

As Amended by Senate Committee

Session of 2019

**SENATE BILL No. 108**

By Committee on Judiciary

2-6

1 AN ACT concerning ~~children; relating to crimes and punishment; *crimes,*~~  
2 ***punishment and criminal procedure; relating to*** involuntary  
3 manslaughter; abuse of a child; ~~revised code for care of children;~~  
4 ~~presumption of unfitness; *{departure sentencing; mitigating factors;}*~~  
5 amending K.S.A. 2018 Supp. 21-5405; ~~and,}~~ 21-5602 and ~~38-2271~~  
6 ***{and 21-6815}*** and repealing the existing sections.

7  
8 ***WHEREAS, The provisions of K.S.A. 2018 Supp. 21-5405 and 21-***  
9 ***5602, as amended by this act, shall be known as Mireya's law.***

10 ***Now, therefore:***

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

12 Section 1. K.S.A. 2018 Supp. 21-5405 is hereby amended to read as  
13 follows: 21-5405. (a) Involuntary manslaughter is the killing of a human  
14 being committed:

15 (1) Recklessly;

16 (2) in the commission of, or attempt to commit, or flight from any  
17 felony, other than an inherently dangerous felony as defined in K.S.A.  
18 2018 Supp. 21-5402, and amendments thereto, that is enacted for the  
19 protection of human life or safety or a misdemeanor that is enacted for the  
20 protection of human life or safety, including acts described in K.S.A. 8-  
21 1566 and 8-1568(a), and amendments thereto, but excluding the acts  
22 described in K.S.A. 8-1567, and amendments thereto;

23 (3) in the commission of, or attempt to commit, or flight from an act  
24 described in K.S.A. 8-1567, and amendments thereto;

25 (4) during the commission of a lawful act in an unlawful manner; or

26 (5) in the commission of, or attempt to commit, or flight from an act  
27 described in K.S.A. 8-1567, and amendments thereto, while:

28 (A) In violation of any restriction imposed on such person's driving  
29 privileges pursuant to article 10 of chapter 8 of the Kansas Statutes  
30 Annotated, and amendments thereto;

31 (B) such person's driving privileges are suspended or revoked  
32 pursuant to article 10 of chapter 8 of the Kansas Statutes Annotated, and  
33 amendments thereto; or

34 (C) such person has been deemed a habitual violator as defined in

1 K.S.A. 8-285, and amendments thereto, including at least one violation of  
2 K.S.A. 8-1567, and amendments thereto, or violating an ordinance of any  
3 city in this state, any resolution of any county in this state or any law of  
4 another state, which ordinance, resolution or law declares to be unlawful  
5 the acts prohibited by that statute.

6 (b) Involuntary manslaughter as defined in:

7 (1) Subsection (a)(1), (a)(2) or (a)(4) is a:

8 (A) Severity level 5, person felony, *except as provided in subsection*  
9 *(b)(1)(B); and*

10 (B) *severity level 3, person felony, if the victim is under the age of six*  
11 *years;*

12 (2) subsection (a)(3) is a severity level 4, person felony; and

13 (3) subsection (a)(5) is a severity level 3, person felony.

14 Sec. 2. K.S.A. 2018 Supp. 21-5602 is hereby amended to read as  
15 follows: 21-5602. (a) Abuse of a child is knowingly:

16 (1) Torturing or cruelly beating any child under the age of 18 years;

17 (2) shaking any child under the age of 18 years which results in great  
18 bodily harm to the child; or

19 (3) inflicting cruel and inhuman corporal punishment upon any child  
20 under the age of 18 years.

21 (b) Abuse of a child is a:

22 (1) Severity level 5, person felony, *except as provided in subsection*  
23 *(b)(2); and*

24 (2) *severity level-3 4, person felony, if the victim is under the age of*  
25 *six years.*

26 (c) A person who violates the provisions of this section may also be  
27 prosecuted for, convicted of, and punished for any form of battery or  
28 homicide.

