11505 HOUSE J'DICIARY

SB

56

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM February 7, 2005

SUBJECT: HCS CSSB 56(JUD)

TO: Representative Lesil McGuire,
Chair of House Judiciary Committee
Attn: Vanessa

FROM: Pam Finley
Revisor of Statutes

Concerning amendment # 1, now found in bill section 11, please note that because of the renumbering of paragraphs in AS 12.55.126(g), a cross-reference in AS 33.20.010(a) should also be amended. We have not made this change because of our understanding that AS 12.55.126(g) may once again be amended in the next committee for policy reasons. However, if the renumbering of paragraphs in AS 12.55.126(g) remains in the bill, a conforming change should be made to AS 33.20.010(a).

PF:med
05-086.med

Enclosure

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: January 28, 2005 **FURTHER REFERRALS: Finance**

Date of Committee Action: February 4, 2005

The JUDICIARY Committee considered: **CSSB 56(JUD)**

CS FOR SENATE BILL NO. 56(JUD) **CRIMINAL LAW/PROCEDURE/SENTENCING**

"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."

Recommends it be replaced with [X] HCS *or* [ ] CS *for* CSSB 56 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____ _____Committee
[ ] Letter of Intent_____ ___Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓
COR/Inst.	2			✓
COR/Prob.	3			✓
DPS	4			✓
ADM/PDA	5			

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gruenberg			✓	
	Kott			✓	
	ANDERSON	X			
	Johnston	X			
	Gara			✓	
Chair: McGUIRE	McGuire	X			
Chair:					

AMENDMENT #1 By Rep. McGuire

PASSED

OFFERED IN THE HOUSE

TO: CSSB 56 (JUD)

Page 5, line 19, following "**one to three years:**" insert:

a defendant sentenced under this subparagraph may, if the court finds it appropriate, be granted a suspended imposition of sentence under AS 12.55.085 if, as a condition of probation under AS 12.55.086, the defendant is required to serve an active term of imprisonment within the range specified in this subparagraph, unless the court finds that a mitigation factor under AS 12.55.155 applies;

Page 6, line 9 - 14:

Delete all material and insert the following:

(g) If a defendant is sentenced under (c) , [(d) 1] , (d) 2, **d (3), d (4),** [(e) 1], (e) 2, (e) 3, **(e) 4,** or (i) of this section, except to the extent permitted under AS 12.55.155 – 12.55.175,

[(1) imprisonment may not be suspended under AS 12.55.080;]

[(2) i] **(1) I**mposition of sentence may not be suspended under AS 12.55.085;

[(3)] **(2)** terms of imprisonment may not be otherwise reduced.

A#1 Commentary

The purpose of this amendment is to maintain the court's ability to impose a Suspended Imposition of Sentence (SIS) for a first felony offender who commits an eligible C or B felony. The bill was not intended to make a change in current SIS practice; the amendments should restore the status quo.

24-LS0308\L.7
Luckhaupt
2/1/05

New **AMENDMENT** #2 - PASSED

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56(JUD)

Page 3, line 15, through page 4, line 9:

Delete all material.

Renumber the following bill sections accordingly.

Page 24, line 4:

Delete "Sections 1, 4, 6, 26, and 29 - 31"

Insert "Sections 1, 4, 25, and 28 - 30"

Page 24, lines 5 - 6:

Delete "Sections 2, 3, 5, 7 - 25, and 27 - 28"

Insert "Sections 2, 3, 5, 6 - 24, 26, and 27"

Page 24, line 7:

Delete "secs. 8 - 21"

Insert "secs. 7 - 20"

AMENDMENT #4 - PASSED

Offered in the House
To: CSSB 56 (JUD)

By Representative Gara & McGuire

Section 7 of the bill should be deleted and replaced with the following:

*** Sec. 7.** AS 12.55.120 is amended by adding a new subsection to read:

(e) A sentence within an applicable presumptive range set out in AS 12.55.125, or a consecutive or partially consecutive sentence imposed in accordance with the minimum sentences set out in AS 12.55.127, may not be appealed to the court of appeals under this section or AS 22.07.020 on the ground that the sentence is excessive. However, such a sentence may be reviewed by the supreme court on the grounds that it is excessive through a petition filed under rules adopted by the supreme court.

AMENDMENT #6 - PASSED

OFFERED IN THE HOUSE
TO: CSSB 56 (JUD)

BY REPRESENTATIVE GRUENBERG

Page 17, line 1, following "behavior":

Insert "**;**

(17) the defendant committed the offense while suffering from a mental disorder or disability, including fetal alcohol spectrum disorder, that was insufficient to constitute a complete defense, but that significantly affected the defendant's conduct"

Conceptual A. to A#6
by McGuire

Mitigator
Does not apply
to crimes against
a person (AS 11.41)
or arson

Amendment # 8B by Rep. Gruenberg
PASSED

CS SB 56 (JUD)

P. 17, L. 26

Delete "10 days"
Insert "20 days"

AMENDMENT #10 - PASSED

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56 (JUD)

Page 1 line 4 insert a new section 1

Section 1. Legislative Intent

It is the intent of the legislature in passing this bill to preserve the basic structure of Alaska's presumptive sentencing system, which is designed to avoid disparate sentences. With this bill the legislature sets out a sentencing framework, subject to judicial adjustment for statutory aggravating or mitigating factors that are determined in a manner that is constitutional under the decision of the U.S. Supreme Court in Blakely v. Washington. The single, definite presumptive terms set out in current law can unduly constrain the sentencing process, particularly under the mandates of Blakely v. Washington. Although the presumptive terms are being replaced by presumptive ranges, it is not the intent of this bill in doing so to bring about an overall increase in the amount of active imprisonment for felony sentences. Rather, the bill is intended to give judges the authority to impose an appropriate sentence, with an appropriate amount of probation supervision, by taking into account the consideration set out in AS 12.55.005 and 12.55.015

AMENDMENT #2 - PASSED

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56 (JUD)

Page 3 line 15 – page 4 line 9

Strike section 6

24-LS0308\L.1
Luckhaupt
1/28/05

AMENDMENT #3 - WITHDRAWN

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: CSSB 56(JUD)

Page 4, lines 10 - 17:

Delete all material. (§ 7)

Renumber the following bill sections accordingly.

Page 24, line 4:

Delete "Sections 1, 4, 6, 26, and 29 - 31"

Insert "Sections 1, 4, 6, 25, and 28 - 30"

Page 24, lines 5 - 6:

Delete "Sections 2, 3, 5, 7 - 25, and 27 - 28"

Insert "Sections 2, 3, 5, 7- 24, and 26 - 27"

Page 24, line 7:

Delete "secs. 8 - 21"

Insert "secs. 7 - 20"

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MEMORANDUM January 27, 2005

SUBJECT: Removal of Section 7 and Blakely
(Work Order No. 24-LS0391\A.2)

TO: Representative Les Gara

FROM: Gerald P. Luckhaupt
Legislative Counsel

Question Presented: Is sec. 7 of HB 78 required under *Blakely v. Washington*?
Answer: No.

GPL:med
05-058.med

24-LS0308\L.5
Luckhaupt
2/1/05

AMENDMENT #5 - FAILS

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56(JUD)

Page 17, line 1, following "behavior":

Insert "**;**

(17) the defendant, at the time of sentencing, is actively participating in or has successfully completed treatment that is relevant to the offense and that was begun after the offense was committed"

24-LS0308\L.4
Luckhaupt
2/1/05

AMENDMENT #7 - FAILS

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56(JUD)

Page 2, lines 5 - 6:

Delete "**an employment obligation of the defendant preexisted sentencing**"

Insert "**the defendant has an employment obligation**"

24-LS0308\L.2
Luckhaupt
2/1/05

AMENDMENT #8 - FAILS

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56(JUD)

Page 1, lines 4 - 7:

Delete all material. (81)

Renumber the following bill sections accordingly.

Page 24, line 4:

Delete "Sections 1, 4, 6, 26, and 29 - 31"

Insert "Sections 3, 5, 25, and 28 - 30"

Page 24, lines 5 - 6:

Delete "Sections 2, 3, 5, 7 - 25, and 27-28"

Insert "Sections 1, 2, 4, 6 - 24, 26, and 27"

Page 24, line 7:

Delete "secs. 8 - 21"

Insert "secs. 7 - 20"

DELETE SECTION 1 of CSHB 78 and CSSB 56

REASONING:

Section 1 of the bill is unconstitutional because it seeks to eliminate the right to indictment by the grand jury of an aggravating factor that essentially become an element of the crime charged. Article I, Section 8 of the Alaska Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.

In Blakely the U.S. Supreme Court required that its ruling in Apprendi be applied, that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The prescribed statutory maximum is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Justice Scalia in his majority opinion reminded that "the Constitution limits States' authority to reclassify elements as sentencing factors.." 124 S.Ct. 2531, 2537, fn. 6. He also reiterated the point made by J. Bishop in a treatise that "every fact which is legally essential to the punishment" **must be charged in the indictment** and proved to the jury. 124 S.Ct. at 2536, fn. 5. Justice Scalia criticized the challenged practice of labeling elements as sentencing factors as a regime "in which the defendant, with **no warning in** either **his indictment** or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment." 124 S.Ct. at 2542.

In Alaska our Supreme Court in State v. Malloy, 46 P.3d 949 (Alaska 2002) upheld the Court of Appeals' pre-Apprendi view in its earlier opinion in the case, based on Donlun v. State, 527 P.2d 472 (Alaska 1974), that general principles of fairness and notice, grounded in our constitutional guarantees of due process, right to trial by jury, and the guarantee of grand jury indictment, require that aggravated circumstances that provide for increased punishment be set forth in the indictment and proven at trial. 46 P.3d at 952. The Supreme Court stated: "Donlun accurately presaged Apprendi's holding that aggravating facts **must be charged [in the indictment]** and proved beyond a reasonable doubt to the jury when their existence would allow or require the court to impose a sentence exceeding the maximum otherwise authorized." 46 P.3d at 954.

Eliminating the need to present an aggravating factor to a grand jury is unconstitutional because it violates a defendant's constitutional right to grand jury indictment for what is essentially an element of the charged offense.

Amendment # 8A by Rep. Gara

FAILS

CSSB 56 (JUD)

P. 17., L. 26

Delete "10 days"
Insert "30 days"

24-LS0308\L.3
Luckhaupt
2/1/05

AMENDMENT #9 - FAILS

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56(JUD)

Page 19, lines 11 - 30:

Delete all material. (§26)

Renumber the following bill sections accordingly.

Page 23, lines 19 - 31:

Delete all material. (§30&31)

Renumber the following bill sections accordingly.

Page 24, line 4:

Delete "Sections 1, 4, 6, 26, and 29 - 31"

Insert "Sections 1, 4, 6, and 28"

Page 24, lines 5 - 6:

Delete "Sections 2, 3, 5, 7 - 25, and 27 - 28"

Insert "Sections 2, 3, 5, 7 - 25, 26, and 27"

DELETE SECTIONS 26, 30, AND 31

REASONING:

These sections of the bill seek to allow police officers to detain and arrest probationers and parolees, without being directed to do so by the supervising probation or parole officer, based upon their reasonable suspicion or probable cause to believe that they have recently violated or are about to violate a condition of probation or parole even though the believed violation is not a crime in and of itself, or one that creates an imminent public danger or threatens serious harm to persons or property.

Article I, Section 14 of our state constitution protects against unreasonable searches and seizures. Article I, Section 21 protects our right to privacy. In Roman v. State, 570 P.2d 1235 (Alaska 1977) our Supreme Court held as a matter of Alaska Constitutional law that prisoners released on parole have the same protections against government searches and seizures as other citizens, except when reasonably conducted searches and seizures are performed by probation/parole officers, or police officers acting under the direction of the probation/parole officer. This constitutional ruling was codified in AS 33.16.150(b)(3) that requires a parolee to submit to reasonable searches and seizures by a parole officer or a police officer acting under the direction of a parole officer.

It would therefore be unconstitutional to allow a police officer to detain or arrest a parolee/probationer for a believed violation that did not constitute an independent crime or if the officer is not acting at the direction of the probation/parole officer. That is exactly what these sections of the bill seek to do, rendering them unconstitutional.

Vanessa Tondini

From: Joshua Fink [Joshua_Fink@admin.state.ak.us]
Sent: Monday, January 24, 2005 11:33 AM
To: Vanessa Tondini; Joshua Appelbee
Subject: Blakely Amendments

Here are two amendments that I am hoping to get either John, Tom, or Lesil to introduce. Susan Parkes indicated that Law would see these as friendly amendments.

The first would allow a sentence to be mitigated if the defendant is actively participating in, or has completed, a treatment program prior to sentencing.

The second would allow a mitigator if the defendant suffers from a mental defect such as fetal alcohol syndrome that significantly affected his or her behaviour, but is not sufficient to constitute a defense.

Please share them with your respective bosses and let me know what you think. My cell number is 748-2164.

Thanks, Josh.

24-LS0308\L.9
Luckhaupt
2/3/05

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: CSSB 56(JUD)

Page 4, line 11:

Delete "appellate court"

Insert "court of appeals"

Page 4, line 12, following "reviewed":

Insert "by the court of appeals"

Page 4, lines 13 - 14:

Delete "and the sentencing court is not required to make specific findings,"

Page 4, line 17, following "AS 12.55.127":

Insert "and the sentencing court has made findings that justify the decision under AS 12.55.005. Nothing in this subsection limits the authority of the supreme court to review a sentence or accept a petition"

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSSB 56 (JUD)

Page 4, line 24 delete "five to eight" and insert "four to six".

Page 5, line 2 delete "seven to 11" and insert "six to eight".

Page 5, line 10 delete "ten to 14" and insert "nine to eleven".

Page 5, line 12 delete " 15 to 20" and insert "14 to 16".

Page 5, line 19 delete "one to three" and insert "six months to two".

Page 5, line 21 delete "two to four" and insert "one to three".

Page 5, line 22 delete "four to seven" and insert "three to five".

Page 5, line 24 delete " six to 10" and insert "five to seven".

Page 6, line 1 delete "zero to two" and insert "zero to one".

Page 6, line 2 delete "two to four" and insert "one to three".

Page 6, line 4 delete "three to five" and insert "two to four".

Page 6, line 7 delete "one to two" and insert "zero to two".

Page 6, line 22 delete "eight to 12" and insert "seven to nine".

Page 6, line 26 delete "12 to 16" and insert "nine to 11".

Page 6, line 28 delete "15 to 20" and insert "14 to 16".

Page 6, line 30 delete "20 to 30" and insert "19 to 21".

Page 7, lines 1 and 2 delete "25 to 35" and insert "24 to 26".

Page 7, line 5 delete "30 to 40" and insert "29 to 31".

Page 7, line 12 delete "five to eight" and insert "four to six".

Page 7, line 16 delete " 10 to 14" and insert "nine to 11".

Page 7, line 18 delete "12 to 16" and insert "nine to 11".

Page 7, line 20 delete "15 to 20" and insert "14 to 16".

Page 7, line 23 delete "15 to 25" and insert "14 to 16".

Page 7, line 26 delete "20 to 30" and insert "19 to 21".

Page 8, line 1 delete "two to four" and insert "one to three".

Page 8, line 4 delete "five to eight" and insert "four to six".

Page 8, line 7 delete " 10 to 14" and insert "nine to 11".

Page 8, line 9 delete "10 to 14" and insert "nine to 11".

Page 8, line 12 delete "15 to 20" and insert "14 to 16".

Page 8, line 20 delete "one to two" and insert "zero to two".

Page 8, line 23 delete " two to five" and insert "one to three".

Page 8, line 26 delete "three to six " and insert "two to four".

Page 8, line 29 delete "three to six" and insert "two to four".

Page 9, line 1 delete "six to 10" and insert "five to seven".

Amendment ___ to CSSB 56(JUD) By Gruenberg

24-LS0308\L

requirements of an agency authorized by the court to make referrals for rehabilitative treatment or to provide rehabilitative treatment; **and**

(7) if ordered by the court, to abide by additional conditions of probation imposed by the defendant's probation officer; an additional condition imposed by the probation officer must be provided orally and in writing to the defendant; the additional condition is binding upon delivery until modified by the court; this paragraph does not require written notice of conditions relating to the day-to-day management of probationers, in which probation officers direct the activities of probationers to implement existing court-imposed conditions.

* **Sec. 7.** AS 12.55.120 is amended by adding a new subsection to read:

(e) A sentence reviewed by the appellate court under this section and AS 22.07.020, or by the superior court under AS 22.10.020, or a sentence reviewed by petition accepted under court rules, may not be reversed as excessive, and the sentencing court is not required to make specific findings, if the sentence is within an applicable presumptive range set out in AS 12.55.125, or is a consecutive or partially consecutive sentence imposed in accordance with the minimum sentences set out in AS 12.55.127.

* **Sec. 8.** AS 12.55.125(c) is amended to read.

