

K.S.A. § **21-4718**

KANSAS STATUTES ANNOTATED
CHAPTER 21.--CRIMES AND PUNISHMENTS
KANSAS CRIMINAL CODE (ARTICLES 31 TO 47)
PART III.--CLASSIFICATION OF CRIMES AND SENTENCING
ARTICLE 47.--SENTENCING GUIDELINES

21-4718. Departure sentencing; hearing; notice; findings of fact and conclusions of law; order; upward durational departure sentencing, procedures and jury requirements.

(a) (1) Whenever a person is convicted of a felony, the court upon motion of either the defendant or the state, shall hold a hearing to consider imposition of a departure sentence other than an upward durational departure sentence. The motion shall state the type of departure sought and the reasons and factors relied upon. The hearing shall be scheduled so that the parties have adequate time to prepare and present arguments regarding the issues of departure sentencing. The victim of a crime or the victim's family shall be notified of the right to be present at the hearing for the convicted person by the county or district attorney. The parties may submit written arguments to the court prior to the date of the hearing and may make oral arguments before the court at the hearing. The court shall review the victim impact statement. Prior to the hearing, the court shall transmit to the defendant or the defendant's attorney and the prosecuting attorney copies of the presentence investigation report.

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

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

(4) In each case in which the court imposes a sentence that deviates from the presumptive sentence, the court shall make findings of fact as to the reasons for departure as provided in this subsection regardless of whether a hearing is requested.

(b) (1) Upon motion of the county or district attorney to seek an upward durational departure sentence, the court shall consider imposition of such upward durational departure sentence in the manner provided in subsection (b)(2). The county or district attorney shall file such motion to seek an upward durational departure sentence not less than 30 days prior to the date of trial or if the trial date is to take place in less than 30 days then within five days from the date of the arraignment.

(2) The court shall determine if the presentation of any evidence regarding the alleged fact or factors that may increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be presented to a jury and proved beyond a reasonable doubt during the trial of the matter or following the determination of the defendant's innocence or guilt.

(3) If the presentation of the evidence regarding the alleged fact or factors is submitted to the jury during the trial of the matter as determined by the court, then the provisions of subsections (b)(5), (b)(6) and (b)(7) shall be applicable.

(4) If the court determines it is in the interest of justice, the court shall conduct a separate departure sentence proceeding to determine whether the defendant may be subject to an upward durational departure sentence. Such proceeding shall be conducted by the court before the trial jury as soon as practicable. If any person who served on the trial jury is unable to serve on the jury for the upward durational departure sentence proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If there are insufficient alternate jurors to replace trial jurors who are unable to serve at the upward durational departure sentence proceeding, the court may conduct such upward durational departure sentence proceeding before a jury which may have 12 or less jurors, but at no time less than six jurors. Any decision of an upward durational departure sentence proceeding shall be decided by a unanimous decision of the jury. Jury selection procedures, qualifications of jurors and grounds for exemption or challenge of prospective jurors in criminal trials shall be applicable to the selection of such jury. The jury at the upward durational departure sentence proceeding may be waived in the manner provided by [K.S.A. 22-3403](#), and amendments thereto, for waiver of a trial jury. If the jury at the upward durational departure sentence proceeding has been waived or the trial jury has been waived, the upward durational departure sentence proceeding shall be conducted by the court.

(5) In the upward durational departure sentence proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of determining if any specific factors exist that may serve to enhance the maximum sentence as provided by [K.S.A. 21-4716](#) or [21-4717](#), and amendments thereto. Only such evidence as the state has made known to the defendant prior to the upward durational departure sentence proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the upward durational departure sentence proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral arguments.

(6) The court shall provide oral and written instructions to the jury to guide its deliberations.

(7) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more specific factors exist that may serve to enhance the maximum sentence, the defendant may be sentenced pursuant to [K.S.A. 21-4716](#) through [21-4719](#), and amendments thereto; otherwise, the defendant shall be sentenced as provided by law. The jury, if its verdict is a unanimous recommendation that one or more of the specific factors that may serve to enhance the maximum sentence exists, shall designate in writing, signed by the foreman of the jury, the specific factor or factors which the jury found beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a verdict of finding any of the specific factors, the court shall dismiss the jury and shall only impose a sentence as provided by law. In nonjury cases, the court shall follow the requirements of this subsection in determining if one or more of the specific factors exist that may serve to enhance the maximum sentence.

History: L. 1992, ch. 239, § 18; L. 1993, ch. 291, § 264; L. 1994, ch. 291, § 58; L. 2002, ch. 170, § 2; June 6.

<[General Materials \(GM\)](#) - References, Annotations, or Tables>

LAW REVIEW AND BAR JOURNAL REFERENCES:

2003 Pocket Part LAW REVIEW AND BAR JOURNAL REFERENCES:

Survey of Recent Cases, 46 K.L.R. 919 (1998).

'2002 Legislative Wrap-Up,' Paul T. Davis, 71 J.K.B.A. No. 7, 15 (2002).

'Surviving Apprendi: A Procedural Ideal Meets the Real World of Determinate Sentencing,' Teresa L. Sittenauer, 72 J.K.B.A. No. 1, 44 (2003).

CASE ANNOTATIONS

1995 Main Volume CASE ANNOTATIONS

1. Whether prosecution is required to give notice of grounds upon which departure is sought examined. [State v. Gideon, 257 K. 591, 617, 894 P.2d 850 \(1995\)](#).
2. Whether court must make findings of fact of reasons for presumptive sentence departure if hearing not requested examined. [State v. Mares, 20 K.A.2d 971, 972, 893 P.2d 296 \(1995\)](#).

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3. Trial court's factual findings neither supported by evidence in record nor established by compelling reasons for upward sentence departure. [State v. Cox, 258 K. 557, 573, 908 P.2d 603 \(1995\)](#).
4. Notice requirements for court imposing departure sentence on its own volition discussed. [State v. Trimble, 21 K.A.2d 32, 37, 894 P.2d 920 \(1995\)](#).
5. Testimony of victim's family supporting downward departure in involuntary manslaughter held substantial competent evidence. [State v. Heath, 21 K.A.2d 410, 416, 901 P.2d 29 \(1995\)](#).
6. Trial court must rule on motion for departure from presumptive sentence after sentence imposed. [State v. Bost, 21 K.A.2d 560, 566, 903 P.2d 160 \(1995\)](#).
7. Lack of notice to defendant of aggravating factor used in imposition of departure sentence ruled harmless error. [State v. Valentine, 260 K. 431, 440, 921 P.2d 770 \(1996\)](#).
8. Trial court did not err by imposing upward departure based in part on randomness of defendant's crime. [State v. Alderson, 260 K. 445, 466, 922 P.2d 435 \(1996\)](#).
9. Sentencing court's jurisdiction to modify or depart from sentence after imposition of lawful KSGA (21-4701 et seq.) discussed. [State v. Miller, 260 K. 892, 896, 900, 926 P.2d 652 \(1996\)](#).
10. Prosecution motion to seek departure sentence is time-barred when not filed before imposition of conversion sentence. [State v. Beall, 22 K.A.2d 486, 488, 920 P.2d 448 \(1996\)](#).

11. Prosecutor has authority to recommend upward departure sentence to facilitate plea agreement. [Soto v. State, 23 K.A.2d 85, 89, 927 P.2d 954 \(1996\)](#).
12. Court not required to state reasons for refusing to depart from imposing a presumptive sentence. [State v. Windom, 23 K.A.2d 429, 430, 431, 932 P.2d 1019 \(1997\)](#).
13. Defendant may agree to a combined departure and sentencing hearing. [State v. Rodriguez, 23 K.A.2d 559, 560, 933 P.2d 164 \(1997\)](#).
14. Imposition of imprisonment sentence where defendant's offense committed while in custody pending felony trial requires departure. [State v. Marsh, 263 K. 773, 776, 952 P.2d 933 \(1998\)](#).
15. Defendant's failure to object to lack of notice to depart by trial judge precluded review. [State v. Billington, 24 K.A.2d 759, 761, 953 P.2d 1059 \(1998\)](#).
16. Trial court is not required to issue reasons for denial of departure to a defendant under subsection (a)(2). [State v. Koehn, 266 K. 10, 13, 966 P.2d 63 \(1998\)](#).
17. Error for court to depart from presumptive sentence without giving notice to parties. [State v. Colbert, 26 K.A.2d 177, 182, 987 P.2d 1103 \(1999\)](#).
18. Trial court imposition of upward departure based on fiduciary relationship of defendant and victim upheld. [State v. Ippert, 268 K. 254, 261, 995 P.2d 858 \(2000\)](#).
19. Remanded for court's failure to give reasonable notice to parties of intent to impose upward dispositional sentence; however, holding in [State v. Gould, 271 K. 391](#), pertaining to upward durational departures does not apply to upward dispositional departures. [State v. Carr, 29 K.A.2d 501, 28 P.3d 436 \(2001\)](#).

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