29 ~~Sec. 3.—K.S.A. 2018 Supp. 38-2271 is hereby amended to read as~~  
30 ~~follows: 38-2271. (a) It is presumed in the manner provided in K.S.A. 60-~~  
31 ~~414, and amendments thereto, that a parent is unfit by reason of conduct or~~  
32 ~~condition which renders the parent unable to fully care for a child, if the~~  
33 ~~state establishes, by clear and convincing evidence, that:~~

34 (1) A parent has previously been found to be an unfit parent in  
35 proceedings under K.S.A. 2018 Supp. 38-2266 et seq., and amendments  
36 thereto, or comparable proceedings under the laws of another jurisdiction;

37 (2) (A) a parent has twice before been convicted of a crime specified  
38 in article 34, 35, or 36 of chapter 21 of the Kansas Statutes Annotated,  
39 prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas  
40 Statutes Annotated, or K.S.A. 2018 Supp. 21-6104, 21-6325, 21-6326 or  
41 21-6418 through 21-6421, and amendments thereto, or comparable  
42 offenses under the laws of another jurisdiction, or an attempt or attempts to  
43 commit such crimes, and the victim was under the age of 18 years; or

1 ~~(B) a parent has been convicted of involuntary manslaughter, K.S.A.~~  
2 ~~2018 Supp. 21-2405, and amendments thereto, or abuse of a child, K.S.A.~~  
3 ~~2018 Supp. 21-5602, and amendments thereto, or a comparable offense~~  
4 ~~under the laws of another jurisdiction, or an attempt or to commit such~~  
5 ~~crime, and the victim was under the age of six years;~~

6 ~~(3) on two or more prior occasions a child in the physical custody of~~  
7 ~~the parent has been adjudicated a child in need of care as defined by~~  
8 ~~K.S.A. 2018 Supp. 38-2202(d)(1), (d)(3), (d)(5) or (d)(11), and~~  
9 ~~amendments thereto, or comparable proceedings under the laws of another~~  
10 ~~jurisdiction;~~

11 ~~(4) the parent has been convicted of causing the death of another~~  
12 ~~child or stepchild of the parent;~~

13 ~~(5) the child has been in an out-of-home placement, under court order~~  
14 ~~for a cumulative total period of one year or longer and the parent has~~  
15 ~~substantially neglected or willfully refused to carry out a reasonable plan,~~  
16 ~~approved by the court, directed toward reintegration of the child into the~~  
17 ~~parental home;~~

18 ~~(6) (A) the child has been in an out-of-home placement, under court~~  
19 ~~order for a cumulative total period of two years or longer; (B) the parent~~  
20 ~~has failed to carry out a reasonable plan, approved by the court, directed~~  
21 ~~toward reintegration of the child into the parental home; and (C) there is a~~  
22 ~~substantial probability that the parent will not carry out such plan in the~~  
23 ~~near future;~~

24 ~~(7) a parent has been convicted of capital murder, K.S.A. 21-3439,~~  
25 ~~prior to its repeal, or K.S.A. 2018 Supp. 21-5401, and amendments~~  
26 ~~thereto, murder in the first degree, K.S.A. 21-3401, prior to its repeal, or~~  
27 ~~K.S.A. 2018 Supp. 21-5402, and amendments thereto, murder in the~~  
28 ~~second degree, K.S.A. 21-3402, prior to its repeal, or K.S.A. 2018 Supp.~~  
29 ~~21-5403, and amendments thereto, voluntary manslaughter, K.S.A. 21-~~  
30 ~~3403, prior to its repeal, or K.S.A. 2018 Supp. 21-5404, and amendments~~  
31 ~~thereto, human trafficking or aggravated human trafficking, K.S.A. 21-~~  
32 ~~3446 or 21-3447, prior to their repeal, or K.S.A. 2018 Supp. 21-5426, and~~  
33 ~~amendments thereto, or commercial sexual exploitation of a child, K.S.A.~~  
34 ~~2018 Supp. 21-6422, and amendments thereto, or comparable proceedings~~  
35 ~~under the laws of another jurisdiction or, has been adjudicated a juvenile~~  
36 ~~offender because of an act which if committed by an adult would be an~~  
37 ~~offense as provided in this subsection, and the victim of such murder was~~  
38 ~~the other parent of the child;~~

39 ~~(8) a parent abandoned or neglected the child after having knowledge~~  
40 ~~of the child's birth or either parent has been granted immunity from~~  
41 ~~prosecution for abandonment of the child under K.S.A. 21-3604(b), prior~~  
42 ~~to its repeal, or K.S.A. 2018 Supp. 21-5605(d), and amendments thereto;~~  
43 ~~or~~

