

House Corrections and Juvenile Justice Committee- House Bill 2299

February 22, 2019

Kansas Association of Criminal Defense Lawyers

Opponent

Chairman Jennings and Members of the Committee:

The Kansas Association of Criminal Defense Lawyers (KACDL) is a 300+ member organization dedicated to ensuring justice and due process for persons accused of crime or other misconduct. KACDL is opposed to HB2299, which would amend K.S.A. 21-6815(c)(1)(A) to prevent defendants convicted of a sex offense described in Article 55 of Chapter 21 of the Kansas Statutes Annotated and defendants convicted of human trafficking, aggravated human trafficking, incest, or aggravated incest from arguing for a departure based on the conduct of a victim under the age of 16. The language proposed in HB 2299 would apply to juvenile defendants as it is not limited to defendants over the age of 18.

*The following testimony is identical to that offered in our written testimony on House Bill 2283.

Overview of Sentencing Guidelines and Departure Mechanisms

A brief overview of the sentencing guidelines and the departure mechanism provided by this statute is important for understanding the language at issue in HB2299. The Kansas Sentencing Guidelines Act (KSGA) was enacted in 1993 to provide uniformity in sentencing for criminal conduct. K.S.A. 21-6802(a). A defendant who is convicted of a crime is sentenced based on the severity level of the offense and that defendant's prior criminal history. In a routine case, a defendant is sentenced to one of the three possible sentences, listed in months, in the sentencing grid box which corresponds to his or her criminal history and the severity level of the crime committed. (A copy of the current nondrug sentencing grid is attached to this testimony for reference.)

However, the KSGA also recognizes that in certain circumstances, a different sentence, either more or less severe might be appropriate. K.S.A. 21-6802(b) ("[t]he sentencing court may consider in all cases a range of alternatives with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case, consistent with these guidelines and the permitted disposition and durational departures..."). Therefore, the KSGA permits a defendant to file, through their attorney, a motion for a downward departure. K.S.A. 21-6817. (Incidentally, the KSGA also permits the State or the

court itself to seek an upward departure -- a more severe sentence, or prison instead of probation -- based on aggravating circumstances.) The purpose of a departure motion is to allow the judge to tailor the sentence in certain cases where the sentence provided by the guidelines does not take into account the unique circumstances of that individual case. That motion asks a judge to find that there are substantial and compelling reasons for the judge to grant a lesser sentence than the sentence in the grid box which applies to that defendant -- either a shorter prison sentence, or probation instead of a prison sentence. The defendant's motion is only filed after a conviction, meaning that a defendant has been found guilty either by trial or plea, of a felony crime. It is not a defense to any of the charges in the case and if a judge grants such a departure it does not mean a defendant is not guilty or that a victim is any less of a victim.

It is the defendant's duty, as the one making the motion, to set forth circumstances for the court to consider as substantial and compelling reasons. K.S.A. 21-6815(c)(1) provides a list of some circumstances which the legislature has recognized in the past may, in some cases, be mitigating circumstances that warrant a reduction in sentence. A mitigating factor is defined by statute as a "substantial and compelling reason justifying an exceptional sentence whereby the sentencing court may impose a departure sentence outside of the standard sentencing range for a crime. A mitigating factor may result in a dispositional or durational departure". K.S.A. 21-6803. The legislature wisely saw fit to provide these departure factors when the KSGA was created because they understood that each crime set out by statute could encompass a wide range of behaviors and that in some cases, the presumptive punishment would not fit the crime.

The legislature recodified the KSGA effective July 1, 2011. In *State v. Theurer*, 50 Kan. App. 2d 1203, 1220–22, 337 P.3d 725, 738–39 (2014), the Court noted that "[t]hese changes appear to reflect a more balanced, case-based view of sentencing, in line with the KCCRC's recommendation that a sentence should 'enhance public safety through deterrence of future criminal action, ... rehabilitate the offender, and ... appropriately punish [the offender] for committing the offense.'" *Theurer*, at 1220–22 citing the Kansas Criminal Code Recodification Commission, Final Report, p. 28. (December 16, 2010).