(c) Except as provided in (i) of this section, a defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, **five to eight** ~~X~~ [FIVE] years; seven

(2) if the offense is a first felony conviction

[(A) OTHER THAN FOR MANSLAUGHTER] and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury **or death** during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional employee, emergency medical technician, paramedic, ambulance attendant, or other emergency

responder who was engaged in the performance of official duties at the time of the offense, **seven to ~~10~~** [SEVEN] years; ten ✓

[(B) FOR MANSLAUG''TER AND THE CONDUCT RESULTING IN THE CONVICTION WAS KNOWINGLY DIRECTED TOWARDS A CHILD UNDER THE AGE OF 16, SEVEN YEARS;

(C) FOR MANSLAUGHTER AND THE CONDUCT RESULTING IN THE CONVICTION INVOLVED DRIVING WHILE UNDER THE INFLUENCE OF AN ALCOHOLIC BEVERAGE, INHALANT, OR CONTROLLED SUBSTANCE, SEVEN YEARS;]

(3) if the offense is a second felony conviction, **10 to ~~15~~** [10] years; 13 ✓

(4) if the offense is a third felony conviction and the defendant is not subject to sentencing under (*l*) of this section, **15 to ~~20~~** [15] years. 19

* **Sec. 9.** AS 12.55.125(d) is amended to read:

(d) Except as provided in (i) of this section, a defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, one to ~~three~~ years; two

(2) if the offense is a first felony conviction, the defendant violated AS 11.41.130, and the victim was a child under 16 years of age, two to ~~four~~ years; three

(3) if the offense is a second felony conviction, **four to ~~seven~~** [FOUR] six years;

(4) [(2)] if the offense is a third felony conviction, **six to ~~10~~** [SIX] nine years.

* **Sec. 10.** AS 12.55.125(e) is amended to read:

(e) Except as provided in (i) of this section, a defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve

page 3 of 7

circumstances described in (4) of this subsection, zero to ~~two~~ years: one

(2) if the offense is a second felony conviction, **two to four** [TWO] three years;

(3) [(2)] if the offense is a third felony conviction, **three to ~~five~~** four [THREE] years;

(4) [(3)] if the offense is a first felony conviction, and the defendant violated AS 08.54.720(a)(15), **one to ~~two~~ years** [ONE YEAR]. one and a half

*** Sec. 11.** AS 12.55.125(g) is amended to read:

(g) If a defendant is sentenced under (c), **(d), (e)** [(d)(1), (d)(2), (e)(1), (e)(2), (e)(3)], or (i) of this section, except to the extent permitted under AS 12.55.155 - 12.55.175,

(1) imprisonment may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced.

*** Sec. 12.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 40 years and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction and does not involve circumstances described in (B) of this paragraph, **eight to ~~12~~** [EIGHT] 11 years,

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, **12 to ~~16~~** [10] years; 15

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, **15 to ~~20~~** [15] years; 19

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, **20 to ~~30~~** [20] years; 25

(E) if the offense is a third felony conviction and the defendant

is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 25 to ~~35~~ [25] years; 30

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 30 to ~~40~~ [30] years; 35

(2) attempt, conspiracy, or solicitation to commit sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction and does not involve circumstances described in (B) of this paragraph, five to ~~eight~~ [FIVE] seven years;

(B) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 to ~~14~~ [10] years; thirteen

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 12 to ~~16~~ [10] years; 15

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to ~~20~~ [15] years; 19

(E) if the offense is a third felony conviction, does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 15 to ~~25~~ [15] years; 20

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 20 to ~~30~~ [20] years; 25

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography may be sentenced to a definite term of imprisonment of not more than 20 years and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) **if the offense is a first felony conviction, two to ~~four~~ three years;**

(B) if the offense is a second felony conviction and does not involve circumstances described in **(C)** [(B)] of this paragraph, **five to ~~eight~~ seven** [FIVE] years;

(C) [(B)] if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, **10 to ~~14~~ 13** [10] years;

(D) [(C)] if the offense is a third felony conviction, does not involve circumstances described in **(E)** [(D)] of this paragraph, **10 to ~~14~~ 13** [10] years;

(E) [(D)] if the offense is a third felony conviction, and the defendant has two prior convictions for sexual felonies, **15 to ~~20~~ 19** [15] years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 10 years and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) **if the offense is a first felony conviction, one to ~~two~~ one and a half years;**

(B) if the offense is a second felony conviction and does not involve circumstances described in **(C)** [(B)] of this paragraph, **two to ~~five~~ four** [TWO] years;

(C) [(B)] if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, **three to ~~six~~ five** [THREE] years;

(D) [(C)] if the offense is a third felony conviction and does not involve circumstances described in **(E)** [(D)] of this paragraph, **three to ~~six~~ five** [THREE] years;

(E) [(D)] if the offense is a third felony conviction and the

defendant has two prior convictions for sexual felonies, ~~six to 10~~ [SIX] nine years.

* **Sec. 13.** AS 12.55.125 is amended by adding a new subsection to read:

(n) In imposing a sentence within a presumptive range under (c), (d), (e), or (i) of this section, the total term, made up of the active term of imprisonment plus any suspended term of imprisonment, must fall within the presumptive range, and the active term of imprisonment may not fall below the lower end of the presumptive range.

* **Sec. 14.** AS 12.55.127(d) is amended by adding a new paragraph to read:

(4) "presumptive term" means the midd the applicable presumptive range set out in AS 12.55.125.

* **Sec. 15.** AS 12.55.145(a) is amended to read:

(a) For purposes of considering prior convictions in imposing sentence under

(1) AS 12.55.125(c), **(d), or (e)** [(d)(1), (d)(2), (e)(1), OR (e)(2)],

(A) a prior conviction may not be considered if a period of 10 or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for an unclassified or class A felony;

(B) a conviction in this or another jurisdiction of an offense having elements similar to those of a felony defined as such under Alaska law at the time the offense was committed is considered a prior felony conviction;

(C) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective;

(2) AS 12.55.125(*i*),

(A) a conviction in this or another jurisdiction of an offense having elements similar to those of a most serious felony is considered a prior most serious felony conviction;

CSSB 56 (JUD)

Current "presumptive" terms compared to presumptive ranges in ~~House Bill 78~~ January 2005

	First Felony	First Felony (special crimes)	Second Felony	Sex Felony with a prior sex felony	Third+ Felony	Sex Felony with two prior sex felonies	Max
Unclassified Sex Offense	(8) **to ~~12~~** 11	weapon or serious injury (10) **12 to ~~16~~** 15	(15) **to ~~20~~** 19	(20) **to ~~30~~** 25	(25) **to ~~35~~** 30	(30) **to ~~40~~** 35	(40)
A Felony Sex Offense	(5) **to ~~8~~** 7	weapon or serious injury (10) **to ~~14~~** 13	(10) **12 to ~~16~~** 15	(15) **to ~~20~~** 19	(15) **to ~~25~~** 20	(20) **to ~~30~~** 25	(30)
A Felony	(5) **to ~~8~~** 7	weapon, serious injury, or police victim (7) **to ~~11~~** 10	(10) **to ~~14~~** 13	n/a	(15) **to ~~20~~** 19	n/a	(20)
B Felony Sex Offense	(0, but 1 to 3 by court-made law) **2 to ~~4~~** 3	n/a	(5) **to ~~8~~** 7	(10) **to ~~14~~** 13	(10) **to ~~14~~** 13	(15) **to ~~20~~** 19	(20)
B Felony	(0, but 1 to 3 by court-made law) **1 to ~~2~~** 2	crim neg hom of child: (0, but 1 to 3 by court-made law) **2 to ~~4~~** 3	(4) **to ~~7~~** 4	n/a	(6) **to ~~10~~** 9	n/a	(10)
C Felony Sex Offense	(0) **1 to ~~2~~** 1½	n/a	(2) **to ~~5~~** 4	(3) **to ~~6~~** 5	(3) **to ~~8~~** 5	(6) **to ~~10~~** 9	(10)
C Felony	(0) **to ~~2~~** 1	wanton waste or same-day by guide (1) **to ~~2~~** 1½	(2) **to ~~4~~** 3	n/a	(3) **to ~~5~~** 4	n/a	(5)
Numbers in parentheses are the current "presumptive" terms and maximums							
Numbers in **bold** show the presumptive ranges in the bill							

Explanatory Trial

LEGISLATIVE RESEARCH REPORT

JANUARY 31, 2005

REPORT NUMBER 05.141

RIGHT OF APPEAL BASED ON THE EXCESSIVENESS OF A CRIMINAL SENTENCE

PREPARED FOR SENATOR GENE THERRIAULT

BY PATRICIA YOUNG, MANAGER

You asked that we perform a quick search of state laws on criminal appeals to determine if laws in any states provide that a party in a criminal action may not appeal a sentence solely on grounds of excessiveness if the sentence falls within a range established for the defendant's conviction level and the class of offense.

Our search identified two states—Kansas and Washington—with explicit prohibitions in statute against appeals based on the excessiveness of sentences unless those sentences are outside the range established as the standard.[1]

- **Kansas**—KSA § 21-4721(c) provides that for felonies committed on or after July 1, 1993, the court "shall not review" any sentence that is within the presumptive sentence for the crime, or any sentence resulting from a court-approved agreement between the state and the defendant.

- **Washington**—ARCW § 9.94A.585(1) provides that a sentence within the standard sentence range for an offense "shall not be appealed."[2]

We found statutory language in two states that may produce a similar effect by omitting from the lists of conditions under which defendants may appeal, those sentences that fall within the standard sentencing ranges. Florida law—Fla. Stat. § 924.06(1)(e)—provides that a defendant may appeal a sentence that exceeds the statutory maximum. In similar fashion, Oregon law—

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[1] There may be additional states with laws of similar practical application but worded such that our LEXIS queries did not identify them. We did not search court rules or review case law for effects in other states similar to the laws in Kansas and Washington. We include annotated copies of these states' laws as Attachments A and B, respectively.

[2] The Washington Court of Appeals rejected an equal protection challenge to this statute. *State v. Rousseau*, 78 Wash. App. 774, 898 P. 2d 870 (Wash. App. 1995), review denied, 128 Wash. 2d 1011, 910 P.2d 482 (Wash. 1996), described in *Rozkydal v. State*, 938 P.2d 1091, 1098.

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ORS § 138.040(1)(b)—provides that the appellate court may review a sentence as to whether it exceeds the maximum allowable by law or is unconstitutionally cruel and unusual. It is possible that, in these states, the court will not review an appeal for excessiveness if the sentence in question falls within the standard range.[3]

In addition, we note that North Carolina law—N.C. Gen. Stat. § 15A-1444(a1)—includes provisions that are somewhat similar to those in Kansas and Washington as well as to those in Alaska. The law in North Carolina specifies that a defendant has no *right of appeal* on the issue of excessiveness of a sentence if that sentence falls within the presumptive range. The law goes on to provide, however, that although not entitled to appeal the issue as a matter of right, the defendant may petition for discretionary appellate review.[4]

As you may know, the Alaska Legislature amended AS 12.55.120, the law on appeal of sentences, in 1995. Since that time, a felony defendant may appeal as excessive only those sentences requiring more than two years of unsuspended incarceration. The statute does not address a defendant's right to petition the court for discretionary review, but that right is explicit in the Alaska Court Rules of Appellate Procedure, Rule 215(a)(5) and Rule 402 (a)(1).

In 1997, a defendant challenged the constitutionality of the Alaska law, arguing that the judiciary has the inherent authority to review sentences (an authority the legislature cannot eliminate), and that the law violates equal protection and due process rights. The Alaska Supreme Court determined that in this context, the term *appeal* means the *right to require* an appellate review of a lower court's decision, and the term *petition* means the *right to request* such a review.[5] The Court held the law to be constitutional, noting as follows:

> Alaska law does not deny anyone the opportunity to seek sentence review. Instead, under AS 12.55.120(a) and Appellate Rule 215(a)([5]), certain felony defendants (those who have been sentenced to 2 years or less) must seek sentence review by petition rather than by appeal. The effect of this procedural distinction is to require those defendants who receive lesser sentences to convince the appellate court that there is good reason to hear their case before the criminal justice system devotes the time and money required to pursue and decide a sentence appeal.[6]

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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[3] We include annotated copies of the Florida and Oregon statutes as Attachment C and D, respectively.

[4] We include an annotated copy of the North Carolina law as Attachment E.

[5] *Rozkydal v. State*, 938 P.2d 1091, 1094-5 (1997 Alaska App.) We include a copy of the *Rozkydal* decision as Attachment F.

[6] *Rozkydal*, 1097. Brackets indicate the change in numbering of Appellate Rule 215(a)(2) to 215(a)(5) by Supreme Court Order Number 1268, effective April 15, 2000.

THE FOLLOWING PAGES MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL

Attachment A

KSA § 21-4721

1 of 1 DOCUMENT

LexisNexis (R) KANSAS ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2003 SUPPLEMENT ***
*** ANNOTATIONS CURRENT THROUGH NOVEMBER 19, 2004 ***

CHAPTER 21. CRIMES AND PUNISHMENTS
ARTICLE 47. SENTENCING GUIDELINES

GO TO KANSAS STATUTES ARCHIVE DIRECTORY

K.S.A. § 21-4721 (2003)

21-4721. Departure sentence subject to appeal; confinement or release of defendant pending review; scope of review; action by court; written opinion, when; summary disposition; correction of arithmetic or clerical errors.

(a) A departure sentence is subject to appeal by the defendant or the state. The appeal shall be to the appellate courts in accordance with rules adopted by the supreme court.

(b) Pending review of the sentence, the sentencing court or the appellate court may order the defendant confined or placed on conditional release, including bond.

(c) On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

(1) Any sentence that is within the presumptive sentence for the crime; or

(2) any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record.

(d) In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the sentencing grid for a crime, sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure:

(1) Are supported by the evidence in the record; and

(2) constitute substantial and compelling reasons for departure.

(e) In any appeal, the appellate court may review a claim that:

(1) A sentence that departs from the presumptive sentence resulted from partiality, prejudice, oppression or corrupt motive;

(2) the sentencing court erred in either including or excluding recognition of a prior conviction or juvenile adjudication for criminal history scoring purposes; or

(3) the sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.

(f) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing.

(g) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed. The court may issue a written opinion in any other case when it is believed that a written opinion will provide guidance to sentencing courts and others in implementing the sentencing guidelines adopted by the Kansas sentencing commission. The appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal.

(h) A review under summary disposition shall be made solely upon the record that was before the sentencing court.

9. Appeals challenging a sentence imposed pursuant to KSGA (21-4701 et seq.) are limited to subsections (a) and (e) and illegal sentences. *State v. McCallum, 21 K.A.2d [illegible], 895 P.2d 1258 (1995).*

10. Downward departure upheld in involuntary manslaughter sentencing where defendant involved in auto accident fatality. *State v. Heath, 21 K.A.2d 410, 412, 901 P.2d 29 (1995).*

11. Imposition of incarceration or probation in border box case is presumptive sentence for appeal purposes. *State v. Bost, 21 K.A.2d 560, 567, 903 P.2d 160 (1995).*

12. Evidence in record constitutes substantial and compelling reasons justifying downward durational departure. State v. Favela, 259 K. 215, 228, 232, 239, *911 P.2d 792 (1996).*

13. Conditional release includes any situation where a defendant is released by a court under restrictive conditions. *State v. Arredon, 22 K.A.2d 91, 95, 911 P.2d 818 (1996).*

14. Excessive brutality of defendant provided separate and independent reason for durational departure. *State v. Hunter, 22 K.A.2d 103, 105, 911 P.2d 1121 (1996).*

15. Aggravating factor of excessive brutality constituted a substantial and compelling reason for upward departure. State v. Vann, 260 K. 431, 441, 444, *921 P.2d 770 (1996).*

16. Trial court did not err by relying on randomness of crime as aggravating factor justifying upward departure. State v. Anderson, 260 K. 445, 467, *922 P.2d 435 (1996).*

17. 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, 899, *926 P.2d 652 (1996).*

18. District court procedure when defendant challenges criminal history score discussed. *State v. Lakey, 22 K.A.2d 595, 597, [illegible] P.2d 470 (1996).*

19. Prosecutor has authority to recommend upward departure sentence to facilitate plea agreement. *Soto v. State, 23 K.A.2d [illegible] 937 P.2d 954 (1997).*

20. Evidentiary hearing denied because of court's ex parte meeting with victim's family and ex parte consideration of pertinent [illegible] statement. State v. Scales, 261 K. 734, 737, *933 P.2d 737 (1997).*

21. Imposition of imprisonment sentence where defendant's offense within nonprison grid but committed while defendant [illegible] presumptive not appealable. *State v. Burrows, 23 K.A.2d 342, 343, 345, 929 P.2d 1391 (1997).*

22. Court not required to state reasons for refusing to depart from imposing a presumptive sentence. *State v. Windom, 23 K.A.2d [illegible] 130, 131, 932 P.2d 1019 (1997).*

23. Standard of review for sentencing appeals; burden of proof. *State v. Rodriguez, 23 K.A.2d 559, 561, 562, 933 P.2d 161 (1997).*

24. Shooting during aggravated assault not per se excessive brutality; sentencing departure not supported by substantial and compelling reasons. State v. Eisele, 262 K. 80, 83, 84, *936 P.2d 742 (1997).*

25. Excessive brutality constituted substantial and compelling reason for upward durational departure. State v. Jackson, 262 K. 129, 137, *938 P.2d 761 (1997).*

26. Appeal dismissed for lack of jurisdiction; imposition of consecutive sentences not inconsistent with presumptive sentences does not constitute departure sentence. State v. Ware, 262 K. 180, *938 P.2d 197 (1997).*

27. Departure improper since aggravating factors relied on not substantial or compelling reasons or supported by record. State v. Salgado-Corral, 262 K. 392, 411, *940 P.2d 11 (1997).*

28. Departure sentence justified where defendant committed crimes while on supervised parole and lied on court [illegible] State v. [illegible] 262 K. 434, 445, *939 P.2d 879 (1997).*

29. Defendant not barred to sentence in plea agreement under (c)(2); sentence vacated and remanded. *State v. Chr[illegible] 23 K.A.2d 970, 975, 937 P.2d 1239 (1997).*

30. Aggravating factors specified in 21-4717(a) substantial and compelling as matter of law; substantial competent

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

1 of 1 DOCUMENT

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(c) On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

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(h) Any case under summary disposition shall be made solely upon the record that was before the sentencing court.