1       ~~(9) a parent has made no reasonable efforts to support or~~  
2 ~~communicate with the child after having knowledge of the child's birth;~~

3       ~~(10) a father, after having knowledge of the pregnancy, failed without~~  
4 ~~reasonable cause to provide support for the mother during the six months~~  
5 ~~prior to the child's birth;~~

6       ~~(11) a father abandoned the mother after having knowledge of the~~  
7 ~~pregnancy;~~

8       ~~(12) a parent has been convicted of rape, K.S.A. 21-3502, prior to its~~  
9 ~~repeal, or K.S.A. 2018 Supp. 21-5503, and amendments thereto, or~~  
10 ~~comparable proceedings under the laws of another jurisdiction resulting in~~  
11 ~~the conception of the child; or~~

12       ~~(13) a parent has failed or refused to assume the duties of a parent for~~  
13 ~~two consecutive years next preceding the filing of the petition. In making~~  
14 ~~this determination the court may disregard incidental visitations, contacts,~~  
15 ~~communications or contributions.~~

16       ~~(b) The burden of proof is on the parent to rebut the presumption of~~  
17 ~~unfitness by a preponderance of the evidence. In the absence of proof that~~  
18 ~~the parent is presently fit and able to care for the child or that the parent~~  
19 ~~will be fit and able to care for the child in the foreseeable future, the court~~  
20 ~~shall terminate parental rights in proceedings pursuant to K.S.A. 2018-~~  
21 ~~Supp. 38-2266 et seq., and amendments thereto.~~

22       ~~***§Sec. 3. K.S.A. 2018 Supp. 21-6815 is hereby amended to read as***~~  
23 ~~***follows: 21-6815. (a) Except as provided in subsection (b), the***~~  
24 ~~***sentencing judge shall impose the presumptive sentence provided by the***~~  
25 ~~***sentencing guidelines unless the judge finds substantial and compelling***~~  
26 ~~***reasons to impose a departure sentence. If the sentencing judge departs***~~  
27 ~~***from the presumptive sentence, the judge shall state on the record at the***~~  
28 ~~***time of sentencing the substantial and compelling reasons for the***~~  
29 ~~***departure.***~~

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

34       ~~***(c) (1) Subject to the provisions of subsections (c)(3) and (e), the***~~  
35 ~~***following nonexclusive list of mitigating factors may be considered in***~~  
36 ~~***determining whether substantial and compelling reasons for a departure***~~  
37 ~~***exist:***~~

38       ~~***(A) The victim was an aggressor or participant in the criminal***~~  
39 ~~***conduct associated with the crime of conviction, except that this factor***~~  
40 ~~***shall not apply to a sexually violent crime as defined in K.S.A. 22-3717,***~~  
41 ~~***and amendments thereto, or electronic solicitation as defined in K.S.A.***~~  
42 ~~***2018 Supp. 21-5509, and amendments thereto, when: (i) The victim is less***~~  
43 ~~***than 14 years of age and the offender is 18 or more years of age; or (ii)***~~

1 *the offender hires any person by giving, or offering to or agreeing to give,*  
2 *anything of value to the person to engage in an unlawful sex act.*

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

6 *(C) The offender, because of physical or mental impairment, lacked*  
7 *substantial capacity for judgment when the offense was committed. The*  
8 *voluntary use of intoxicants, drugs or alcohol does not fall within the*  
9 *purview of this factor.*

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

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

15 *(F) The offender committed such crime as a result of an injury,*  
16 *including major depressive disorder, polytrauma, post-traumatic stress*  
17 *disorder or traumatic brain injury, connected to service in a combat*  
18 *zone, as defined in section 112 of the federal internal revenue code of*  
19 *1986, in the armed forces of the United States of America. As used in*  
20 *this subsection, "major depressive disorder," "polytrauma," "post-*  
21 *traumatic stress disorder" and "traumatic brain injury" shall mean the*  
22 *same as such terms are defined in K.S.A. 2018 Supp. 21-6630, and*  
23 *amendments thereto.*

24 *(2) Subject to the provisions of subsection (c)(3), the following*  
25 *nonexclusive list of aggravating factors may be considered in*  
26 *determining whether substantial and compelling reasons for departure*  
27 *exist:*

