

HOUSE BILL No. 2326

By Committee on Corrections and Juvenile Justice

Requested by Brenna Visocsy on behalf of Kansas Appleseed

2-7

1 AN ACT concerning crimes, punishment and criminal procedure; relating
2 to sentencing; adding consideration of whether the offender has
3 physical custody of such offender's minor child or is a legal guardian or
4 custodian with physical custody of a minor child to the factors
5 considered for a dispositional departure; adding such consideration to
6 the factors considered for a diversion; amending K.S.A. 21-6815 and
7 22-2908 and repealing the existing sections.

8
9 *Be it enacted by the Legislature of the State of Kansas:*

10 Section 1. K.S.A. 21-6815 is hereby amended to read as follows: 21-
11 6815. (a) Except as provided in subsection (b), the sentencing judge shall
12 impose the presumptive sentence provided by the sentencing guidelines
13 unless the judge finds substantial and compelling reasons to impose a
14 departure sentence. If the sentencing judge departs from the presumptive
15 sentence, the judge shall state on the record at the time of sentencing the
16 substantial and compelling reasons for the departure.

17 (b) Subject to the provisions of K.S.A. 21-6817(b), and amendments
18 thereto, any fact that would increase the penalty for a crime beyond the
19 statutory maximum, other than a prior conviction, shall be submitted to a
20 jury and proved beyond a reasonable doubt.

21 (c) (1) Subject to the provisions of subsections (c)(3) and (e), the
22 following nonexclusive list of mitigating factors may be considered in
23 determining whether substantial and compelling reasons for a departure
24 exist:

25 (A) The victim was an aggressor or participant in the criminal
26 conduct associated with the crime of conviction, except that this factor
27 shall not apply to a sexually violent crime as defined in K.S.A. 22-3717,
28 and amendments thereto, or electronic solicitation as defined in K.S.A. 21-
29 5509, and amendments thereto, when:

30 (i) The victim is less than 14 years of age and the offender is 18 or
31 more years of age; or

32 (ii) the offender hires any person by giving, or offering to or agreeing
33 to give, anything of value to the person to engage in an unlawful sex act.

34 (B) The offender played a minor or passive role in the crime or
35 participated under circumstances of duress or compulsion. This factor may

1 be considered when it is not sufficient as a complete defense.

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

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

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

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

19 (G) *The offender:*

20 (i) *Has physical custody of such offender's minor child or is a legal*
21 *guardian or custodian with physical custody of a minor child at the time of*
22 *sentencing for the current crime of conviction; or*

23 (ii) *had physical custody of such offender's minor child or was a*
24 *legal guardian or custodian with physical custody of a minor child at the*
25 *time the current crime of conviction was committed.*

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

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

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

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

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

43 (E) The defendant, 18 or more years of age, employed, hired, used,

1 persuaded, induced, enticed or coerced any individual under 16 years of
2 age to:

- 3 (i) Commit any person felony;
- 4 (ii) assist in avoiding detection or apprehension for commission of
5 any person felony; or
- 6 (iii) attempt, conspire or solicit, as defined in K.S.A. 21-5301, 21-
7 5302 and 21-5303, and amendments thereto, to commit any 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 extreme
11 sexual violence and the defendant is a predatory sex offender. As used in
12 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. 21-5426(b),
24 and amendments thereto, if the victim is less than 14 years of age; or

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

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

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

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

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

43 (G) The defendant was incarcerated during the commission of the

1 offense.

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

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

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

13 (d) In determining aggravating or mitigating circumstances, the court
14 shall consider:

15 (1) Any evidence received during the proceeding;

16 (2) the presentence report;

17 (3) written briefs and oral arguments of either the state or counsel for
18 the defendant; and

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

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

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

30 (2) the truthfulness, completeness and reliability of any information
31 or testimony provided by the defendant;

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

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

35 (5) the timeliness of the defendant's assistance.

36 Sec. 2. K.S.A. 22-2908 is hereby amended to read as follows: 22-
37 2908. (a) In determining whether diversion of a defendant is in the
38 interests of justice and of benefit to the defendant and the community, the
39 county or district attorney shall consider at least the following factors
40 among all factors considered:

41 (1) The nature of the crime charged and the circumstances
42 surrounding it;

43 (2) any special characteristics or circumstances of the defendant;

(3) whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas bureau of investigation or the division of vehicles of the department of revenue;

(4) whether there is a probability that the defendant will cooperate with and benefit from diversion;

(5) whether the available diversion program is appropriate to the needs of the defendant;

(6) whether there is a probability that the defendant committed such crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder or traumatic brain injury, connected to service in a combat zone, as defined in section 112 of the federal internal revenue code of 1986, in the armed forces of the United States of America;

(7) if subsection (a)(6) applies to the defendant, whether there is a probability that the defendant will cooperate with and benefit from inpatient or outpatient treatment from any treatment facility or program operated by the United States department of defense, the United States department of veterans affairs or the Kansas national guard with the consent of the defendant, as a condition of diversion;

(8) the impact of the diversion of the defendant upon the community;

(9) recommendations, if any, of the involved law enforcement agency;

(10) recommendations, if any, of the victim;

(11) *whether the defendant:*

(A) *Has physical custody of such offender's minor child or is a legal guardian or custodian with physical custody of a minor child at the time the county or district attorney is making the determination described in this subsection; or*

(B) *had physical custody of such offender's minor child or was a legal guardian or custodian with physical custody of a minor child at the time the alleged crime was committed;*

(12) provisions for restitution; and

~~(12)~~(13) any mitigating circumstances.

(b) A county or district attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint if the complaint alleges that the defendant committed a:

(1) Violation of K.S.A. 8-1567, and amendments thereto, and the defendant:

(A) Has previously participated in diversion upon a complaint alleging a violation of that statute or an ordinance of a city in this state which prohibits the acts prohibited by that statute;

(B) has previously been convicted of or pleaded nolo contendere to a

1 violation of that statute or a violation of a law of another state or of a
2 political subdivision of this or any other state, which law prohibits the acts
3 prohibited by that statute; or

4 (C) during the time of the alleged violation was involved in a motor
5 vehicle accident or collision resulting in personal injury to another person
6 or death;

7 (2) violation under chapter 8 of the Kansas Statutes Annotated, and
8 amendments thereto, and the defendant was a commercial driver's license
9 holder at the time the violation was committed or at any subsequent time
10 prior to being considered for diversion;

11 (3) class A or B felony or for crimes committed on or after July 1,
12 1993, an off-grid crime, a severity level 1, 2 or 3 felony for nondrug
13 crimes, a drug severity level 1 or 2 felony for drug crimes committed on or
14 after July 1, 1993, but prior to July 1, 2012, or a drug severity level 1, 2 or
15 3 felony committed on or after July 1, 2012; or

16 (4) domestic violence offense, as defined in K.S.A. 21-5111, and
17 amendments thereto, and the defendant has participated in two or more
18 diversions in the previous five year period upon complaints alleging a
19 domestic violence offense.

20 (c) A county or district attorney may enter into a diversion agreement
21 in lieu of further criminal proceedings on a complaint for violations of
22 article 10 of chapter 32 of the Kansas Statutes Annotated, and amendments
23 thereto, if such diversion carries the same penalties as the conviction for
24 the corresponding violations. If the defendant has previously participated
25 in one or more diversions for violations of article 10 of chapter 32 of the
26 Kansas Statutes Annotated, and amendments thereto, then each subsequent
27 diversion shall carry the same penalties as the conviction for the
28 corresponding violations.

29 (d) As used in this section, "major depressive disorder,"
30 "polytrauma," "post-traumatic stress disorder" and "traumatic brain injury"
31 mean the same as in K.S.A. 21-6630, and amendments thereto.

32 Sec. 3. K.S.A. 21-6815 and 22-2908 are hereby repealed.

33 Sec. 4. This act shall take effect and be in force from and after its
34 publication in the statute book.