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4 **SENATE BILL No. 521**

5
6 By Committee on Judiciary

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8 2-6
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10 AN ACT concerning crimes, criminal procedure and punishment; relat-
11 ing to departure sentencing, procedures; amending K.S.A. 21-4718
12 and K.S.A. 2001 Supp. 21-4716 and repealing the existing sections.
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14 *Be it enacted by the Legislature of the State of Kansas:*

15 Section 1. K.S.A. 2001 Supp. 21-4716 is hereby amended to read as
16 follows: 21-4716. (a) ***Except as provided in subsection (b), the***
17 ***sentencing judge shall impose the presumptive sentence provided by the***
18 ***sentencing guidelines for crimes committed on or after July 1, 1993, un-***
19 ***less the judge finds substantial and compelling reasons to impose a de-***
20 ***parture. ~~Other than the fact of a prior conviction, any fact that would~~***
21 ***increase the penalty for a crime beyond the statutory maximum, must be***
22 ***submitted to a jury or to the court in a bench trial, and proved beyond a***
23 ***reasonable doubt.*** If the sentencing judge departs from the presumptive
24 sentence, the judge shall state on the record at the time of sentencing
25 the substantial and compelling reasons for the departure.

26 ***(b) Subject to the provisions of subsection (b)(1) of K.S.A. 21-***
27 ***4718, and amendments thereto, any fact that would increase the***
28 ***penalty for a crime beyond the statutory maximum, other than a***
29 ***prior conviction, must be submitted to a jury and proved beyond a***
30 ***reasonable doubt.***

31 ~~(b)(1)~~ ***(c)(1)*** Subject to the provisions of subsection (b)(3), the fol-
32 lowing nonexclusive list of mitigating factors may be considered in deter-
33 mining whether substantial and compelling reasons for a departure exist:

34 (A) The victim was an aggressor or participant in the criminal conduct
35 associated with the crime of conviction.

36 (B) The offender played a minor or passive role in the crime or par-
37 ticipated under circumstances of duress or compulsion. This factor is not
38 sufficient as a complete defense.

39 (C) The offender, because of physical or mental impairment, lacked
40 substantial capacity for judgment when the offense was committed. The
41 voluntary use of intoxicants, drugs or alcohol does not fall within the
42 purview of this factor.

43 (D) The defendant, or the defendant's children, suffered a continuing

1 pattern of physical or sexual abuse by the victim of the offense and the
2 offense is a response to that abuse.

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

5 (2) Subject to the provisions of subsection (b)(3), the following no-
6 nexclusive list of aggravating factors may be considered in determining
7 whether substantial and compelling reasons for departure exist:

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

11 (B) The defendant's conduct during the commission of the current
12 offense manifested excessive brutality to the victim in a manner not nor-
13 mally present in that offense.

14 (C) The offense was motivated entirely or in part by the race, color,
15 religion, ethnicity, national origin or sexual orientation of the victim **or**
16 ***the offense was motivated by the defendant's belief or perception,***
17 ***entirely or in part, of the race, color, religion, ethnicity, national***
18 ***origin or sexual orientation of the victim whether or not the de-***
19 ***fendant's belief or perception was correct.***

20 (D) The offense involved a fiduciary relationship which existed be-
21 tween the defendant and the victim.

22 (E) The defendant, 18 or more years of age, employed, hired, used,
23 persuaded, induced, enticed or coerced any individual under 16 years of
24 age to commit or assist in avoiding detection or apprehension for com-
25 mission of any person felony or any attempt, conspiracy or solicitation as
26 defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto
27 to commit any person felony regardless of whether the defendant knew
28 the age of the individual under 16 years of age.

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

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

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

36 (b) a crime involving an act of sexual intercourse, sodomy or lewd
37 fondling and touching with any child who is 14 or more years of age but
38 less than 16 years of age and with whom a relationship has been estab-
39 lished or promoted for the primary purpose of victimization; or

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

42 (ii) "Predatory sex offender" is an offender who has been convicted
43 of a crime of extreme sexual violence as the current crime of conviction

1 and who:

2 (a) Has one or more prior convictions of any crimes of extreme sexual
3 violence. Any prior conviction used to establish the defendant as a pred-
4 atory sex offender pursuant to this subsection shall also be counted in
5 determining the criminal history category; or

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

9 (iii) “Mental condition or personality disorder” means an emotional,
10 mental or physical illness, disease, abnormality, disorder, pathology or
11 condition which motivates the person, affects the predisposition or desires
12 of the person, or interferes with the capacity of the person to control
13 impulses to commit crimes of extreme sexual violence.

14 (G) The defendant was incarcerated during the commission of the
15 offense.

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

18 (3) If a factual aspect of a crime is a statutory element of the crime
19 or is used to subclassify the crime on the crime severity scale, that aspect
20 of the current crime of conviction may be used as an aggravating or mit-
21 igating factor only if the criminal conduct constituting that aspect of the
22 current crime of conviction is significantly different from the usual crim-
23 inal conduct captured by the aspect of the crime.

24 (c) In determining aggravating or mitigating circumstances, the court
25 shall consider:

- 26 (1) Any evidence received during the proceeding;
- 27 (2) the presentence report;
- 28 (3) written briefs and oral arguments of either the state or counsel
29 for the defendant; and
- 30 (4) any other evidence relevant to such aggravating or mitigating cir-
31 cumstances that the court finds trustworthy and reliable.

