

CHAPTER 71.00 UPWARD DURATIONAL DEPARTURE

71.01 UPWARD DURATIONAL DEPARTURE - SENTENCING PROCEEDING

The laws of Kansas provide for a separate sentencing proceeding when a defendant has been found guilty of a crime and the State seeks an increase in the defendant's sentence above the presumptive sentence provided by law. At the proceeding, the trial jury shall consider aggravating factors relevant to the question of the sentence.

The State contends that the following aggravating factors exist in this case:

[List aggravating factors set forth in the State's written notice.]

Notes on Use

For authority, see K.S.A. 21-4716, 21-4717 and 21-4718. This instruction should be given in all upward durational departure hearings to guide deliberations on the existence of aggravating factors. It is the trial court's responsibility to determine whether aggravating factors are substantial and compelling reasons to depart as a matter of law.

This instruction may be preceded by the applicable introductory and cautionary instructions contained in PIK 3d 51.02, 51.04, 51.05 and 51.06, as modified to fit this proceeding. In *State v. McClennon*, 273 Kan. ___, 45 P.3d 848 (2002), the Kansas Supreme Court noted that under K.S.A. 2001 Supp. 21-4716(b)(3), if a factual aspect of a crime is a statutory element of the crime, that aspect of the current crime of conviction may be used as an aggravating factor for sentencing purposes only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by that aspect of the crime. This subsection applies to all aggravating factors. If the trial court is instructing a jury on an aggravating factor that is also an element of the crime of conviction, the court should instruct the jury that the aggravating factor found to exist must be "significantly different" than the usual criminal conduct involved in such an act. The Committee has prepared no pattern instruction since the language would necessarily be fact-specific for each case.

71.02 BURDEN OF PROOF

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating factors. In deciding whether the State has met its burden, you may consider all the evidence presented at the trial [and the additional evidence presented at this hearing].

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings. The bracketed language should be included if the parties offered additional evidence after the trial on the existence of aggravating factors.

71.03 UNANIMOUS VERDICT

The jury must unanimously agree as to each finding of an aggravating factor. If you find beyond a reasonable doubt that there are one or more aggravating factors, you must designate upon the verdict form with particularity the aggravating factors unanimously agreed upon by the jury.

If you are unable to agree that any aggravating factors exist, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict on any aggravating factors.

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings.

71.04 EFFECT ON SENTENCE

If you unanimously find beyond a reasonable doubt that there are one or more aggravating factors, then the Court may increase the defendant's sentence above the presumptive sentence provided by law. The length of the defendant's sentence, including any increase due to the existence of aggravating factors, is a matter for determination by the Court.

If you are unable to agree that any aggravating factors exist, then the defendant will receive the presumptive sentence provided by law.

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings.

71.05 CONCLUDING INSTRUCTION

Your presiding juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in court and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.

Your agreement upon a verdict finding any aggravating factors must be unanimous.

District Judge

Date

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings.

71.06 VERDICT FORM FINDING AGGRAVATING FACTOR(S)

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following aggravating factors have been established by the evidence. [The presiding juror shall place an X in the square in front of such aggravating factor(s).]

[factor]

[factor]

[etc.]

Presiding Juror

Date of Verdict

Notes on Use

For authority, see K.S.A. 21-4718. The applicable aggravating factors as set forth in the instructions should be included in the verdict form.

71.07 VERDICT FORM FOR SENTENCE AS PROVIDED BY LAW

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, state that we are unable to reach a unanimous verdict on any aggravating factors.

Presiding Juror

Date of Verdict

Notes on Use

For authority, see K.S.A. 21-4718. If, after a reasonable time for deliberation, the jury is unable to reach a verdict finding any specific factors, the court shall dismiss the jury whether or not this verdict form is signed. In this case, the court shall only impose a sentence as provided by law.