Written briefs shall not be required unless ordered by the appellate court and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

(i) The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors.

HISTORY: L. 1992, ch. 239, § 21; L. 1995, ch. 251, § 17; July 1.

NOTES:
[provided by the Kansas Revisor of Statutes]

LAW REVIEW AND BAR JOURNAL REFERENCES:

Survey of Recent Cases, *43 K.L.R. 1000 (1995).*

"Delacruz: Following the Nichols Court Through the Looking Glass," Eric Lawrence, *44 K.L.R. 1045 (1996).*

Survey of Recent Cases, *45 K.L.R. 1393 (1997).*

"Solidifying the Use of Juvenile Proceedings as Sentence Enhancement and Clarifying Second-Degree Murder," *Kay Redeker, 37 W.L.J. 483 (1998).*

Survey of Recent Cases, *46 K.L.R. 915, 921, 930 (1998).*

"The Kansas Sentencing Guidelines Act," *Robert J. Lewis, Jr., 38 W.L.J. 327 (1999).*

"Are We Not Treating the Judiciary as the 'Ugly Duckling' of Government?" Ed Collister, *9 Kan. J.L. & Pub. Pol'y, No. 2, 302 (1999).*

"Writing to the Kansas appellate courts: a lesson in appellate jurisdiction," Autumn Fox, 69 J.K.B.A. No. 4, 32 (2000).

"Criminal Procedure Survey of Cases," *48 K.L.R. 895 (2000).*

"Criminal Procedure Survey of Recent Cases," *50 K.L.R. 901 (2002).*

CASE ANNOTATIONS

1. Standard of review for subsection (e)(1) challenge to plea bargained sentence within presumptive range examined. *State v. Starks, 20 K.A.2d 179, 181, 885 P.2d 387 (1994).*

2. Whether court erred by issuing defendant an upward departure based on previous prior convictions examined. State v. Gideon, 257 K. 591, 622, *894 P.2d 850 (1995).*

3. Whether appellate court has jurisdiction to review denial of defendant's motion requesting departure examined. *State v. Myers, 20 K.A.2d 401, 402, 888 P.2d 866 (1995).*

4. Whether judge erred by failing to set forth substantial and compelling reasons for dispositional departure examined. *State v. Rhoads, 20 K.A.2d 790, 800, 892 P.2d 918 (1995).*

5. Whether sentencing judge has discretion to impose concurrent or consecutive sentences in multiple conviction cases examined. *State v. Peal, 20 K.A.2d 816, 820, 893 P.2d 258 (1995).*

6. Whether substantial and compelling reasons existed for departure from presumptive sentence examined. *State v. Richardson, 20 K.A.2d 932, 933, 939, 901 P.2d 1 (1995).*

7. 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, 574, *908 P.2d 603 (1995).*

8. Conversion of defendant's sentence to prison from nonimprisonment for offense committed on parole supported by substantial and compelling reasons. *State v. Trimble, 21 K.A.2d 32, 38, 894 P.2d 920 (1995).*

9. Appeals challenging a sentence imposed pursuant to KSGA (21-4701 et seq.) are limited to subsections (a) and (e) and illegal sentences. *State v. McCallum, 21 K.A.2d 40, 895 P.2d 1258 (1995).*

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18. D[illegible] court procedure when defendant challenges criminal history score discussed. *State v. Lakey, 22 K.A.2d 585, 587, [illegible] P.2d 470 (1996).*

19. P[illegible]or has authority to recommend upward departure sentence to facilitate plea agreement. *Soto v. State, 23 K.A.2d [illegible] P.2d 951 (1996).*

20. [illegible] he[illegible]denied because of court's ex parte meeting with victim's family and ex parte consideration of p[illegible]au[illegible]ishment. State v. Scales, 261 K. 734, 737, *933 P.2d 737 (1997).*

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22. [illegible] not required to state reasons for refusing to depart from imposing a presumptive sentence. *State v. Windom, 23 K.A.2d [illegible]0, 431, [illegible]2 P.2d 1019 (1997).*

23. [illegible] of review for sentencing appeals; burden of proof. *State v. Rodriguez, 23 K.A.2d 559, 561, 562, 933 P.2d 1[illegible]*

24. [illegible]ding aggravated assault not per se excessive brutality; sentencing departure not supported by subs[illegible]ial and compelling reasons. State v. Eisele, 262 K. 80, 83, 84, *936 P.2d 742 (1997).*

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28. [illegible]ive sentence justified where defendant committed crimes while on supervised parole and lied on court af[illegible]. State v. [illegible], 262 K. 434, 445, *939 P.2d 879 (1997).*

29. Pa[illegible] failed to agree to sentence in plea agreement under (c)(2); sentence vacated and remanded. *State v. Cha[illegible]3 K.A.2d 910, 915, 937 P.2d 1239 (1997).*

30. A[illegible]ting factors specified in 21-4717(a) substantial and compelling as matter of law; substantial competent

evidence supported each. *State v. Hernandez, 24 K.A.2d 285, 289, 944 P.2d 188 (1997).*

31. Trial court departure sentence vacated where insufficient evidence of substantial and compelling reasons for departure. State v. Bailey, 263 K. 685, 698, *952 P.2d 1289 (1998).*

32. 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).*

33. Defendant's federal convictions properly considered as prior convictions for determining criminal history. *State v. Heath, 25 K.A.2d 587, 588, 967 P.2d 775 (1998).*

34. Placement at conservation camp must be considered when sentencing defendant falling within nondrug border box to imprisonment sentence. *State v. Schick, 25 K.A.2d 702, 703, 971 P.2d 346 (1998).*

35. Appellate court may not review any sentence that is within the presumptive range of sentence for the crime. State v. Stephens, 266 K. 886, 894, *975 P.2d 801 (1999).*

36. Court's upward durational departure of aggravated robbery conviction supported by findings of fact. State v. Yardley, 267 K. 37, 43, *978 P.2d 886 (1999).*

37. Upward departure based on defendant's perjury remanded for finding that all elements of perjury satisfied. *State v. Smart, 26 K.A.2d 808, 813, 995 P.2d 407 (1999).*

38. Dispositional downward departure for aggravated indecent liberties with a child conviction not supported by evidence. *State v. Chrisco, 26 K.A.2d 816, 817, 995 P.2d 401 (1999).*

39. Trial court did not abuse discretion in imposing downward departure in aggravated criminal sodomy case. State v. Minor, 268 K. 292, 298, *997 P.2d 648 (2000).*

40. Consecutive sentence imposed by trial court is not a departure sentence; no jurisdictional basis for appellate court to review sentence subsequent to 1995 amendment of section. State v. Flores, 268 K. 657, *999 P.2d 919 (2000).*

41. Appellate court may not review sentence within presumptive sentence for crime; legislative branch has power to limit jurisdiction of all inferior courts. *State v. Lewis, 27 K.A.2d 134, 998 P.2d 1141 (2000).*

42. Under facts of this case, no basis for dispositional departure sentence when defendant absconded from custody. State v. McKay, 271 K. 725, *26 P.3d 58 (2001).*

43. Defendant may not appeal a sentence that falls within presumptive range. *State v. Dugan, 29 K.A.2d 71, 25 P.3d 145 (2002).*

LexisNexis (R) Notes:

CASE NOTES

1. Where a defendant convicted of selling marijuana in violation of *Kan. Stat. Ann. § 65-4163(a)(3)* and of unlawfully using a communication facility in causing or facilitating the commission of a felony sale of marijuana in violation of *Kan. Stat. Ann. § 65-4141* was sentenced under *Kan. Stat. Ann. § 21-4721(e)* and could properly appeal on grounds his sentence resulted from partiality, prejudice, oppression or corrupt motive, § 21-4721(e) was not unconstitutional on equal protection grounds. *State v. Kee, 27 Kan. App. 2d 677, 6 P.3d 938, 2000 Kan. App. LEXIS 657 (2000).*

2. Where a defendant convicted of selling marijuana in violation of *Kan. Stat. Ann. § 65-4163(a)(3)* and of unlawfully using a communication facility in causing or facilitating the commission of a felony sale of marijuana in violation of

Kan. Stat. Ann. § 65-4141 was sentenced under *Kan. Stat. Ann. § 21-4721(e)* and could properly appeal on grounds his sentence resulted from partiality, prejudice, oppression or corrupt motive, § 21-4721(e) was not unconstitutional on equal protection grounds. *State v. Koe, 27 Kan. App. 2d 677, 6 P.3d 938, 2000 Kan. App. LEXIS 657 (2000).*

3. Departure sentence was properly imposed pursuant to *Kan. Stat. Ann. § 21-4721(d)* after a trial court found that defendant's crimes were part of a major organized drug manufacturing activity in violation of *Kan. Stat. Ann. § 21-4717(a)*; because the trial court relied on statutory aggravating factors, such factors were substantial and compelling as a matter of law, and there was competent evidence supporting each factor. *State v. Hernandez, 24 Kan. App. 2d 285, 944 P.2d 188, 1997 Kan. App. LEXIS 137 (1997).*

4. Defendant's durational departure sentence of 24 months' imprisonment following his conviction for drug crimes, including possession of cocaine with the intent to sell in violation of *Kan. Stat. Ann. § 65-4161(a)*, was not unreasonable where (1) defendant was in possession of packaging materials and telecommunications equipment used in the large scale distribution of drugs and controlled substance, as identified in *Kan. Stat. Ann. § 21-4717(a)(1)(D)*, (2) defendant was in possession of large amounts of cocaine at the time of his arrest, with a street value between $25,000 and $50,000, pursuant to *Kan. Stat. Ann. § 21-4717(a)(1)(F)*, (3) defendant's argument that departure sentences were to be imposed only in "extraordinary" cases was without merit, and (4) defendant failed to show that his crimes would be considered less than many drug crimes, even in a large urban area. *State v. Davis, 262 Kan. 711, 941 P.2d 946, 1997 Kan. LEXIS 120 (1997).*

5. On defendant's appeal of trial court's imposition of a departure sentence after she pled no contest to aggravated assault of a law enforcement officer under *Kan. Stat. Ann. § 21-3411*, the appeals court was required by *Kan. Stat. Ann. § 21-4721(c)(1)* to review whether the trial court's findings of fact and reasons justifying departure were supported by substantial competent evidence and constituted substantial and compelling reasons for departure as a matter of law. *State v. Eisele, 263 Kan. 712, 952 P.2d 1261, 1997 Kan. LEXIS 78 (1997).*

6. Trial court's upward durational sentence imposed following defendant's conviction of level 4 aggravated battery, was affirmed, even though the trial court should not have considered defendant's subsequent drive-by shooting of a witness as an aggravating factor in sentencing defendant, defendant's excessive brutality toward the victim independently justified the departure under *Kan. Stat. Ann. § 21-4721(d)*(Supp. 1993). *State v. Valentine, 260 Kan. 431, 921 P.2d 770, 1996 Kan. LEXIS 54.*

7. Trial court articulated substantial and compelling reasons for departing downward from sentencing guidelines for defendant's sentences for aggravated robbery and kidnapping where defendant had no prior criminal history, was only 19 years old at the time of the incident, had nothing to gain from the incident, had a supportive family, and his employer testified he was a good worker; though no single factor was sufficient to support the departure, all the factors were mitigating, and in conjunction they justified the departure. *State v. Murphy, 270 Kan. 804, 19 P.3d 80, 2001 Kan. LEXIS 290.*

8. Trial court articulated substantial and compelling reasons for departing downward from sentencing guidelines for defendant's sentences for aggravated robbery and kidnapping where defendant had no prior criminal history, was only 19 years old at the time of the incident, had nothing to gain from the incident, had a supportive family, and his employer testified he was a good worker; though no single factor was sufficient to support the departure, all the factors were mitigating, and in conjunction they justified the departure. *State v. Murphy, 270 Kan. 804, 19 P.3d 80, 2001 Kan. LEXIS 290.*

9. Where defendant was convicted of intentional second-degree murder and was sentenced to a term of imprisonment of

154 months, the trial court erred by imposing an upward departure from the presumptive sentence on the grounds that defendant created a danger of harm or death to more than one person and that he committed the crimes while engaged in the operation of a crack cocaine house, a danger to society as a whole, because the facts stated by the sentencing court in justification of departure were not supported by the record, and the reasons stated on the record for departure did not adequately justify a sentence outside the presumptive sentence. *State v. Bailey, 263 Kan. 685, 952 P.2d 1289, 1998 Kan. LEXIS 10 (1998).*

10. Where defendant was convicted for first-degree felony murder and attempted voluntary manslaughter, he was not entitled to appeal consecutive sentences under *Kan. Stat. Ann. § 21-4721(c)(1)*, (e)(1) because the statutes prohibiting such appeals were in effect on October 5, 1996 and those provisions prohibit review of presumptive sentences for crimes committed on or after July 1, 1995; imposition of consecutive sentences did not constitute a departure sentence. *State v. Flores, 268 Kan. 657, 999 P.2d 919, 2000 Kan. LEXIS 39 (2000).*

11. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing. The findings that community corrections could be served by rehabilitation and that a treatment plan was available were not supported by the evidence as required under *Kan. Stat. Ann. § 21-4721(d).* The sentence imposed did not provide for defendant's rehabilitation and the treatment plan did not include a treatment plan for pedophilia or any other type of sexual disorder, and any plan considered as a factor to depart downwardly from the presumptive sentence had to include treatment for the behavior that caused the crime. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

12. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing because the finding that defendant was not a danger to society was not supported by sufficient evidence as required under *Kan. Stat. Ann. § 21-4721(d).* Although a clinical psychologist and defendant's employer testified that they did not believe defendant was a danger to society, it could not be said that defendant had no predisposition to commit similar crimes or any other crimes because he had a felony and misdemeanor criminal record and had refused to allocute to the crimes for which he was convicted. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

13. Where defendant received the presumptive sentences for aggravated indecent liberties with a minor, the appellate court lacked jurisdiction to entertain his untimely appeal under *Kan. Stat. Ann. § 21-4721(c)(1)* even though the trial court denied a motion for departure. *State v. Parker, 23 Kan. App. 2d 655, 934 P.2d 987, 1997 Kan. App. LEXIS 48 (1997).*

14. When a lawful sentence has been imposed under Kansas Sentencing Guidelines Act, the sentencing court has no jurisdiction to modify that sentence except to correct arithmetic or clerical errors pursuant to *Kan. Stat. Ann. § 21-4721(i).* Likewise, there is no jurisdiction for a sentencing court to consider or reconsider possible sentence departure from the presumptive sentence after the sentence has been imposed and the sentencing proceeding has been concluded. *State v. Miller, 260 Kan. 892, 926 P.2d 652, 1996 Kan. LEXIS 146 (1996).*

15. Court reviewed an issue related to a constitutional violation in determining the terms and conditions of a presumptive probation sentence, even though normally the court had no jurisdiction to consider an appeal from a presumptive sentence under *Kan. Stat. Ann. § 21-4721(c)(1). State v. Yong Spencer, 31 Kan. App. 2d 681, 70 P.3d 1226, 2003 Kan. App. LEXIS 561 (2003).*

16. After defendant was convicted for two counts of rape and five counts of aggravated indecent liberties with a child, the appellate court could not review whether defendant's sentence was cruel and unusual punishment, for to do so would

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Kan. Stat. Ann. § 65-4141 was sentenced under *Kan. Stat. Ann. § 21-4721(e)* and could properly appeal on grounds his sentence resulted from partiality, prejudice, oppression or corrupt motive, § 21-4721(e) was not unconstitutional on equal protection grounds. *State v. Doe, 27 Kan. App. 2d 677, 6 P.3d 938, 2000 Kan. App. LEXIS 657 (2000).*

3. Departure sentence was properly imposed pursuant to *Kan. Stat. Ann. § 21-4721(d)* after a trial court found that defendant's crimes were part of a major organized drug manufacturing activity in violation of *Kan. Stat. Ann. § 21-4717(a)*; because the trial court relied on statutory aggravating factors, such factors were substantial and compelling as a matter of law, and there was competent evidence supporting each factor. *State v. Hernandez, 24 Kan. App. 2d 285, 944 P.2d 188, 1997 Kan. App. LEXIS 137 (1997).*