32 Sec. 2. K.S.A. 21-4718 is hereby amended to read as follows: 21-
33 4718. (a) (1) Whenever a person is convicted of a felony, the court upon
34 motion of either the defendant or the state, shall hold a hearing to con-
35 sider imposition of a departure sentence *other than an upward durational*
36 *departure sentence*. The motion shall state the type of departure sought
37 and the reasons and factors relied upon. The hearing shall be scheduled
38 so that the parties have adequate time to prepare and present arguments
39 regarding the issues of departure sentencing. The victim of a crime or
40 the victim’s family shall be notified of the right to be present at the hear-
41 ing for the convicted person by the county or district attorney. The parties
42 may submit written arguments to the court prior to the date of the hearing
43 and may make oral arguments before the court at the hearing. The court

1 shall review the victim impact statement. Prior to the hearing, the court
2 shall transmit to the defendant or the defendant's attorney and the pros-
3 ecuting attorney copies of the presentence investigation report.

4 (2) At the conclusion of the hearing or within 20 days thereafter, the
5 court shall issue findings of fact and conclusions of law regarding the
6 issues submitted by the parties, and shall enter an appropriate order.

7 ~~(b)~~ (3) If the court decides to depart on its own volition, without a
8 motion from the state or the defendant, the court must notify all parties
9 of its intent and allow reasonable time for either party to respond if ~~they~~
10 ~~request~~ *requested*. The notice shall state the type of departure intended
11 by the court and the reasons and factors relied upon.

12 ~~(c)~~ (4) In each case in which the court imposes a sentence that de-
13 viates from the presumptive sentence, the court shall make findings of
14 fact as to the reasons for departure *as provided in this subsection* regard-
15 less of whether a hearing is requested.

16 (b) (1) *Whenever a person is convicted of a felony, the court, upon*
17 *motion of the county or district attorney, or upon the filing of a written*
18 *notice of the court itself, shall conduct a separate departure sentence pro-*
19 *ceeding to determine whether the defendant might be subject to an up-*
20 *ward durational departure sentence. Such notice shall be filed by the court*
21 ***not less than 30 days prior to the date of trial or if the trial date is***
22 ***to take place in less than 30 days then*** *within five days from the date*
23 *of the arraignment and allow reasonable time for either party to respond*
24 *if requested and shall state the specifics of the departure intended by the*
25 *court and the reasons and factors relied upon. If the county or district*
26 *attorney decides to seek an upward durational departure sentence, the*
27 *county or district attorney must file a motion* ***not less than 30 days prior***
28 ***to the date of trial or if the trial date is to take place in less than 30***
29 ***days then*** *within five days from the date of the arraignment. The pro-*
30 *ceeding shall be conducted by the court before the trial jury as soon as*
31 *practicable. If any person who served on the trial jury is unable to serve*
32 *on the jury for the upward durational departure sentence proceeding, the*
33 *court shall substitute an alternate juror who has been impaneled for the*
34 *trial jury. If there are insufficient alternate jurors to replace trial jurors*
35 *who are unable to serve at the upward durational departure sentence*
36 *proceeding, the court may summon a special jury of 12 persons which*
37 *shall determine all of the specific facts that may serve to enhance the*
38 *maximum sentence. Jury selection procedures, qualifications of jurors and*
39 *grounds for exemption or challenge of prospective jurors in criminal trials*
40 *shall be applicable to the selection of such special jury. The jury at the*
41 *upward durational departure sentence proceeding may be waived in the*
42 *manner provided by K.S.A. 22-3403, and amendments thereto, for waiver*
43 *of a trial jury. If the jury at the upward durational departure sentence*

1 *proceeding has been waived or the trial jury has been waived, the upward*
2 *durational departure sentence proceeding shall be conducted by the court.*

3 (2) *In the upward durational departure sentence proceeding, evi-*
4 *dence may be presented concerning any matter that the court deems rel-*
5 *evant to the question of determining if any specific factors exist that may*
6 *serve to enhance the maximum sentence as provided by K.S.A. 21-4716*
7 *or 21-4717, and amendments thereto. Only such evidence as the state has*
8 *made known to the defendant prior to the departure sentence proceeding*
9 *shall be admissible, and no evidence secured in violation of the constitu-*
10 *tion of the United States or of the state of Kansas shall be admissible. No*
11 *testimony by the defendant at the upward durational departure sentence*
12 *proceeding shall be admissible against the defendant at any subsequent*
13 *criminal proceeding. At the conclusion of the evidentiary presentation,*
14 *the court shall allow the parties a reasonable period of time in which to*
15 *present oral argument.*

16 (3) *The court shall provide oral and written instructions to the jury*
17 *to guide its deliberations.*

18 (4) *If, by unanimous vote, the jury finds beyond a reasonable doubt*
19 *that one or more specific factors exist that may serve to enhance the max-*
20 *imum sentence, the defendant may be sentenced pursuant to K.S.A. 21-*
21 *4716 through 21-4719, and amendments thereto; otherwise, the defendant*
22 *shall be sentenced as provided by law. The jury, if its verdict is a unani-*
23 *mous recommendation that one or more of the specific factors that may*
24 *serve to enhance the maximum sentence exists, shall designate in writing,*
25 *signed by the foreman of the jury, the specific factor or factors which the*
26 *jury found beyond a reasonable doubt. If, after a reasonable time for*
27 *deliberation, the jury is unable to reach a verdict of finding any of the*
28 *specific factors, the court shall dismiss the jury and shall only impose a*
29 *sentence as provided by law. In nonjury cases, the court shall follow the*
30 *requirements of this subsection in determining if one or more of the spe-*
31 *cific factors that may serve to enhance the maximum sentence exists.*

32 Sec. 3. K.S.A. 21-4718 and K.S.A. 2001 Supp. 21-4716 are hereby
33 repealed.

34 Sec. 4. This act shall take effect and be in force from and after its
35 publication in the ~~statute book~~ **Kansas register**.

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