28 *(A) The victim was particularly vulnerable due to age, infirmity, or*  
29 *reduced physical or mental capacity which was known or should have*  
30 *been known to the offender.*

31 *(B) The defendant's conduct during the commission of the current*  
32 *offense manifested excessive brutality to the victim in a manner not*  
33 *normally present in that offense.*

34 *(C) The offense was motivated entirely or in part by the race, color,*  
35 *religion, ethnicity, national origin or sexual orientation of the victim or*  
36 *the offense was motivated by the defendant's belief or perception,*  
37 *entirely or in part, of the race, color, religion, ethnicity, national origin*  
38 *or sexual orientation of the victim whether or not the defendant's belief*  
39 *or perception was correct.*

40 *(D) The offense involved a fiduciary relationship which existed*  
41 *between the defendant and the victim.*

42 *(E) The defendant, 18 or more years of age, employed, hired, used,*  
43 *persuaded, induced, enticed or coerced any individual under 16 years of*

1 *age to:*

2 *(i) Commit any person felony;*

3 *(ii) assist in avoiding detection or apprehension for commission of*  
4 *any person felony; or*

5 *(iii) attempt, conspire or solicit, as defined in K.S.A. 2018 Supp. 21-*  
6 *5301, 21-5302 and 21-5303, and amendments thereto, to commit any*  
7 *person felony.*

8 *That the defendant did not know the age of the individual under 16*  
9 *years of age shall not be a consideration.*

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

13 *(i) "Crime of extreme sexual violence" is a felony limited to the*  
14 *following:*

15 *(a) A crime involving a nonconsensual act of sexual intercourse or*  
16 *sodomy with any person;*

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

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

23 *(d) aggravated human trafficking, as defined in K.S.A. 2018 Supp.*  
24 *21-5426(b), and amendments thereto, if the victim is less than 14 years*  
25 *of age; or*

26 *(e) commercial sexual exploitation of a child, as defined in K.S.A.*  
27 *2018 Supp. 21-6422, and amendments thereto, if the victim is less than*  
28 *14 years of age.*

29 *(ii) "Predatory sex offender" is an offender who has been convicted*  
30 *of a crime of extreme sexual violence as the current crime of conviction*  
31 *and who:*

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

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

39 *(iii) "Mental condition or personality disorder" means an*  
40 *emotional, mental or physical illness, disease, abnormality, disorder,*  
41 *pathology or condition which motivates the person, affects the*  
42 *predisposition or desires of the person, or interferes with the capacity of*  
43 *the person to control impulses to commit crimes of extreme sexual*

1 violence.

2 (G) *The defendant was incarcerated during the commission of the*  
3 *offense.*

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

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

9 (3) *If a factual aspect of a crime is a statutory element of the crime*  
10 *or is used to subclassify the crime on the crime severity scale, that aspect*  
11 *of the current crime of conviction may be used as an aggravating or*  
12 *mitigating factor only if the criminal conduct constituting that aspect of*  
13 *the current crime of conviction is significantly different from the usual*  
14 *criminal conduct captured by the aspect of the crime.*

15 (d) *In determining aggravating or mitigating circumstances, the*  
16 *court shall consider:*

17 (1) *Any evidence received during the proceeding;*

18 (2) *the presentence report;*

19 (3) *written briefs and oral arguments of either the state or counsel*  
20 *for the defendant; and*

21 (4) *any other evidence relevant to such aggravating or mitigating*  
22 *circumstances that the court finds trustworthy and reliable.*

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

29 (1) *The court's evaluation of the significance and usefulness of the*  
30 *defendant's assistance, taking into consideration the prosecutor's*  
31 *evaluation of the assistance rendered;*

32 (2) *the truthfulness, completeness and reliability of any information*  
33 *or testimony provided by the defendant;*

34 (3) *the nature and extent of the defendant's assistance;*

35 (4) *any injury suffered, or any danger or risk of injury to the*  
36 *defendant or the defendant's family resulting from such assistance; and*

37 (5) *the timeliness of the defendant's assistance.}*

38 ~~Sec. 4-3-4.}~~ K.S.A. 2018 Supp. 21-5405-~~and~~{}, 21-5602-~~and~~ 38-  
39 ~~2271- {and 21-6815}~~ are hereby repealed.

40 ~~Sec. 5-4-5.}~~ This act shall take effect and be in force from and after  
41 its publication in the statute book.