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5. [illegible] appeal of a trial court's imposition of a departure sentence after she pled no contest to aggravated assault of [illegible] under *Kan. Stat. Ann. § 21-3411*, the appeals court was required by *Kan. Stat. Ann. § 21-4[illegible]* whether the trial court's findings of fact and reasons justifying departure were supported by substantial [illegible] and constituted substantial and compelling reasons for departure as a matter of law. *State v. Eisele, 26[illegible] 712, 1997 Kan. LEXIS 78 (1997).*

6. [illegible] upward durational sentence imposed following defendant's conviction of level 4 aggravated battery, was affirmed; [illegible] the trial court should not have considered defendant's subsequent drive-by shooting of a witness as an aggravating factor in sentencing defendant, defendant's excessive brutality toward the victim independently justified the departure [illegible] *Kan. Stat. Ann. § 21-4721(d)*(Supp. 1993). *State v. Valentine, 260 Kan. 431, 921 P.2d 770, 1996 Kan. L[illegible]*

7. [illegible] constituted substantial and compelling reasons for departing downward from sentencing guidelines for [illegible] for aggravated robbery and kidnapping where defendant had no prior criminal history, was only 19 [illegible] the incident, had nothing to gain from the incident, had a supportive family, and his [illegible] was a good worker; though no single factor was sufficient to support the departure, all the factors were [illegible] and in conjunction they justified the departure. *State v. Murphy, 270 Kan. 804, 19 P.3d 80, 2001 K[illegible]*

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9. Where [illegible] was convicted of intentional second-degree murder and was sentenced to a term of imprisonment of

154 months, the trial court erred by imposing an upward departure from the presumptive sentence on the grounds that defendant created a danger of harm or death to more than one person and that he committed a crime while engaged in the operation of a crack cocaine house, a danger to society as a whole, because the facts cited by the sentencing court in justification of departure were not supported by the record, and the reasons stated on the record for departure did not adequately justify a sentence outside the presumptive sentence. *State v. Bailey, 263 Kan. 685, 952 P.2d 1289, 1998 Kan. LEXIS 10 (1998).*

10. Where defendant was convicted for first-degree felony murder and attempted voluntary manslaughter, he was not entitled to appeal consecutive sentences under *Kan. Stat. Ann. § 21-4721(c)(1)*, (e)(1) because the statutes on October 5, 1996 and those provisions prohibit review of presumptive sentences for crimes committed on or after July 1, 1995; imposition of consecutive sentences did not constitute a departure sentence. *State v. Flores, 268 Kan. 637, 999 P.2d 919, 2000 Kan. LEXIS 39 (2000).*

11. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child to place defendant on probation was reversed and remanded for resentencing. The findings that community corrections could be served by rehabilitation and that a treatment plan was available were not supported by the evidence as required under *Kan. Stat. Ann. § 21-4721(d)*. The sentence imposed did not provide for defendant's rehabilitation and the treatment plan did not include a treatment plan for pedophilia or any other type of sexual disorder, and any plan considered as a factor to depart downwardly from the presumptive sentence had to include treatment for the behavior that caused the crime. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

12. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing because the finding that defendant was not a danger to society was not supported by sufficient evidence as required under *Kan. Stat. Ann. § 21-4721(d)*. Although a clinical psychologist and defendant's employer testified that they did not believe defendant was a danger to society, it could not be said that defendant had no predisposition to commit similar crimes or any other crimes because he had a felony and misdemeanor criminal record and had refused to allocute to the crimes for which he was convicted. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

13. Where defendant received the presumptive sentences for aggravated indecent liberties with a minor, the appellate court lacked jurisdiction to entertain his untimely appeal under *Kan. Stat. Ann. § 21-4721(c)(1)* even though the trial court denied a motion for departure. *State v. Parker, 23 Kan. App. 2d 655, 934 P.2d 987, 1997 Kan. App. LEXIS 18 (1997).*

14. When a lawful sentence has been imposed under Kansas Sentencing Guidelines Act, the sentencing court has no jurisdiction to modify that sentence except to correct arithmetic or clerical errors pursuant to *Kan. Stat. Ann. § 21-4721(i)*. Likewise, there is no jurisdiction for a sentencing court to consider or reconsider possible sentence departure from the presumptive sentence after the sentence has been imposed and the sentencing proceeding has been concluded. *State v. Miller, 260 Kan. 892, 926 P.2d 652, 1996 Kan. LEXIS 146 (1996).*

15. Court reviewed an issue related to a constitutional violation in determining the terms and conditions of a presumptive probation sentence, even though normally the court had no jurisdiction to consider an appeal from a presumptive sentence under *Kan. Stat. Ann. § 21-4721(c)(1). State v. Yong Spencer, 31 Kan. App. 2d 681, 70 P.3d 1226, 2003 Kan. App. LEXIS 561 (2003).*

16. After defendant was convicted for two counts of rape and five counts of aggravated indecent liberties with a child, the appellate court could not review whether defendant's sentence was cruel and unusual punishment, for to do so would

null[illegible] *Kan. Stat. Ann. § 21-4721* which barred appeals of presumptive guideline sentences. *State v. Blackshire, 29 Kan. App.* [illegible] *2001 Kan. App. LEXIS 684 (2001).*

17. Where [illegible] was convicted for first-degree felony murder and attempted voluntary manslaughter, he was not ent[illegible] consecutive sentences under *Kan. Stat. Ann. § 21-4721(c)(1),* (e)(1) because he committed the offenses on [illegible] and those provisions prohibit review of presumptive sentences for crimes committ[illegible] on or after July 1, 1993; im[illegible] of consecutive sentences did not constitute a departure sentence. *State v. Flores, 268 Kan. 657, 999 P.2d 919, 2*[illegible] *Kan. LEXIS 39 (2000).*

18. It is proper in any appeal for the appellate court to review a claim that a sentence that departs from the presumptive se[illegible] partiality, prejudice, oppression or corrupt motive. *Kan. Stat. Ann. § 21-4721(e)(1). State v. S*[illegible] *P.2d 664, 2000 Kan. LEXIS 3 (2000).*

19. [illegible] a sentence violated *Kan. Stat. Ann. § 21-4720(b)(4),* which provides that the total controlling sen[illegible] base sentence, a court did not err by increasing defendant's base sentence to 38 months a[illegible] other counts to 19 months; *Kan. Stat. Ann. § 22-3504* enables a court to correct an illegal sen[illegible] defendant had never been legally sentenced, a proper sentence could later be imposed. Fur[illegible] *21-4721(c)(2)* did not preclude review of the resentencing. State v. *Baldwin, 24 Kan. App. 2d* [illegible] *P.2d 422, 1997 Kan. App. LEXIS 102 (1997).*

20. [illegible] pled guilty to felony murder, *Kan. Stat. Ann. § 21-3401,* and aggravated robbery, *Kan. Stat. Ann. §* [illegible] of consecutive sentences, authorized under *Kan. Stat. Ann. § 21-4720(b),* was not appealable u[illegible] the [illegible] Sentencing Guidelines Act, *Kan. Stat. Ann. § 21-4701* et seq., because the statutory grounds of appeal [illegible] *21-4721* were inapplicable and the consecutive sentence was not in and of itself inconsistent [illegible] was not a departure sentence under *Kan. Stat. Ann. § 21-4721(a). State v. Ware, 262* [illegible] *LEXIS 75 (1997).*

21. [illegible] since a defendant's last felony conviction is a substantial and compelling reason for dep[illegible] *21-4721* is to be viewed in light of the purposes of the guidelines and the facts of the cas[illegible] *Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

2[illegible] sentences of 77-months and 34-months were presumptive sentences, the appellate court was [illegible] appeal pursuant to *Kan. Stat. Ann. § 21-4721(c)(1). State v. Peal, 20 Kan. App. 2d* [illegible] *LEXIS 53 (1995).*

23. [illegible] sentence imposed following defendant's conviction of level 4 aggravated battery, was a[illegible] should not have considered defendant's subsequent drive-by shooting of a witness as an a[illegible] defendant, defendant's excessive brutality toward the victim independently justified the d[illegible] *Kan. Stat. Ann. § 21-4721(d)*(Supp. 1993). *State v. Valentine, 260 Kan. 431, 921 P.2d 770, 1996 Kan. L*[illegible]

2[illegible] *§ 21-4721(d)(2)* refers to something that is real, not imagined, something with su[illegible] *Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, 1996 Kan. App. LEXIS 16 (1996).*

25. [illegible] in *Kan. Stat. Ann. § 21-4721(d)(2)* implies that a court is forced, by the facts of a case, to leave [illegible] ordinary. *State v. Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, 1996 Kan. App. LEXIS 1*[illegible]

2[illegible] coupled with her unconscious state and the gunshot wound to her head, coupled with defendant's [illegible] the victim who his younger brother had accidentally shot, but his dragging her from his apartment an[illegible] degree weather, were substantial and compelling reasons under *Kan. Stat. Ann. § 21-4*[illegible] *State v. Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, 1996 Kan. App. LEXIS 16*

(1996).

27. Although the moral duty to assist an injured and helpless victim is not listed among those factors in *Kan. Stat. Ann. § 21-4721(d)(2)*, § 21-4721(d)(2) is not an exclusive list of factors that may be considered by the state, and the court did not err in considering this factor as one of the grounds for departure. *State v. Hunter, 22 Kan. App. 2d 3, 911 P.2d 1121, 1996 Kan. App. LEXIS 16 (1996).*

28. Under *Kan. Stat. Ann. 21-4721(d)*, the review of a departure sentence on appeal is limited to whether the sentencing court's findings of fact and reasons justifying a departure: (1) are supported by evidence in the record; and (2) provide substantial and compelling reasons for departure. *State v. Trimble, 21 Kan. App. 2d 32, 894 P.2d 920, 1995 Kan. App. LEXIS 81 (1995).*

29. Where the trial court initially imposed an upward durational sentence, it had authority, after revocation, to impose a lesser, presumptive, sentence. *State v. McGill, 271 Kan. 150, 22 P.3d 597, 2001 Kan. LEXIS 277 (2001).*

30. Even though an appellate court is without jurisdiction to consider a sentence within the presumptive sentencing range for the crime, pursuant to *Kan. Stat. Ann. § 21-4721(c)(1)*, the court had jurisdiction to consider whether a trial court contemplated placing a border box defendant in a correctional conservation camp before incarcerating him in order to insure that the trial court followed the mandates of *Kan. Stat. Ann. § 21-4603d(a). State v. Schultz, 25 Kan. App. 2d 702, 971 P.2d 346, 1998 Kan. App. LEXIS 757 (1998).*

31. Where defendant moved to exclude a prior conviction from consideration at sentencing because the State's proof of his crime of failure to register as a sex offender, and the State unsuccessfully asked the trial court to reconsider the court's motion, the State adequately preserved for appeal the issue as to whether the trial court erred by failing to consider the prior conviction (though the better practice would have been for the State to object or take exception after the court's ruling). *State v. Pottoroff, 96 P.3d 280, 2004 Kan. App. LEXIS 884 (Kan. Ct. App. 2004).*

32. Generally, under *Kan. Stat. Ann. § 21-4721(e)*, the Kansas Supreme Court has jurisdiction to consider whether a district court errs in determining the appropriate classification of a defendant's prior convictions under the sentencing guidelines error by stipulating to his or her criminal history cannot request a correction of sentence under *Kan. Stat. Ann. § 22-3504* after pronouncement of sentence. *State v. Goeller, 276 Kan. 578, 77 P.3d 1272, 2003 Kan. LEXIS 592 (2003).*

33. Although defendant failed to provide written notice of claimed errors within his criminal history worksheet in contravention of the requirements of *Kan. Stat. Ann. § 21-4715(c)*, the supreme court vacated and remanded his sentence where his foreign conviction was incorrectly classified as there was no oral stipulation by defendant in open court and no opportunity for him or counsel to review the amended criminal history worksheet prior to the hearing. *State v. Vandervort, 276 Kan. 164, 72 P.3d 925, 2003 Kan. LEXIS 478 (2003).*

34. Appellate court lacked jurisdiction to hear defendant's appeal of sentence where the sentence for murder was within the presumptive range. *State v. Clemons, 273 Kan. 328, 45 P.3d 384, 2002 Kan. LEXIS 136 (2002).*

35. Generally, the appellate court does not have jurisdiction to consider sentencing appeals when the sentence is the result of an agreement between the State and the defendant and the sentencing court approves the sentence on the record. However, where *Kan. Stat. Ann. § 21-4721(c)* applies, the appellate court may consider a claim that the sentence is illegal. *State v. Boswell, 30 Kan. App. 2d 9, 37 P.3d 40, 2001 Kan. App. LEXIS 1181 (2001).*

36. Where defendant was sentenced within the presumptive sentencing range for the crime he committed, under *Kan. Stat. Ann. § 21-4721(c)(1)*, there could be no appeal from the sentence. *State v. Adams, 29 Kan. App. 2d 559, 30 P.3d 317,*

2001 Kan. [illegible] LEXIS 773 (2001).

37. After defendant was convicted for two counts of rape and five counts of aggravated indecent liberties with a child, the appellate court could not review whether defendant's sentence was cruel and unusual punishment, for to do so would nullify *Kan. Stat. Ann. § 21-4721* which barred appeals of presumptive guideline sentences. *State v. Blackshire, 29 Kan. App. 2d 493, 28 P.3d 440, 2001 Kan. App. LEXIS 684 (2001).*

38. Finding that the fact that defendant absconded from the court's jurisdiction for two months was not a substantial and compelling reason to depart from the presumptive sentence of probation was proper. *State v. McKay, 271 Kan. 725, 26 P.3d [illegible] Kan. LEXIS 489 (2001).*

39. Defendant's appeal of a sentence that fell within the presumptive range was deemed frivolous because he knew that such sentences were not appealable under *Kan. Stat. Ann. § 21-4721(c)(1)*; the State was entitled to recover attorneys' fees and costs of reproducing its brief pursuant to Kan. Sup. Ct. Rule 7.07(c). *State v. Dugan, 29 Kan. App. 2d 71, 25 P.3d [illegible] Kan. App. LEXIS 372 (2001).*

40. Where an appellate court was required to review departure sentence based upon whether the sentencing court's finding of [illegible] the departure were supported by the evidence pursuant to *Kan. Stat. Ann. § 21-4721(d)*, and where the [illegible] was required to state compelling reasons on the record under *Kan. Stat. Ann. § 21-4716(a)* supporting [illegible] with respect to his narcotics convictions was improper because the sentencing court [illegible] adverse inference from defendant's refusal to disavow affiliation with a gang. *State v. Aikman, 29 Kan. [illegible] Kan. App. LEXIS 489 (2001).*

41. [illegible] a departure sentence under the authority granted it by *Kan. Stat. Ann. § 21-4721*, the Supreme Court [illegible] determined that the presumptive guidelines sentence was 2 years' probation for stalking, and because the sentencing court did not, as required by *Kan. Stat. Ann. § 21-4716(a)*, state for the record the substantial and compelling reasons for departing when it imposed a sentence of a 5-year probationary period, remand was required so that the sentencing court [illegible] appropriate reasons justifying the imposition of a departure sentence and impose such a [illegible] *259, 13 P.3d 887, 2000 Kan. LEXIS 988 (2000).*

42. [illegible] for first-degree felony murder and attempted voluntary manslaughter, he was not [illegible] sentences under *Kan. Stat. Ann. § 21-4721(c)(1)*, (e)(1) because he committed the offenses [illegible] these provisions prohibit review of presumptive sentences for crimes committed on or after July [illegible] presumptive sentences did not constitute a departure sentence. *State v. Flores, 268 Kan. 657, 999 [illegible] Kan. LEXIS [illegible] (2000).*

43. [illegible] *Stat. Ann. § 21-4721* applied, an appellate court's jurisdiction to consider a challenge to a sentence was [illegible] by the statute or a claim that the sentence was otherwise illegal. *State v. Lewis, 27 [illegible] 2000 Kan. App. LEXIS 110 (2000).*

44. [illegible] jurisdiction to hear an appeal of a presumptive sentence. *Kan. Stat. Ann. § 21-4721(c). State v. [illegible] 1141, 2000 Kan. App. LEXIS 110 (2000).*

45. [illegible] *Stat. Ann. § 21-4721(d)*, a sentencing court's findings of fact and reasons justifying a departure must be supported by evidence in the record and constitute substantial and compelling reasons for departure. A claim that the [illegible] relied upon by the sentencing court do not constitute substantial and compelling reasons for departure is [illegible] *26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

46. [illegible] depart downwardly from the presumptive sentences for defendant's convictions for [illegible] liberties with a child and one count of indecent liberties with a child and to place [illegible] and remanded for resentencing. The findings that community interests would be [illegible] a treatment plan was available were not supported by the evidence as required under *Kan. [illegible] -47*[illegible] sentence imposed did not provide for defendant's rehabilitation and the proposed treatment [illegible] pedophilia or any other type of sexual disorder, and any plan of treatment used

as a factor to depart downwardly from the presumptive sentence had to include treatment [illegible] the crime. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465*.

47. Sentencing court's decision to depart downwardly from the presumptive sentences [illegible] three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing pursuant to *Kan. Stat. Ann. § 21-4721(d)* where, among other things, the sentencing court found that defendant was supporting a family. Although there was evidence that defendant had a loving relationship with his children that remained in the home, there [illegible] a danger to them if given probation, and the application of the "supporting a family" [illegible] was reason to believe that defendant could harm the very children he was supporting. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

48. Appellate court employs a two-step test when determining if a sentencing departure [illegible] compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. If either test has not [illegible] has erred in imposing a departure sentence. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

49. Appellate court employs a two-step test when determining if a sentencing departure [illegible] compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. The first step is [illegible] appellate court to determine if the facts stated by the sentencing judge in justifying [illegible] *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

50. Appellate court employs a two-step test when determining if a sentencing departure [illegible] and compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. The second step [illegible] appellate court to determine if the reasons stated on the record for departure are adequate to justify a sentence outside the presumptive test. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

51. Sentencing court's decision to depart downwardly from the presumptive sentences [illegible] aggravated indecent liberties with a child and one count of indecent liberties with a child and to place probation was reversed and remanded for resentencing because the decision was not [illegible] compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. The fact that defendant [illegible] his home was not a substantial and compelling reason to depart because the victims had [illegible] to the home with their mother and half-brothers, questions were raised concerning the safety of the [illegible] who had remained in defendant's home, and there was nothing to support the conclusion that the victims would not be in defendant's home in the near future or that defendant would not repeat the crimes if he had the opportunity. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

52. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's [illegible] aggravated indecent liberties with a child and one count of indecent liberties with a child and to place probation was reversed and remanded for resentencing because the decision was not supported by evidence as required under *Kan. Stat. Ann. § 21-4721(d)*. Among other things, the finding that defendant [illegible] was not supported by an expert's testimony, and defendant's loving relationship with his three children [illegible] support a finding that defendant was not a danger to children. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

53. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing pursuant to *Kan. Stat. Ann. § 21-4721(d)* where, among other things, the sentencing court relied heavily upon the testimony of an expert who opined that defendant was not a pedophile. Because that testimony effectively controverted the jury's verdict, the sentencing court's reliance on the testimony was questionable, and its remedy was to grant a judgment of acquittal or a new trial rather than [illegible] dispositional departure. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

54. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for

three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing because the finding that defendant was not a danger to society was not supported by sufficient evidence as required under *Kan. Stat. Ann. § 21-4721(d)*. Although a clinical psychologist and defendant's employer testified that they did not believe defendant was a danger to society, it could not be said that defendant had no predisposition to commit similar crimes or any other crimes because he had a felony and misdemeanor criminal record and had refused to allocute to the crimes for which he was convicted. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

55. Appellate court had no jurisdiction regarding defendant's claim of prejudice regarding the State offering a plea bargain to his accomplice, who was charged with the identical crimes as defendant, but not to defendant; the Kansas Sentencing Guidelines Act, *Kan. Stat. Ann. § 21-4701* et seq., deprived the district court of the jurisdiction to reconsider a departure [illegible]'s lawful sentences or to modify those sentences except to correct a clerical error, and *Kan. Stat. Ann. § 2[illegible]* precluded appellate court from reviewing defendant's sentences, which were within the presumptive limits, [illegible] exceptions. *State v. Scudder, 266 Kan. 886, 975 P.2d 801, 1999 Kan. LEXIS 106 (1999).*

5[illegible] an appellate court is without jurisdiction to consider a sentence within the presumptive sentencing range [illegible] *Stat. Ann. § 21-4721(c)(1)*, the court had jurisdiction to consider whether a trial court contemplated placing a border box defendant in a correctional conservation camp before incarcerating him in order to insure that the trial court followed the mandates of *Kan. Stat. Ann. § 21-4603d(a). State v. Schick, 25 Kan. App. 2d 702, 9[illegible] 1998 Kan. App. LEXIS 757 (1998).*

5[illegible] findings of factual reasons justifying a departure were supported by evidence in the record and constituted s[illegible] reasons for departure; defendant's attitude towards his parole, his commission of crimes while [illegible] murder on two occasions were substantial and compelling reasons for departure. *State v. [illegible], 958 P.2d 1059, 1998 Kan. App. LEXIS 13 (1998).*

5[illegible] was convicted of intentional second-degree murder and was sentenced to a term of imprisonment of [illegible] by imposing an upward departure from the presumptive sentence of 92 to 103 months on the [illegible] created a danger of harm or death to more than one person and that he committed the murder w[illegible] in the operation of a crack cocaine house, a danger to society as a whole, because the facts stated by the s[illegible] in justification of departure were not supported by the record, and the reasons stated on the record for d[illegible] not adequately justify a sentence outside the presumptive sentence. *State v. Bailey, 263 Kan. 685, 952 P.2d [illegible]*

5[illegible] properly imposed pursuant to *Kan. Stat. Ann. § 21-4721(d)* after a trial court found that d[illegible] part of a major organized drug manufacturing activity in violation of *Kan. Stat. Ann. § 21-*[illegible] statutory aggravating factors, such factors were substantial and compelling as a [illegible] competent evidence supporting each factor. *State v. Hernandez, 24 Kan. App. 2d 285, 944 [illegible] Kan. 1057 (1997).*

6[illegible]'s durational departure sentence of 24 months' imprisonment following his conviction for drug crimes, i[illegible] possession with the intent to sell in violation of *Kan. Stat. Ann. § 65-4161(a)*, was not unreasonable v[illegible] possession of packaging materials and telecommunications equipment used in the large scale d[illegible] controlled substance, as identified in *Kan. Stat. Ann. § 21-4717(a)(1)(D)*, (2) defendant was i[illegible] of cocaine at the time of his arrest, with a street value between $25,000 and $50,000, [illegible] *21-4717(a)(1)(F)*, (3) defendant's argument that departure sentences were to be imposed [illegible] first offense, and (4) defendant failed to show that his crimes would be considered less than [illegible] geographical area. *State v. Davis, 262 Kan. 711, 941 P.2d 946, 1997 Kan. LEXIS 120 (1997).*

[illegible] defendant pled guilty to felony murder, *Kan. Stat. Ann. § 21-3401*, and aggravated robbery, *Kan. Stat. Ann.* [illegible] consecutive sentences, authorized under *Kan. Stat. Ann. § 21-4720(b)*, was not appealable [illegible] Guidelines Act, *Kan. Stat. Ann. § 21-4701* et seq., because the statutory grounds of appeal s[illegible] *-4721* were inapplicable and the consecutive sentence was not in and of itself inconsistent v[illegible] and was not a departure sentence under *Kan. Stat. Ann. § 21-4721(a). State v. Ware, 262*

Kan. 180, 938 P.2d 197, 1997 Kan. LEXIS 75 (1997).

62. Kansas appellate courts are without jurisdiction to consider appeals from a sentence [illegible] on or after July 1, 1993, where the imposed sentence is within the presumptive sentence for the crime. *Kan. Stat. Ann. § 21-4721(c)(1). State v. Ford, 262 Kan. 206, 936 P.2d 255, 1997 Kan. LEXIS 67 (1997).*

63. Where defendant received the presumptive sentences for aggravated indecent [illegible] court lacked jurisdiction to entertain his untimely appeal under *Kan. Stat. Ann. § 21-[illegible]* even though the court denied a motion for departure. *State v. Parker, 23 Kan. App. 2d 655, 934 P.2d 987, 1997 Kan. App. LEXIS 112 (1997).*

64. Denial of defendant's motion for a downward sentence departure was proper because the sentence was within the guidelines, and defendant failed to show that the sentence resulted from prejudice, as required by *Kan. Stat. Ann. 21-4721(e)(1). State v. Windom, 23 Kan. App. 2d 429, 932 P.2d 1015, 1997 Kan. App. LEXIS 19 (1997).*

65. Where defendant pled guilty to three counts of burglary committed while he was on parole for a previous felony conviction, the court, under *Kan. Stat. Ann. § 21-4721(c)*, imposed a sentence, which was within the presumptive sentence for the crime; under *Kan. Stat. Ann. [illegible]* the commission of new felonies while an offender was serving a sentence for a previous felony and the [illegible] requirements of *Kan. Stat. Ann. § 21-4608*, defendant properly was sentenced to incarceration for the [illegible] and the imposition of a prison sentence for the new crime did not constitute a departure, as defined in *Kan. Stat. Ann. § 21-4703(f). State v. Burrows, 23 Kan. App. 2d 342, 929 P.2d 1391, 1997 Kan. App. LEXIS 6 (1997).*

66. Defendant's convictions and sentences for second-degree murder, aggravated [illegible] in connection with an appeal that was filed pursuant to *Kan. Stat. Ann. § 60-1507* [illegible] and defendant of his right of allocution, because, based on the fact that *Kan. Stat. Ann. § 21-[illegible] § 21-4721(c)* permitted an upward departure by agreement of the prosecution and [illegible] departure sentences that were imposed was not permissible, and because the trial court [illegible] to the reasons for the upward departure, properly followed *Kan. Stat. Ann. § 21-4718(f). State v. Jones, 23 Kan. App. 2d 65, 927 P.2d 954, 1996 Kan. App. LEXIS 139 (1996).*

67. Under *Kan. Stat. Ann. § 21-4721(e)(3)*, the court had jurisdiction to review defendant's claim that the [illegible] of her Missouri juvenile adjudications in calculating her criminal history under the Kansas Sentencing [illegible] violated the Full Faith and Credit, Due Process, and Ex Post Facto Clauses of the United States Constitution, although this objection was not made at sentencing. *State v. Pope, 23 Kan. App. 2d 69, 927 P.2d 503, [illegible] 73 (1996).*

68. Pursuant to *Kan. Stat. Ann. § 21-4721(a)*, a departure sentence is subject to appeal. [illegible] *4721(c)* an appellate court may not review a sentence that is within the presumptive sentence for the crime [illegible] ce resulting from an agreement between the State and defendant which the sentencing court approves on the record. *State v. Miller, 260 Kan. 892, 926 P.2d 652, 1996 Kan. LEXIS 146 (1996).*

69. Under *Kan. Stat. Ann. § 21-4721(d)*, on appeal, the review of a departure sentence is limited to whether the sentencing court's findings of fact and reasons justifying a departure are supported by the evidence in the record and whether these findings constitute substantial and compelling reasons for departure. Also, under *Kan. Stat. Ann. § 21-[illegible]* may appeal, the appellate court may review a claim that the departure sentence resulted from partiality, prejudice, oppression, or corrupt motive, or that there was an error in computing criminal history or crime severity level and [illegible] *Kan. Stat. Ann. § 21-4721(i)*, the sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors. *State v. Miller, 260 Kan. 892, 926 P.2d 652, 1996 Kan. LEXIS 146 (1996).*

70. Term "substantial" in *Kan. Stat. Ann. § 21-4721(d)(2)* refers to something that is real, not imagined, something with substance and not ephemeral. *State v. Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, 1996 Kan. App. LEXIS 16 (1996).*

71. Term "compelling" in *Kan. Stat. Ann. § 21-4721(d)(2)* implies that a court is forced, by the facts of a case, to leave

the status quo or go beyond what is ordinary. *State v. Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, 1996 Kan. App. LEXIS 16 (1996).*

72. Victim's tender age, coupled with her unconscious state and the gunshot wound to her head, coupled with defendant's failure not only to aid the victim, who his younger brother had accidentally shot, but his dragging her from his apartment and leaving her outside in 11 degree weather, were substantial and compelling reasons under *Kan. Stat. Ann. § 21-4721(d)(2)* for a dispositional departure. *State v. Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, 1996 Kan. App. LEXIS 16 (1996).*

73. Although the moral duty to assist an injured and helpless victim is not listed among those factors in *Kan. Stat. Ann. § 21-* [illegible] is not an exclusive list of factors that may be considered for departure, and the trial court d[illegible] using this factor as one of the grounds for departure. *State v. Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, 1996 Kan. App. LEXIS 16 (1996).*

74. Even though defendant's sentence for aggravated battery fell within the presumptive incarceration range, the court had jurisdiction under former Kan. Stat. Ann. § 21-4721(e)(3) (now Kan. Stat. Ann. § 4164) to hear his claim that his criminal h[illegible] was improperly categorized. *State v. LaGrange, 21 Kan. App. 2d 477, 901 P.2d 44, 1995 Kan. App. LEXIS 132 (*[illegible]

75. [illegible] sentence is not inconsistent with a presumptive sentence; thus, it is not a departure and is not appealable [illegible] § 21-[illegible] section to consider an appeal challenging a sentence imposed pursuant to the h[illegible] set is limited to those grounds specified in *Kan. Stat. Ann. § 21-4721(a)* and (e) and illegal s[illegible] *St[illegible]ra[illegible], 21 Kan. App. 2d 477, 901 P.2d 44, 1995 Kan. App. LEXIS 132 (1995).*

76. [illegible] *Kan. Stat. Ann. § 21-4721(d)(1)*, substantial evidence supported the trial court's finding that defendant, who w[illegible]ce [illegible] for voluntary manslaughter, was not a threat to society where there was evidence that defendant was n[illegible] non-violent. *State v. Grady, 258 Kan. 72, 900 P.2d 227, 1995 Kan. LEXIS 109 (1995).*

77. [illegible] *Kan. Stat. Ann. § 21-4721(d)(1)*, substantial evidence supported the trial court's finding that defendant, who w[illegible] for voluntary manslaughter, went to the victim's house out of concern for the victim's wife where c[illegible] relationship between the victim and his wife and where defendant told the trial court a[illegible] went to the victim's house with the intent to help the victim's wife "and that was it." *State v. Grady, 2[illegible] 12[illegible] 1995 Kan. LEXIS 109 (1995).*

78. [illegible] had [illegible] under *Kan. Stat. Ann. § 21-4721(e)(2)* and (3) of the Kansas Sentencing Guidelines Act to r[illegible] to his criminal history report. *State v. Perez, 21 Kan. App. 2d 217, 897 P.2d 1048, 1995 Kan. [illegible]*

79. [illegible] properly dismissed defendant's appeal from a trial court's imposition of consecutive presumptive s[illegible] defendant's allegation that the trial court abused its discretion ordering those sentences was not one of t[illegible] *Kan. Stat. Ann. § 21-4721. State v. McCallum, 21 Kan. App. 2d 40, 895 P.2d 1258, [illegible]*

80. Under *Kan. Stat. Ann. 21-4721(d)*, the review of a departure sentence on appeal is limited to whether the sentencing c[illegible] findings justifying a departure: (1) are supported by evidence in the record, and (2) constitute s[illegible] two reasons for departure. *State v. Trimble, 21 Kan. App. 2d 32, 894 P.2d 920, 1995 Kan. App. [illegible]*

81. [illegible] *Ann. § 21-4721(d)*, the reviewing court must determine whether the sentencing court's findings of f[illegible] were supported by substantial competent evidence and constituted substantial and c[illegible] re[illegible] of law. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. [illegible] 19[illegible]*

82. [illegible] court finds that either test under *Kan. Stat. Ann. § 21-4721(d)* has not been met, the sentencing court

erred in imposing a departure sentence, and resentencing by the sentencing court is required. *State v. [illegible] Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

83. *Kan. Stat. Ann. § 21-4721* limits review of a departure sentence to the findings [illegible] re specifically enunciated by the sentencing court. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

84. In reviewing a sentencing court's reasons for departure under *Kan. Stat. Ann. 21-47[illegible]* a broader search of the record to examine all facts available to the sentencing court [illegible] substantial and compelling reasons for departure. *State v. Richardson, 20 Kan. App. 2d 93[illegible] 901 P.2d 1, [illegible] App. LEXIS 72 (1995).*

85. Trial court did not err in failing to make specific findings to explain its rejection [illegible] rd departure of his sentence, which was within the presumptive sentence for his drug [illegible] p[illegible] t. *Ann. § 21-4721(c)(2)*, because *Kan. Stat. Ann. § 21-4718(c)* required specific findings [illegible] w only if the trial court did depart. *State v. Mares, 20 Kan. App. 2d 971, 893 P.2d 296, 1995 Kan. App. LEXIS 66 (1995).*

86. Because defendant's sentences of 77-months and 34-months were presumptive sentence[illegible] was without jurisdiction to consider the appeal pursuant to *Kan. Stat. Ann. § 21-4721(c)(1). State v. Peal, 20 Kan. App. 2d 816, 893 P.2d 258, 1995 Kan. App. LEXIS 53 (1995).*

87. Trial court's decision to impose defendant's sentences of 77-months and 34-[illegible] le, because the sentence was not inconsistent with the presumptive sentence, the decision was not [illegible] e of the grounds specified in *Kan. Stat. Ann. § 21-4721*, and it was not a departure sentence [illegible] *Kan. Stat. Ann. § 21-4721(a). State v. Peal, 20 Kan. App. 2d 816, 893 P.2d 258, 1995 Kan. App. LEXIS 53 (1995).*

88. Under certain circumstances a departure sentence can occur within the context of consecutive [illegible] creating a ground for appeal under *Kan. Stat. Ann. § 21-4721(a). State v. Peal, 20 Kan. App. 2d 816, 893 P.2d 258, 1995 Kan. App. LEXIS 53 (1995).*

89. Where defendant pled guilty to three counts of burglary committed while he was [illegible] for a previous felony conviction, the court, under *Kan. Stat. Ann. § 21-4721(c)(1)*, lacked jurisdiction to review the sentence, which was within the presumptive sentence for the crime; under *Kan. Stat. Ann. § 21-4603d(1)*, regarding the commission of new felonies while an offender was serving a sentence for a previous felony, and the consecutive sentencing requirements of *Kan. Stat. Ann. § 21-4608*, defendant properly was sentenced to incarceration for the burglaries, and the imposition of a prison sentence for the new crime did not constitute a departure, as defined in *Kan. Stat. Ann. § 21-4703(f). State v. Burrows, 23 Kan. App. 2d 342, 929 P.2d 1391, 1997 Kan. App. LEXIS 6 (1997).*

90. Appellate court properly dismissed defendant's appeal from a trial court's imposition [illegible] sec[illegible] sentences because defendant's allegation that the trial court abused its discretion ordering [illegible] e of the grounds of appeal specified in *Kan. Stat. Ann. § 21-4721. State v. McCallum, 21 Kan. App. 2d 40, 895 P.2d 1258, 1995 Kan. App. LEXIS 85 (1995).*

91. Under certain circumstances a departure sentence can occur within the context of consecutive sentences thereby creating a ground for appeal under *Kan. Stat. Ann. § 21-4721(a). State v. Peal, 20 Kan. App. 2d 816, 893 P.2d 258, 1995 Kan. App. LEXIS 53 (1995).*

92. Where the trial court initially imposed an upward durational sentence, it had authority, after revo[illegible] ination, to impose a lesser, presumptive, sentence. *State v. McGill, 271 Kan. 150, 22 P.3d 597, 2001 Kan. LEXIS 277 (2001).*

93. When a lawful sentence has been imposed under the Kansas Sentencing Guidelines Act, a sentencing court has no

jurisdiction to modify that sentence except to correct arithmetic or clerical errors, pursuant to *Kan. Stat. Ann. § 21-4721*; moreover, the plain language of *Kan. Stat. Ann. § 22-3705* does not authorize a district court to modify a sentence, but merely states that a defendant must serve the mandatory jail time before he or she is eligible for probation, suspension or reduction of his sentence, or parole. *State v. Smith, 26 Kan. App. 2d 272, 981 P.2d 1182, 1999 Kan. App. LEXIS 543 (1999).*

94. In two consolidated cases, where defendants' underlying sentences were imposed before each defendant served the mandatory jail time, defendants were required to serve the underlying sentences after defendants' respective periods of probation were revoked, and the district court had no power to modify the sentences, pursuant to *K.S.A. §§ 22-3705, 21-4721. State v. Smith, 26 Kan. App. 2d 272, 981 P.2d 1182, 1999 Kan. App. LEXIS 543 (1999).*

95. [illegible] that a sentence violated *Kan. Stat. Ann. § 21-4720(b)(4)*, which provides that the total controlling s[illegible] exceed twice the base sentence, a court did not err by increasing defendant's base sentence to 38 months a[illegible] sentencing on other counts to 19 months; *Kan. Stat. Ann. § 22-3504* enables a court to correct an illegal s[illegible] and because defendant had never been legally sentenced, a proper sentence could later be imposed. Furthermore, *Kan. Stat. Ann. § 21-4721(c)(2)* did not preclude review of the resentencing. State v. *Baldwin, 24 Kan. App. 2d 82, 942 P.2d 1122, 1997 Kan. App. LEXIS 102 (1997).*

96. Defendant's convictions and sentences for second-degree murder, aggravated robbery, and felony theft were upheld in connection with an appeal that was filed pursuant to *Kan. Stat. Ann. § 60-1507* because the trial court properly advised defendant of his right of allocution, because, based on the fact that *Kan. Stat. Ann. § 21-4713* and *Kan. Stat. Ann. §* [illegible] an upward departure by agreement of the prosecution and defendant, defendant's appeal of the [illegible] were imposed was not permissible, and because the trial court, which made findings of fact as to [illegible] departure, properly followed *Kan. Stat. Ann. § 21-4718(c). Soto v. State, 23 Kan. App. 2d 85,* [illegible] *LEXIS 139 (1996).*

97. [illegible] has been imposed under Kansas Sentencing Guidelines Act, the sentencing court has no j[illegible] to modify that sentence except to correct arithmetic or clerical errors pursuant to *Kan. Stat. Ann. § 21-4721(i).* [illegible] is no jurisdiction for a sentencing court to consider or reconsider possible sentence departure from the [illegible] after the sentence has been imposed and the sentencing proceeding has been concluded. *State v.* [illegible] *892, 926 P.2d 652, 1996 Kan. LEXIS 146 (1996).*

98. [illegible] no jurisdiction regarding defendant's claim of prejudice regarding the State offering a plea bargain [illegible], who was charged with the identical crimes as defendant, but not to defendant; the Kansas Sentencing [illegible] *Kan. Stat. Ann. § 21-4701* et seq., deprived the district court of the jurisdiction to reconsider a departure [illegible] sentences or to modify those sentences except to correct a clerical error, and *Kan. Stat. Ann. §* [illegible] the appellate court from reviewing defendant's sentences, which were within the presumptive limits, [illegible]. *State v. Stephens, 266 Kan. 886, 975 P.2d 801, 1999 Kan. LEXIS 106 (1999).*

99. [illegible] sentence may be corrected at any time under *Kan. Stat. Ann. § 22-3504*; an appeal from the sentence imposed [illegible] on or after July 1, 1993, was limited pursuant to *Kan. Stat. Ann. § 21-4721. State v.* [illegible] *255, 876 P.2d 172, 1994 Kan. LEXIS 68 (1994).*

100. [illegible] defendant moved to exclude a prior conviction from consideration at sentencing because it was an element of [illegible] for registration as a sex offender, and the State unsuccessfully asked the trial court to overrule defendant's [illegible] adequately preserved for appeal the issue as to whether the trial court erred by not considering the prior c[illegible] although the better practice would have been for the State to object or take exception after the court's ruling). *S[illegible] 96 P.3d 280, 2004 Kan. App. LEXIS 84 (Kan. Ct. App. 2004).*

101. Finding that the fact that defendant absconded from the court's jurisdiction for two months was a substantial and compelling reason to depart from the presumptive sentence of probation was proper. *State v. Murray, [illegible] P.3d 58, 2001 Kan. LEXIS 489 (2001).*

102. Trial court articulated substantial and compelling reasons for departing downward from the presumptive sentence for defendant's convictions for aggravated robbery and kidnapping where defendant had no prior criminal history, was only 19 years old, did not instigate the incident, had nothing to gain from the incident, had a supportive family, and his employer reported he was a good worker; though no single factor was sufficient to support the departure, all the factors were properly considered, and in conjunction they justified the departure. *State v. Murphy, 270 Kan. 864, 19 P.3d 132, 2001 Kan. LEXIS 159 (2001).*

103. Reviewing a departure sentence under the authority granted it by *Kan. Stat. Ann. § 21-4721*, the Supreme Court of Kansas determined that the presumptive guidelines sentence was 2 years' probation for stalking, but the sentencing court did not, as required by *Kan. Stat. Ann. § 21-4716(a)*, state for the record the substantial and compelling reasons for departing when it imposed a sentence of a 5-year probationary period. Remanding the case, the court held that the sentencing court could cite appropriate reasons justifying the imposition of a departure sentence and impose such a sentence. *State v. Whitesell, 270 Kan. 259, 13 P.3d 887, 2000 Kan. LEXIS 988 (2000).*

104. Defendant's sentence was vacated because due process demanded, at a minimum, a finding that all the elements of perjury were satisfied before perjury was used as a basis for an upward sentencing departure. *Kan. Stat. Ann. § 21-4721(d)* required the court to first review the trial court's departure findings to determine if the evidence supported those findings, then the court had to review those findings to see if they constituted substantial and compelling reasons. *State v. Smart, 26 Kan. App. 2d 808, 995 P.2d 407, 1999 Kan. App. LEXIS 1466 (1999).*

105. Under *Kan. Stat. Ann. § 21-4721(d)*, a sentencing court's findings of fact and reasons justifying departure must be supported by the evidence in the record and constitute substantial and compelling reasons for departure. Whether departure factors relied upon by the sentencing court do not constitute substantial and compelling reasons for departure is a question of law. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1*

106. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing. The findings that community interests would be served by rehabilitation and that a treatment plan was available were not supported by the evidence. *Kan. Stat. Ann. § 21-4721(d)*. The sentence imposed did not provide for defendant's rehabilitation and the treatment plan did not include a treatment plan for pedophilia or any other type of sexual disorder, and any treatment considered as a factor to depart downwardly from the presumptive sentence had to include treatment for the behavior that caused the crime. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

107. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing pursuant to *Kan. Stat. Ann. § 21-4721(d)* where, among other things, the sentencing court found that defendant was supporting a family. Although there was evidence that defendant had a loving relationship with his children that remained in the home, there was no evidence that he was not a danger to them if given probation, and the application of the "supporting a family" factor was questionable where there was reason to believe that defendant could harm the very children he was supporting. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

108. Appellate court employs a two-step test when determining if a sentencing departure is supported by substantial and compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. If either test has not been met, the sentencing court has erred in imposing a departure sentence. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

109. Appellate court employs a two-step test when determining if a sentencing departure is supported by substantial and

compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. The first step is an evidentiary test that requires the appellate court to determine if the facts stated by the sentencing judge in justifying departure are supported by the record. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

110. Appellate court employs a two-step test when determining if a sentencing departure is supported by substantial and compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. The second step is a law test that requires the appellate court to determine if the reasons stated on the record for departure are adequate to justify a sentence outside the presumptive [illegible]. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

111. Sentencing court's decision to depart downwardly from the presumptive sentences for defendant's convictions for [illegible] indecent liberties with a child and one count of indecent liberties with a child and to place defendant on [illegible] reversed and remanded for resentencing because the decision was not supported by substantial and compelling reasons as required under *Kan. Stat. Ann. § 21-4721(d)*. The fact that defendant's victims no longer lived at his home was not a substantial and compelling reason to depart because the victims had expressed an interest in returning to the home with their mother and half-brothers, questions were raised concerning the safety of the three half-brothers who [illegible] in defendant's home, and there was nothing to support the conclusion that the victims would not be in [illegible] home in the near future or that defendant would not repeat the crimes if he had the opportunity. *State v. Chrisco, [illegible] App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

112. [illegible] court's decision to depart downwardly from the presumptive sentences for defendant's convictions for [illegible] indecent liberties with a child and one count of indecent liberties with a child and to place defendant on [illegible] reversed and remanded for resentencing because the decision was not supported by sufficient evidence as required under *Kan. Stat. Ann. § 21-4721(d)*. Among other things, the finding that defendant was not a danger to children was [illegible] by an expert's testimony, and defendant's loving relationship with his three children did not support a finding that he was not a danger to children. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

113. [illegible] court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing pursuant to *Kan. Stat. Ann. § 21-4721(d)* where, among other things, the sentencing court relied heavily upon the testimony of an expert who opined that defendant was not a danger because that testimony effectively controverted the jury's verdict, the sentencing court's reliance on the testimony was unreasonable, and its authority was to grant a judgment of acquittal or a new trial rather than probation as a sentence. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

114. [illegible] court's decision to depart downwardly from the presumptive sentences for defendant's convictions for three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child and to place defendant on probation was reversed and remanded for resentencing because the finding that defendant was not a danger to society was not supported by sufficient evidence as required under *Kan. Stat. Ann. § 21-4721(d)*. Although a clinical psychologist employed by defendant testified that they did not believe defendant was a danger to society, it could not be said that defendant had a propensity not to commit similar crimes or any other crimes because he had a felony and misdemeanor criminal record [illegible] used to allocute to the crimes for which he was convicted. *State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401, 1999 Kan. App. LEXIS 1465 (1999).*

115. [illegible] court had no jurisdiction regarding defendant's claim of prejudice regarding the State offering a plea bargain to a police officer, who was charged with the identical crimes as defendant, but not to defendant; the Kansas Sentencing Guidelines Act, *Kan. Stat. Ann. § 21-4701* et seq., deprived the district court of the jurisdiction to reconsider a defendant's law-following sentences or to modify those sentences except to correct a clerical error, and *Kan. Stat. Ann. § 21-4721* precluded the appellate court from reviewing defendant's sentences, which were within the presumptive [illegible]. *State v. Gyger, 267 Kan. 886, 975 P.2d 801, 1999 Kan. LEXIS 106 (1999).*

[illegible] findings of fact and reasons justifying a departure were supported by evidence in the record and constituted substantial and compelling reasons for departure; defendant's attitude towards his parole, his commission of crimes while on parole, and his being an absconder on two occasions were substantial and compelling reasons for

departure. *State v. Billington, 24 Kan. App. 2d 759, 953 P.2d 1059, 1998 Kan. App. LEXIS [illegible]*

117. Departure sentence was properly imposed pursuant to *Kan. Stat. Ann. § 21-4[illegible]* defendant's crimes were part of a major organized drug manufacturing activity [illegible] *4717(a)*; because the trial court relied on statutory aggravating factors, such factors were [illegible] a matter of law, and there was competent evidence supporting each factor. *State v. Hernandez, 24 Kan. App. 2d [illegible] P.2d 188, 1997 Kan. App. LEXIS 137 (1997).*

118. Defendant's durational departure sentence of 24 months' imprisonment [illegible] conviction including possession of cocaine with the intent to sell in violation of *Kan. Stat. Ann. [illegible]*, was [illegible] where (1) defendant was in possession of packaging materials and telecommunications equipment [illegible] distribution of drugs and controlled substance, as identified in *Kan. Stat. Ann. § 21-[illegible]* in possession of large amounts of cocaine at the time of his arrest, with a street [illegible] pursuant to *Kan. Stat. Ann. § 21-4717(a)(1)(F)*, (3) defendant's argument that [illegible] only in "unusual" cases was without merit, and (4) defendant failed to show that [illegible] major drug crimes, even in a large urban area. *State v. Davis, 262 Kan. 711, 941 P.2d 946, 1997 Kan. LEXIS 120 (1997).*

119. Appellate standard of review for a departure sentence requires a determination of whether the [illegible] stated by the sentencing court in justification of departure are supported by the record and [illegible] reasons stated on the record adequate to justify a sentence outside the presumptive [illegible] *Kan. 392, 940 P.2d 11, 1997 Kan. LEXIS 86 (1997).*

120. On defendant's appeal of a trial court's imposition of a departure sentence after [illegible] assault of a law enforcement officer under *Kan. Stat. Ann. § 21-3411*, the appeals court [illegible] *§ 21-4721* to determine whether the trial court's findings of fact and reasons justifying departure were supported by substantial competent evidence and constituted substantial and compelling reasons for departure as a matter of law. *State v. Eisele, 262 Kan. 80, 936 P.2d 742, 1997 Kan. LEXIS 78 (1997).*

121. Denial of defendant's motion for a downward sentence departure was [illegible] guidelines, and defendant failed to show that the sentence resulted from [illegible] *4721(e)(1). State v. Windom, 23 Kan. App. 2d 429, 932 P.2d 1019, 1997 Kan. App. LEXIS [illegible]*

122. "Conditional release" under chapter 21, and although it was defined under *Kan. [illegible]* court improperly focused on *Kan. Stat. Ann. § 21-4619* regarding expungement of certain convictions and *Kan. Stat. Ann. § 21-4721* dealing with the departure of sentences to conclude that a legislature intended a broader use for the meaning of the term in chapter 21 when the definition set forth in *Kan. Stat. Ann. § 22-3718* applied to all categories. *State v. Arculeo, 261 Kan. 286, 933 P.2d 122, 1997 Kan. LEXIS 4 (1997).*

123. Where defendant pled guilty to three counts of burglary committed while he was an escapee [illegible] for a previous felony conviction, the court, under *Kan. Stat. Ann. § 21-4721(c)(1)*, [illegible] sentence, which was within the presumptive sentence for the crime; under *Kan. Stat. Ann. § 21-[illegible]* commission of new felonies while an offender was serving a sentence for a previous felony, [illegible] requirements of *Kan. Stat. Ann. § 21-4608*, defendant properly was sentenced to incarceration for the burglaries, and the imposition of a prison sentence for the new crime did not constitute a departure, as defined in *Kan. Stat. Ann. § 21-4703(f). State v. Burrows, 23 Kan. App. 2d 342, 929 P.2d 1391, 1997 Kan. App. LEXIS 6 (1997).*

124. Under *Kan. Stat. Ann. § 21-4721(d)*, on appeal, the review of a departure sentence is limited to whether the sentencing court's findings of fact and reasons justifying a departure are supported by the evidence in the record and whether these findings constitute substantial and compelling reasons for departure. Also, under *Kan. Stat. Ann. § 21-4721(e)*, in any appeal, the appellate court may review a claim that the departure sentence resulted from partiality, prejudice, oppression, or corrupt motive, or that there was an error in computing criminal history or crime severity level and under *Kan. Stat. Ann. § 21-4721(i)*, the sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors. *State v. Miller, 260 Kan. 892, 926 P.2d 652, 1996 Kan. LEXIS 146 (1996).*

125. Trial court's upward durational sentence imposed following defendant's conviction of level 4 aggravated battery, was affirmed; although the trial court should not have considered defendant's subsequent drive-by shooting of a witness as an aggravating factor in sentencing defendant, defendant's excessive brutality toward the victim independently justified the departure. *Kan. Stat. Ann. § 21-4721(d)*(Supp. 1993). *State v. Valentine, 260 Kan. 431, 921 P.2d 770, 1996 Kan. LEXIS 76 (1996).*

126. No error occurred where a district court based its departure downward in defendant's case on the fact that the degree of harm attributable to the crime was significantly less than typical, that the victim was an aggressor or participant in the underlying incident, and four other factors. *State v. Favela, 259 Kan. 215, 911 P.2d 792, 1996 Kan. LEXIS 19 (1996).*

127. Under *Kan. Stat. Ann. § 21-4721(d)(1)*, substantial evidence supported the trial court's finding that defendant, who was being sentenced for voluntary manslaughter, was not a threat to society where there was evidence that defendant was peaceful, cooperative in court. *State v. Grady, 258 Kan. 72, 900 P.2d 227, 1995 Kan. LEXIS 109 (1995).*

128. Under *Kan. Stat. Ann. § 21-4721(d)(1)*, substantial evidence supported the trial court's finding that defendant, who was being sentenced for voluntary manslaughter, went to the victim's house out of concern for the victim's wife where defendant was aware of the violent relationship between the victim and his wife and where defendant told the trial court at sentencing that he went to the victim's house with the intent to help the victim's wife "and that was it." *State v. Grady, 258 Kan. 72, 900 P.2d 227, 1995 Kan. LEXIS 109 (1995).*

129. Under *Kan. Stat. Ann. § 21-4721(d)*, the reviewing court must determine whether the sentencing court's findings of fact justifying departure are supported by substantial competent evidence and constituted substantial and compelling reasons as a matter of law. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

130. The time that elapsed since a defendant's last felony conviction is a substantial and compelling reason for departure under *Kan. Stat. Ann. § 21-4721* is to be viewed in light of the purposes of the guidelines and the facts of the case. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

131. If an appellate court finds that either test under *Kan. Stat. Ann. § 21-4721(d)* has not been met, the sentencing court errs in imposing a departure sentence, and resentencing by the sentencing court is required. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

132. *Kan. Stat. Ann. § 21-4721* limits review of a departure sentence to the findings of fact and reasons justifying departure orally announced by the sentencing court. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

133. In reviewing a sentencing court's reasons for departure under *Kan. Stat. Ann. § 21-4721*, the court will not conduct a de novo review of the record to examine all facts available to the sentencing court to determine whether there were substantial and compelling reasons for departure. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

134. The sentencing court does not take into account the time that has elapsed since a defendant's last felony conviction, but *Kan. Stat. Ann. § 21-4721* requires the sentencing court to consider this factor when imposing sentencing. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

135. The court did not err in failing to make specific findings to explain its rejection of defendant's request for a downward dispositional departure sentence, which was the presumptive sentence for his drug-related crimes pursuant to *Kan. Stat. Ann. § 21-4729(a)(2)*, because *Kan. Stat. Ann. § 21-4718(c)* required specific findings of fact or law only if the trial court departed. *State v. Mayes, 20 Kan. App. 2d 971, 893 P.2d 296, 1995 Kan. App. LEXIS 66 (1995).*

136. When a guideline sets presumptive post-release supervision period, a trial court must find substantial and compelling reasons to depart from it on appeal pursuant to *Kan. Stat. Ann. §§ 21-4721* and *22-3717(d)(1)(C)(ii).*

State v. Rhoads, 20 Kan. App. 2d 790, 892 P.2d 918, 1995 Kan. App. LEXIS 55 (1995).

137. Apprendi does not apply when a sentence imposed is based on defendant's criminal history score; the United States Supreme Court has carved out an exception for prior convictions and has reasoned that a sentence within the presumptive sentencing range is not subject to being challenged on appeal pursuant to *Kan. Stat. Ann. § 21-4721* [illegible] *Pennington, 276 Kan. 841, 80 P.3d 44, 2003 Kan. LEXIS 691 (2003).*

138. Where an appellate court was required to review departure sentence based upon whether the sentencing court's finding of facts justifying the departure were supported by the evidence pursuant to *Kan. Stat. Ann. § 21-4721(d)*, and where the sentencing court was required to state compelling reasons on the record under *Kan. Stat. Ann. § 21-4721* [illegible] the departure, defendant's sentence with respect to his narcotics convictions was improper because the sentencing court illegally drew an adverse inference from defendant's refusal to disavow affiliation with a gang. *State v. Aikman, 29 Kan. App. 2d 1, 26 P.3d 1276, 2001 Kan. App. LEXIS 489 (2001)*

139. Where defendant was convicted of robbing an 89-year-old man through physical force, the trial court's decision in granting the State's motion for an upward departure in sentence was reversed and the matter remanded for resentencing because the Kansas Sentencing Guidelines scheme for imposing upward departure sentences was unconstitutional. *State v. Wright, 30 Kan. App. 2d 48, 40 P.3d 304, 2001 Kan. App. LEXIS 1243 (2001).*

140. Where the trial court found that defendant knew that his burglary and robbery victims were elderly and vulnerable, such finding was a "substantial and compelling" reason within the meaning of *Kan. Stat. Ann. § 21-4721(d)(2)*, and a proper basis under *Kan. Stat. Ann. § 21-4716*, for the trial court's upward departure in imposing defendant's sentence. *State v. Peterson, 25 Kan. App. 2d 354, 964 P.2d 685, 1998 Kan. App. LEXIS 84, 73 A.L.R.5th 789 (1998).*

141. No error occurred where a district court based its departure downward in defendant's sentence because the degree of harm attributable to the crime was significantly less than typical, that the victim was [illegible] underlying incident, and four other factors. *State v. Favela, 259 Kan. 215, 911 P.2d 792, 1996 Kan.* [illegible]

142. Because sentencing grids do not take into account the time that has elapsed since a defendant's last felony conviction, *Kan. Stat. Ann. § 21-4721* permits a sentencing court to consider this factor when imposing sentencing. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

143. Where an appellate court was required to review departure sentence based upon whether the sentencing court's finding of facts justifying the departure were supported by the evidence pursuant to *Kan. Stat. Ann.* [illegible] the sentencing court was required to state compelling reasons on the record under *Kan. Stat. Ann.* [illegible] the departure, defendant's sentence with respect to his narcotics convictions was improper because the sentencing court illegally drew an adverse inference from defendant's refusal to disavow affiliation with a gang. *State v. Aikman, 29 Kan. App. 2d 1, 26 P.3d 1276, 2001 Kan. App. LEXIS 489 (2001).*

144. Reviewing a departure sentence under the authority granted it by *Kan. Stat. Ann. § 21-4721*, the Supreme Court of Kansas determined that the presumptive guidelines sentence was 2 years' probation for stalking, and because the sentencing court did not, as required by *Kan. Stat. Ann. § 21-4716(a)*, state for the record the substantial and compelling reasons for departing when it imposed a sentence of a 5-year probationary period, remand was required so that the sentencing court could cite appropriate reasons justifying the imposition of a departure sentence and impose such a sentence. *State v. Whitesell, 270 Kan. 259, 13 P.3d 887, 2000 Kan. LEXIS 988 (2000).*

145. Generally, under *Kan. Stat. Ann. § 21-4721(e)*, the Kansas Supreme Court has jurisdiction to consider whether a district court errs in determining the appropriate classification of a defendant's prior convictions; a defendant who invites

error by stipulating to his or her criminal history cannot request a correction of sentence under *Kan. Stat. Ann. § 22-3504* after pronouncement of sentence. *State v. Goeller, 276 Kan. 578, 77 P.3d 1272, 2003 Kan. LEXIS 592 (2003).*

146. Where a defendant convicted of selling marijuana in violation of *Kan. Stat. Ann. § 65-4163(a)(3)* and of unlawfully using a communication facility in causing or facilitating the commission of a felony sale of marijuana in violation of *Kan. Stat. Ann. § 65-4141* was sentenced under *Kan. Stat. Ann. § 21-4721(e)* and could properly appeal on grounds his sentence resulted from partiality, prejudice, oppression or corrupt motive, § 21-4721(e) was not unconstitutional on equal protection grounds. *State v. Kee, 27 Kan. App. 2d 677, 6 P.3d 938, 2000 Kan. App. LEXIS 657 (2000).*

147. Defendant's convictions and sentences for second-degree murder, aggravated robbery, and felony theft were upheld in connection with an appeal that was filed pursuant to *Kan. Stat. Ann. § 60-1507* because the trial court properly advised defendant of his right of allocution, because, based on the fact that *Kan. Stat. Ann. § 21-4713* and *Kan. Stat. Ann. § 21-4721(c)* permitted an upward departure by agreement of the prosecution and defendant, defendant's appeal of the departure sentences that were imposed was not permissible, and because the trial court, which made findings of fact as to the reasons for the upward departure, properly followed *Kan. Stat. Ann. § 21-4718(c). Soto v. State, 23 Kan. App. 2d 85, 92* [illegible] *1996 Kan. App. LEXIS 139 (1996).*

148. It is proper in any appeal for the appellate court to review a claim that a sentence that departs from the presumptive sentence resulted from partiality, prejudice, oppression or corrupt motive. *Kan. Stat. Ann. § 21-4721(e)(1). State v. Samuel, 265 Kan. 264, 997 P.2d 664, 2000 Kan. LEXIS 3 (2000).*

149. Where defendant was sentenced within the presumptive sentencing range for the crime he committed, under *Kan. S* [illegible] *21(c)(1)*, there could be no appeal from the sentence. *State v. Adams, 29 Kan. App. 2d 589, 30 P.3d 317, 20* [illegible] *. LEXIS 773 (2001).*

150. Where defendant was convicted of intentional second-degree murder and was sentenced to a term of imprisonment o[illegible] months, the trial court erred in imposing an upward departure from the presumptive sentence of 92 to 103 months o[illegible] that defendant created a danger of harm or death to more than one person and that he committed the n[illegible] engaged in the operation of a crack cocaine house, a danger to society as a whole, because the facts stated by the sentencing court in justification of departure were not supported by the record, and the reasons stated on the record f[illegible] did not adequately justify a sentence outside the presumptive sentence. *State v. Bailey, 263 Kan. 685, 952 P* [illegible] *Kan. LEXIS [illegible].*

151. [illegible] did not err in failing to make specific findings to explain its rejection of defendant's request for a downward departure [illegible]s sentence, which was within the presumptive sentence for his drug-related crimes pursuant to *Kan. Stat. A* [illegible] *21-4721(c)(2)*, because *Kan. Stat. Ann. § 21-4718(c)* required specific findings of fact or law only if the trial court d[illegible] *21-4721, 893 P.2d 296, 1995 Kan. App. LEXIS 66 (1995).*

152. [illegible]'s appeal of a sentence that fell within the presumptive range was deemed frivolous because he knew that s[illegible] was not reviewable under *Kan. Stat. Ann. § 21-4721(c)(1)*; the State was entitled to recover attorneys' f[illegible] reasonably incurred pursuant to Kan. Sup. Ct. Rule 7.07(c). *State v. Dugan, 29 Kan. App. 2d 71, 25 P.3d 1* [illegible] *LEXIS [illegible] (2001).*

153. [illegible] committed new crimes while on felony probation for three other criminal cases, denial of d[illegible] for durational [illegible] departure on revocation of probation and sentencing for the new crimes

was proper because appeals form a presumptive sentence were not permitted under *Kan. Stat. Ann.* [illegible] e no appeal was permitted from a presumptive sentence, there was no [illegible] *§ 21-4* [illegible] ct and conclusions of law when a presumptive se[illegible]nce was imposed. *State v. Ruckle, 264 Kan. 10, 966 P2d* [illegible] *LEXIS 664 (1998).*

154. If an appellate court finds that either test under *Kan. Stat. Ann. § 21-4721* [illegible] not been met, the sentencing court erred in imposing a departure sentence, and resentencing by the sentencing court is required. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

155. Where *Kan. Stat. Ann. § 21-4721* applied, an appellate court's jurisdiction to consider a challenge to a [illegible] was limited to those grounds authorized by the statute or a claim that the sentence was otherwise illegal. *State v. Lewis, 27 Kan. App. 2d 134, 998 P.2d 1141, 2000 Kan. App. LEXIS 110 (2000).*

156. Appellate court had no jurisdiction to hear an appeal of a presumptive [illegible] *Kan. Stat. Ann. § 21-* [illegible] *State v. Lewis, 27 Kan. App. 2d 134, 998 P.2d 1141, 2000 Kan. App. LEXIS 110 (2000).*

157. Defendant's five rape convictions were affirmed, since they were sufficiently separated by time, [illegible] circumstance to constitute separate offenses rather than one continuous incident, and the court lacked [illegible] w the sentences imposed under *Kan. Stat. Ann. § 21-4721. State v. Long, 26 Kan. App. 2d 644, 995 P2d* [illegible] *App. LEXIS 1237 (1999).*

158. Under *Kan. Stat. Ann. § 21-4721(c)*, following defendant's criminal conviction, appellate court was without jurisdiction to consider defendant's appeal from the sentence imposed by the trial court for a felony committed [illegible] July 1, 1993 because the sentence imposed was within the range of appropriate [illegible] classification and was [illegible] a "presumptive" sentence. *State v. Bost, 21 Kan. App. 2d 560, 903 P.2d 160, 1995 Kan. App. LEXIS 142 (1995).*

159. Generally, the appellate court does not have jurisdiction to consider [illegible] result of an agreement between the State and the defendant and the sentencing [illegible] prior [illegible] However, where *Kan. Stat. Ann. § 21-4721(c)* applies, the appellate court may consider a claim that the sentence is illegal. *State v. Boswell, 30 Kan. App. 2d 9, 37 P.3d 40, 2001 Kan. App. LEXIS 1181 (2001).*

160. Trial court's findings of fact and reasons justifying a departure were supported by evidence in the record and constituted substantial and compelling reasons for departure; defendant's attitude towards his parole, [illegible] of crimes while on parole, and his being an absconder on two occasions were substantial and compelling reasons for departure. *State v. Billington, 24 Kan. App. 2d 759, 953 P.2d 1059, 1998 Kan. App. LEXIS 13 (1998).*

161. Appellate standard of review for a departure sentence requires a determination of whether the [illegible] the sentencing court in justification of departure are supported by the record and whether there are substantial [illegible] reasons stated on the record adequate to justify a sentence outside the presumptive sentence. *State v. Santos-Correa, 262 Kan. 392, 940 P.2d 11, 1997 Kan. LEXIS 86 (1997).*

162. On defendant's appeal of a trial court's imposition of a departure sentence after she pled no contest to aggravated assault of a law enforcement officer under *Kan. Stat. Ann. § 21-3411*, the appeals court was required by *Kan. Stat. Ann. § 21-4721* to determine whether the trial court's findings of fact and reasons justifying departure were supported by substantial competent evidence and constituted substantial and compelling reasons for departure as a matter of law. *State v. Eisele, 262 Kan. 80, 936 P.2d 742, 1997 Kan. LEXIS 78 (1997).*

163. In reviewing a sentencing court's reasons for departure under *Kan. Stat. Ann. § 21-4721*, the court would conduct a broader search of the record to examine all facts available to the sentencing court to determine whether there were

substantial and compelling reasons for departure. *State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1, 1995 Kan. App. LEXIS 72 (1995).*

164. Generally, under *Kan. Stat. Ann. § 21-4721(e)*, the Kansas Supreme Court has jurisdiction to consider whether a district court errs in determining the appropriate classification of a defendant's prior convictions; a defendant who invites error by stipulating to his or her criminal history cannot request a correction of sentence under *Kan. Stat. Ann. § 22-3504* after pronouncement of sentence. *State v. Goeller, 276 Kan. 578, 77 P.3d 1272, 2003 Kan. LEXIS 592 (2003).*

165. Under *Kan. Stat. Ann. § 21-4721(d)(1)*, substantial evidence supported the trial court's finding that defendant, who was being sentenced for voluntary manslaughter, was not a threat to society where there was evidence that defendant was mild-mannered, peaceful, and non-violent. *State v. Grady, 258 Kan. 72, 900 P.2d 227, 1995 Kan. LEXIS 109 (1995).*

166. Under *Kan. Stat. Ann. § 21-4721(d)(1)*, substantial evidence supported the trial court's finding that defendant, who was being sentenced for voluntary manslaughter, went to the victim's house out of concern for the victim's wife where defendant was aware of the violent relationship between the victim and his wife and where defendant told the trial court at sentencing that he went to the victim's house with the intent to help the victim's wife "and that was it." *State v. Grady, 258 Kan. 72, 900 P.2d 227, 1995 Kan. LEXIS 109 (1995).*

TREATISES AND ANALYTICAL MATERIALS

1. *Kansas Criminal Law Handbook § 14.8*, CHAPTER FOURTEEN. SENTENCING, PROBATION AND [illegible]ENT, A. THE KANSAS SENTENCING GUIDELINES ACT, § 14.8 Departure Sentencing, KANSAS [illegible] LAW HANDBOOK.

2. [illegible] *Law Handbook § 15.2*, CHAPTER FIFTEEN. APPEALS AND POST CONVICTION REMEDIES, A[illegible]PEALS, § 15.2 Appeals by Defendant as a Matter of Right, KANSAS CRIMINAL LAW HANDBOOK.

3. [illegible] *Appellate Practice Handbook § 5.6*, CHAPTER 5. APPELLATE JURISDICTION, IV. APPEALABLE [illegible] CRIMINAL CASES, § 5.6 A. Following Judgment or Commitment, KANSAS APPELLATE PRACTICE HANDBOOK — THIRD EDITION.

4. [illegible] *Appellate Practice Handbook § 5.8*, CHAPTER 5. APPELLATE JURISDICTION, IV. APPEALABLE [illegible] CRIMINAL CASES, § 5.8 C. Sentencing Guidelines Appeals, KANSAS APPELLATE PRACTICE [illegible] — THIRD EDITION.

5. [illegible] *Practice Handbook § 7.12*, CHAPTER 7. APPELLATE PROCEDURE, I. NOTICE OF APPEAL, F. [illegible] APPEALS, § 7.12 2. Time for Appeal — Pursuant to the Kansas Sentencing Guidelines Act, KANSAS [illegible] PRACTICE HANDBOOK — THIRD EDITION.

[illegible] NOTES

1. [illegible] *Law J. 483*, COMMENT: Solidifying the Use of Juvenile Proceedings as Sentence Enhancement and [illegible] Degree Murder [*State v. Pope, 927 P.2d 503 (Kan. Ct. App. 1996)*], Winter, 1998.

2. [illegible] *Law J. 327*, ARTICLE: The Kansas Sentencing Guidelines Act, Spring, 1999.

3. [illegible] *Law 875*, CRIMINAL PROCEDURE EDITION: SURVEY OF RECENT CASES, June, 1998.

4. [illegible] E: Are We Not Treating the Judiciary as the "Ugly Duckling" of Government?,

Attachment B

ARCW § 9.94A.585

LEXSTAT WACODE 9.94A.585

*** STATUTES CURRENT THROUGH 2004 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH JULY 2004 ANNOTATION SERVICE ***

TITLE 9. CRIMES AND PUNISHMENTS
CHAPTER 9.94A. SENTENCING REFORM ACT OF 1981

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 9.94A.585 (2004)

§ 9.94A.585. Which sentences appealable — Procedure — Grounds for reversal — Written opinions.

(1) A sentence within the standard sentence range, under *RCW 9.94A.510* or *9.94A.517*, for an offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under *RCW 9.94A.650* shall also be deemed to be within the standard sentence range for the offense and shall not be appealed.

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

(3) Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond.

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

(5) A review under this section shall be made solely upon the record that was before the sentencing court. Written briefs shall not be required and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

(6) The court of appeals shall issue a written opinion in support of its decision whenever the judgment of the sentencing court is reversed and may issue written opinions in any other case where the court believes that a written opinion would provide guidance to sentencing courts and others in implementing this chapter and in developing a common law of sentencing within the state.

(7) The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law. Such petition shall be filed with the court of appeals no later than ninety days after the department has actual knowledge of terms of the sentence. The petition shall include a certification by the department that all reasonable efforts to resolve the dispute at the superior court level have been exhausted.

HISTORY: 2002 c 290 § 19; 2000 c 28 § 10; 1989 c 4 § 1; 1984 c 209 § 13; 1982 c 192 § 7; 1981 c 137 § 21. Formerly RCW 9.94A.210.

NOTES:
EFFECTIVE DATE — 2002 C 290 §§ 7-11 AND 14-23: See note following *RCW 9.94A.515*.

INTENT — 2002 C 290: See note following *RCW 9.94A.517*.

TECHNICAL CORRECTION BILL — 2000 C 28: See note following *RCW 9.94A.015*.

FFFECTIVE DATES — 1984 C 209: See note following *RCW 9.94A.030.*

EFFECTIVE DATE — 1981 C 137: See *RCW 9.94A.905.*

EDITOR'S NOTES.
2001 c 10 § 6, effective July 1, 2001, recodified *RCW 9.94A.210* to *RCW 9.94A.585.*

EFFECT OF AMENDMENTS.
2002 c 290 § 19, effective July 1, 2003, updated the internal ref ices in light of the 2002 amendments to the sentencing statutes.

JUDICIAL DECISIONS

ANALYSIS
Constitutionality.
In general.
Challenge to procedure.
Standard of review.

CONSTITUTIONALITY..
A Washington state judge's imposition of a 90-month prison sentence for an accused who, in pleading guilty to kidnapping his estranged wife, had admitted facts that supported, under some state statutes, a maximum prison sentence of 53 months violated the accused's right to a jury trial under the United States Constitution's Sixth Amendment, for (1) the judge, after hearing the wife's description of the kidnapping, had imposed the sentence, on the basis of other state statutes allowing in some instances an "exceptional sentence" exceeding the general statutory limit, on the ground that the accused had acted with "deliberate cruelty," a statutorily enumerated ground for an enhanced sentence in a domestic-violence case; (2) the purported facts supporting the finding of deliberate cruelty had been neither (a) admitted by the accused, nor (b) found by the jury; (3) under former *RCW 9.94A.210* (now 9.94A.585), the judge could not have imposed the 90-month sentence solely on the basis of the facts admitted in the accused's guilty plea; and (4) the right to a jury trial was no mere procedural formality, but a fundamental reservation of power in the nation's constitutional structure. *Blakely v. Washington, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).*

IN GENERAL..
Where defendant has requested an exceptional sentence below the standard range, the decision may be reviewed if the court either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. Khanteechit, 101 Wn. App. 137, 5 P.3d 727 (2000).*

CHALLENGE TO PROCEDURE..
A sentence within the standard range generally is not appealable under this section, but a defendant may challenge the procedure used by the court to impose a standard range sentence. Therefore, where the central issue involves a matter of statutory construction, not a claim that the trial court abused its discretion, an appellate court will allow a challenge to a standard range sentence. *State v. Henderson, 99 Wn. App. 369, 993 P.2d 928 (2000).*
Subsection (4) should not be read as prohibiting review of errors occurring in the sentencing proceedings and it did not bar review of defendant's claimed error that the trial court exceeded its authority under the Sentencing Reform Act by allowing the community corrections officer to argue in favor of an exceptional sentence. *State v. Harris, 102 Wn. App. 275, 6 P.3d 1218 (2000).*

STANDARD OF REVIEW..
Defendant could not appeal from a standard range sentence, where the trial court considered defendant's request for application of a mitigating factor, heard extensive argument on the subject, and then exercised its discretion by denying the request. *State v. Cole, 117 Wn. App. 870, 73 P.3d 411 (2003).*

RESEARCH REFERENCES

ALR.

Downward departure under § 5K2.13 of United States Sentencing Guidelines (18 U.S.C. App.) permitting downward departure for defendants with significantly reduced mental capacity convicted of nonviolent offenses. *128 ALR Fed. 593.*

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

Attachment C

Fla. Stat. § 924.06

1 of 1 DOCUMENT

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH NOVEMBER 30, 2004 ***

TITLE 47. CRIMINAL PROCEDURE AND CORRECTIONS
CHAPTER 924. CRIMINAL APPEALS AND COLLATERAL REVIEW

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 924.06 (2004)

§ 924.06. Appeal by defendant

(1) A defendant may appeal from:

(a) A final judgment of conviction when probation has not been granted under chapter 948, except as provided in subsection (3);

(b) An order granting probation under chapter 948;

(c) An order revoking probation under chapter 948;

(d) A sentence, on the ground that it is illegal; or

(e) A sentence imposed under *s. 921.0024* of the Criminal Punishment Code which exceeds the statutory maximum penalty provided in *s. 775.082* for an offense at conviction, or the consecutive statutory maximums for offenses at conviction, unless otherwise provided by law.

(2) An appeal from an order granting probation shall proceed in the same manner and have the same effect as an appeal of a judgment of conviction. An appeal of an order revoking probation may review only proceedings after the order of probation. If a judgment of conviction preceded an order of probation, the defendant may appeal from the order or the judgment or both.

(3) A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue, or a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to a direct appeal.

HISTORY: s. 285, ch. 19554, 1939; CGL 1940 Supp. 8663(295); s. 22, ch. 20519, 1941; s. 3, ch. 59-130; s. 147, ch. 70-339; s. 7, ch. 76-274; s. 3, ch. 83-87; s. 6, ch. 93-406; s. 5, ch. 96-248; s. 27, ch. 97-194; s. 13, ch. 98-204.

LexisNexis (R) Notes:

CASE NOTES

1. Order finding defendant guilty and withholding adjudication was an appealable "final judgment of conviction" within the meaning of *Fla. Stat. ch. 924.06(1)(a)* based on the broad definition of "conviction" found in *Fla. Stat. ch. 921.0011(2)* and *Fla. R. Crim. P. 3.703(d)(6)*, and *Fla. R. Crim. P. 3.650*'s definition of "judgment" and use of the term "adjudication" in a manner synonymous with "determination." *Waite v. City of Fort Lauderdale, 681 So. 2d 901, 1996 Fla. App. LEXIS 11110, 21 Fla. L. Weekly D 2281 (Fla. Dist. Ct. App. 4th Dist. 1996)*, criticized by *Payton v. State, 732 So. 2d 1086, 1998*

Fla. App. LEXIS 9683, 23 Fla. L. Weekly D 1817 (Fla. Dist. Ct. App. 2d Dist. 1998).

2. Defendant's due process rights were not violated by *Fla. Stat. ch. 924.07(1)(i)* that allowed the state to appeal a downward departure sentence but did not allow defendant to appeal an upward departure sentence because the Criminal Punishment Code provided for the establishment of the lowest permissible sentence, and defendant could appeal a sentence that was illegal or violated the statutory maximum under *Fla. Stat. ch. 924.06(1)(d). Hall v. State, 773 So. 2d 99, 2000 Fla. App. LEXIS 15179, 25 Fla. L. Weekly D 2720 (Fla. Dist. Ct. App. 1st Dist. 2000).*

3. State of Florida could appeal pursuant to *Fla. Stat. ch. 924.06* a sentence imposed outside the sentencing guidelines where the court failed to provide written reasons for the downward departure. *State v. Kepner, 560 So. 2d 251, 1990 Fla. App. LEXIS 1615, 15 Fla. L. Weekly D 695 (Fla. Dist. Ct. App. 3d Dist. 1990),* quashed by *577 So. 2d 576, 1991 Fla. LEXIS 497, 16 Fla. L. Weekly S 227 (Fla. 1991).*

4. Under *Fla. Stat. ch. 924.06(3)* a prerequisite to a direct appeal challenging a guilty plea is a motion in the trial court to withdraw the guilty plea, therefore juvenile's challenge to his guilty plea in a delinquency action was dismissed for failure to file such a motion. *L.L. v. State, 429 So. 2d 347, 1983 Fla. App. LEXIS 19478 (Fla. Dist. Ct. App. 5th Dist. 1983),* questioned by *T.G. v. State, 741 So. 2d 517, 1999 Fla. App. LEXIS 8196, 24 Fla. L. Weekly D 1422 (Fla. Dist. Ct. App. 5th Dist. 1999),* questioned by *T.G. v. State, 741 So. 2d 517, 1999 Fla. App. LEXIS 293, 24 Fla. L. Weekly D 216 (Fla. Dist. Ct. App. 5th Dist. 1999).*

5. In defendant's appeal from an order that denied defendant's motion for a supersedeas bond pending appeal, the court reversed because *Fla. Stat. ch. 924.06(2)* granted defendant the right to appeal from an order that granted probation in the same manner and scope as if a judgment of conviction had been entered, and if defendant was entitled to be at liberty on bail pending appeal, defendant was equally entitled to be at liberty under terms of a supersedeas bond pending appeal from an order of probation. *Murphy v. State, 231 So. 2d 263, 1970 Fla. App. LEXIS 6915 (Fla. Dist. Ct. App. 4th Dist. 1970).*

6. Defendant's appeal, alleging lack of jurisdiction, of his conviction and sentence for aggravated assault with a deadly weapon, battery, and violating an injunction against domestic violence entered following his plea of nolo contendere was dismissed because, under *Fla. Stat. ch. 924.06(3),* a defendant who enters a plea of nolo contendere without specifically reserving the right to file a direct appeal, waives his right to appeal all matters relating to the judgment except certain appealable issues which occurred contemporaneously with the entry of the plea. *Abney v. State, 685 So. 2d 1027, 1997 Fla. App. LEXIS 101, 22 Fla. L. Weekly D 174 (Fla. Dist. Ct. App. 5th Dist. 1997).*

7. Defendant who pleaded guilty to an offense had the right to appeal a sentence that was imposed outside of the guidelines. *Fla. Stat. chs. 924.06(1)* and *921.001(5). Knowlton v. State, 466 So. 2d 278, 1985 Fla. App. LEXIS 12503, 10 Fla. L. Weekly 457 (Fla. Dist. Ct. App. 4th Dist. 1985),* review denied by *476 So. 2d 675, 1985 Fla. LEXIS 3817 (Fla. 1985).*

8. Under *Fla. Stat. ch. 924.06(3)* a prerequisite to a direct appeal challenging a guilty plea is a motion in the trial court to withdraw the guilty plea, therefore juvenile's challenge to his guilty plea in a delinquency action was dismissed for failure to file such a motion. *L.L. v. State, 429 So. 2d 347, 1983 Fla. App. LEXIS 19478 (Fla. Dist. Ct. App. 5th Dist. 1983),* questioned by *T.G. v. State, 741 So. 2d 517, 1999 Fla. App. LEXIS 8196, 24 Fla. L. Weekly D 1422 (Fla. Dist. Ct. App. 5th Dist. 1999),* questioned by *T.G. v. State, 741 So. 2d 517, 1999 Fla. App. LEXIS 293, 24 Fla. L. Weekly D 216 (Fla. Dist. Ct. App. 5th Dist. 1999).*

9. Defendant's appeal was dismissed because defendant gave up the right to appeal in the plea form, and the attorney's untimely statement about reserving the right to appeal did not identify, with particularity, the point of law reserved for appeal as required by *Fla. R. App. P. 9.140(b)(2)(A)(i). Prince v. State, 2004 Fla. App. LEXIS 16429, 29 Fla. L. Weekly D 2463 (Fla. Dist. Ct. App. 4th Dist. Nov. 3 2004).*

10. Where appellant entered a plea of guilty in open court, then he filed a notice of appeal, and thereafter filed his motion to withdraw his plea in the trial court, the appellate court found that the trial court had been divested of jurisdiction to consider the motion to withdraw and that appellant had not preserved his right to appeal the issue of whether he could withdraw his plea and, accordingly, the appeal required dismissal pursuant to *Fla. Stat. ch. 924.051(4)* and *Fla. Stat. ch. 924.06(3)*; the court noted that, without having preserved the argument that his plea was involuntary by having made a motion to withdraw the plea, the grounds which appellant could assert in his appeal were limited pursuant to *Fla. R. App. P. 9.140(b)(2)(A). Kearse v. State, 858 So. 2d 1247, 2003 Fla. App. LEXIS 17382, 28 Fla. L. Weekly D 2622 (Fla. Dist. Ct. App. 5th Dist. 2003).*

11. Appeal from a judgment entered on defendant's plead of nolo contendere to charges of kidnapping, burglary of a dwelling with battery, attempted first degree murder, and two counts of sexual battery was dismissed because defendant did not reserve a right to appeal at the time the plea was entered or file a motion to withdraw the plea either before or after sentence was imposed; under both *Fla. R. App. P. 9.140(b)* and *Fla. Stat. ch. 924.06(3)*, a defendant who pleads guilty has no right to a direct appeal, except for such matters as would invalidate the plea itself. *Kalupp v. State, 729 So. 2d 987, 1999 Fla. App. LEXIS 3865, 24 Fla. L. Weekly D 815 (Fla. Dist. Ct. App. 5th Dist. 1999).*

12. Under *Fla. Stat. ch. 924.06(3)*, defendant could not directly appeal from a judgment and habitual offender sentence entered on a plea of nolo contendere because he did not expressly reserve the right of appeal or identify with particularity the point of law being reserved, and therefore he could obtain review only by collateral attack. *Williams v. State, 691 So. 2d 484, 1997 Fla. App. LEXIS 130, 22 Fla. L. Weekly D 209 (Fla. Dist. Ct. App. 4th Dist. 1997).*

13. A defendant does not have a right to a general review of his guilty or nolo contendere plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived; such an automatic right would in effect eliminate both the necessity for a defendant to move for a withdrawal of his plea and the obligation to show a manifest injustice or prejudice as ground for such a plea withdrawal after sentence. *Nettles v. State, 673 So. 2d 547, 1996 Fla. App. LEXIS 4780, 21 Fla. L. Weekly D 1159 (Fla. Dist. Ct. App. 4th Dist. 1996).*

14. Although the court record showed that defendant intended to plead nolo contendere and to reserve his right to appeal the denial of his motion to suppress, defendant actually pleaded guilty; the mistake did not confer jurisdiction on the appellate court, because *Fla. