duress or compulsion. This factor may
33 be considered when it is not sufficient as a complete defense.

34 (C) The offender, because of physical or mental impairment, lacked
35 substantial capacity for judgment when the offense was committed. The

1 voluntary use of intoxicants, drugs or alcohol does not fall within the
2 purview of this factor.

3 (D) The defendant, or the defendant's children, suffered a continuing
4 pattern of physical or sexual abuse by the victim of the offense and the
5 offense is a response to that abuse.

6 (E) The degree of harm or loss attributed to the current crime of
7 conviction was significantly less than typical for such an offense.

8 (F) The offender committed such crime as a result of an injury,
9 including major depressive disorder, polytrauma, post-traumatic stress
10 disorder or traumatic brain injury, connected to service in a combat zone,
11 as defined in section 112 of the federal internal revenue code of 1986, in
12 the armed forces of the United States of America. As used in this
13 subsection, "major depressive disorder," "polytrauma," "post-traumatic
14 stress disorder" and "traumatic brain injury" shall mean the same as such
15 terms are defined in K.S.A. 2018 Supp. 21-6630, and amendments thereto.

16 (2) Subject to the provisions of subsection (c)(3), the following
17 nonexclusive list of aggravating factors may be considered in determining
18 whether substantial and compelling reasons for departure exist:

19 (A) The victim was particularly vulnerable due to age, infirmity, or
20 reduced physical or mental capacity which was known or should have
21 been known to the offender.

22 (B) The defendant's conduct during the commission of the current
23 offense manifested excessive brutality to the victim in a manner not
24 normally present in that offense.

25 (C) The offense was motivated entirely or in part by the race, color,
26 religion, ethnicity, national origin or sexual orientation of the victim or the
27 offense was motivated by the defendant's belief or perception, entirely or
28 in part, of the race, color, religion, ethnicity, national origin or sexual
29 orientation of the victim whether or not the defendant's belief or perception
30 was correct.

31 (D) The offense involved a fiduciary relationship which existed
32 between the defendant and the victim.

33 (E) The defendant, 18 or more years of age, employed, hired, used,
34 persuaded, induced, enticed or coerced any individual under 16 years of
35 age to:

36 (i) Commit any person felony;

37 (ii) assist in avoiding detection or apprehension for commission of
38 any person felony; or

39 (iii) attempt, conspire or solicit, as defined in K.S.A. 2018 Supp. 21-
40 5301, 21-5302 and 21-5303, and amendments thereto, to commit any
41 person felony.

42 That the defendant did not know the age of the individual under 16
43 years of age shall not be a consideration.

1 (F) The defendant's current crime of conviction is a crime of extreme
2 sexual violence and the defendant is a predatory sex offender. As used in
3 this subsection:

4 (i) "Crime of extreme sexual violence" is a felony limited to the
5 following:

6 (a) A crime involving a nonconsensual act of sexual intercourse or
7 sodomy with any person;

8 (b) a crime involving an act of sexual intercourse, sodomy or lewd
9 fondling and touching with any child who is 14 or more years of age but
10 less than 16 years of age and with whom a relationship has been
11 established or promoted for the primary purpose of victimization;

12 (c) a crime involving an act of sexual intercourse, sodomy or lewd
13 fondling and touching with any child who is less than 14 years of age;

14 (d) aggravated human trafficking, as defined in K.S.A. 2018 Supp.
15 21-5426(b), and amendments thereto, if the victim is less than 14 years of
16 age; or

17 (e) commercial sexual exploitation of a child, as defined in K.S.A.
18 2018 Supp. 21-6422, and amendments thereto, if the victim is less than 14
19 years of age.

20 (ii) "Predatory sex offender" is an offender who has been convicted of
21 a crime of extreme sexual violence as the current crime of conviction and
22 who:

23 (a) Has one or more prior convictions of any crimes of extreme
24 sexual violence. Any prior conviction used to establish the defendant as a
25 predatory sex offender pursuant to this subsection shall also be counted in
26 determining the criminal history category; or

27 (b) suffers from a mental condition or personality disorder which
28 makes the offender likely to engage in additional acts constituting crimes
29 of extreme sexual violence.

30 (iii) "Mental condition or personality disorder" means an emotional,
31 mental or physical illness, disease, abnormality, disorder, pathology or
32 condition which motivates the person, affects the predisposition or desires
33 of the person, or interferes with the capacity of the person to control
34 impulses to commit crimes of extreme sexual violence.

35 (G) The defendant was incarcerated during the commission of the
36 offense.

37 (H) The crime involved two or more participants in the criminal
38 conduct, and the defendant played a major role in the crime as the
39 organizer, leader, recruiter, manager or supervisor.

40 In determining whether aggravating factors exist as provided in this
41 section, the court shall review the victim impact statement.

42 (3) If a factual aspect of a crime is a statutory element of the crime or
43 is used to subclassify the crime on the crime severity scale, that aspect of

1 the current crime of conviction may be used as an aggravating or
2 mitigating factor only if the criminal conduct constituting that aspect of the
3 current crime of conviction is significantly different from the usual
4 criminal conduct captured by the aspect of the crime.

5 (d) In determining aggravating or mitigating circumstances, the court
6 shall consider:

- 7 (1) Any evidence received during the proceeding;
- 8 (2) the presentence report;
- 9 (3) written briefs and oral arguments of either the state or counsel for
10 the defendant; and
- 11 (4) any other evidence relevant to such aggravating or mitigating
12 circumstances that the court finds trustworthy and reliable.

13 (e) Upon motion of the prosecutor stating that the defendant has
14 provided substantial assistance in the investigation or prosecution of
15 another person who is alleged to have committed an offense, the court may
16 consider such mitigation in determining whether substantial and
17 compelling reasons for a departure exist. In considering this mitigating
18 factor, the court may consider the following:

- 19 (1) The court's evaluation of the significance and usefulness of the
20 defendant's assistance, taking into consideration the prosecutor's
21 evaluation of the assistance rendered;
- 22 (2) the truthfulness, completeness and reliability of any information
23 or testimony provided by the defendant;
- 24 (3) the nature and extent of the defendant's assistance;
- 25 (4) any injury suffered, or any danger or risk of injury to the
26 defendant or the defendant's family resulting from such assistance; and
- 27 (5) the timeliness of the defendant's assistance.

28 Sec. 2. K.S.A. 2018 Supp. 21-6815 is hereby repealed.

29 Sec. 3. This act shall take effect and be in force from and after its
30 publication in the statute book.