Mitigating factor in K.S.A. 21-6815(c)(1)(A)

K.S.A. 21-6815(c)(1)(A), at issue in this bill, is one of six specifically enumerated circumstances which the court can consider as a mitigating circumstance. This has been a departure factor since the beginning of the KSGA. While other parts of the departure statutes have been amended over the years, this factor has remained the same. If a judge finds this factor is present in a case *and* that it is a substantial and compelling reason to grant a departure, that judge may reduce the sentence in that case. K.S.A. 21-6815(a). If a judge makes a finding that the victim was an aggressor or participant in a crime, it does not change that person's status as a victim and it does not relieve a defendant of criminal liability. It is

simply a recognition that fairness dictates that a defendant who commits a crime where the victim played a role in the criminal activity may be punished less severely than a defendant who committed the same crime without the victim playing a role in the criminal activity. A defendant who committed a crime with the victim's participation may be less likely to reoffend in the future outside those specific circumstances in the crime of conviction, that defendant may deserve a less severe punishment, or may be more amenable to rehabilitation.

As the fiscal note provided by the sentencing commission shows, departures under K.S.A. 21-6815(c)(1)(A) are relatively rare. There were two cases where a departure was granted under this subsection in fiscal year 2018. The fiscal note does not state whether those cases involved defendants convicted of a sex offense described in Article 55 of Chapter 21 of the Kansas Statutes Annotated or defendants convicted of human trafficking, aggravated human trafficking, incest, or aggravated incest.

Recent application of K.S.A. 21-6815(c)(1)(A)

There was a Leavenworth County case recently where this departure factor was utilized. The defendant was convicted of a Severity Level 1 Electronic Solicitation charge. In that case, the defendant was sentenced to 70 months in prison. He will also have to register as a sex offender for the next 25 years (most likely the remainder of his life as he is 67 years old) and after his 70 months in prison he will have to report to postrelease supervision for at least 36 months. The Judge's finding in that case, that this departure factor was a substantial and compelling factor, did not excuse the defendant's conduct. It simply recognized that the role of the victims in that case was one factor which supported a somewhat shortened sentence. There were actually three different factors from K.S.A. 21-6815(c)(1) that the judge relied on when granting this departure for a reduced sentence: the role of the victim in the case; the defendant's intellectual disability, which the Judge found impacted the defendant's capacity for judgment at the time of the offense; and that the degree of harm or loss was less than typical. There was a lot of information provided to the Judge at sentencing which has not been fully represented in the media. Additionally, if the County Attorney thought the Judge had made a mistake in applying those departure factors, the County Attorney could have filed an appeal. The time for an appeal has passed and none has been filed.

Limiting the use of this departure factor does not protect victims. The victims in any given case are protected by the laws which have already convicted the defendant of the crime charged. Limiting this departure factor removes a judge's ability to consider all of the circumstances and evidence in a particular crime *after conviction* and prior to sentencing.

KACDL believes the departure factor in K.S.A. 21-6815(c)(1)(A) is a relevant sentencing consideration for a judge in select cases. It is not a defense to a criminal charge and it does not negate a victim's status as a victim. We would note that it is used sparingly by judges, as

documentation indicates it was accepted as a departure factor twice in fiscal year 2018. We would urge this Committee to allow judges to continue to consider this factor as a sentencing consideration in appropriate cases.

Thank you for your consideration,

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SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3+ Person Felony	2 Person Felony	1 Person & 1 Nonperson Felony	1 Person Felony	3+ Nonperson Felony	2 Nonperson Felony	1 Nonperson Felony	2+ Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 564	285 272 258	267 253 240	246 234 221	226 214 203	203 196 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38		
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25		21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

Probation Terms are:
 36 months recommended for felonies classified in Severity Levels 1-5
 24 months recommended for felonies classified in Severity Levels 6-7
 18 months (up to) for felonies classified in Severity Level 8
 12 months (up to) for felonies classified in Severity Levels 9-10

Postrelease Supervision Terms are:
 36 months for felonies classified in Severity Levels 1-4
 24 months for felonies classified in Severity Levels 5-6
 12 months for felonies classified in Severity Levels 7-10

Postrelease for felonies committed before 4/20/95 are:
 24 months for felonies classified in Severity Levels 1-6
 12 months for felonies classified in Severity Level 7-10

LEGEND	
	Presumptive Probation
	Presumptive Imprisonment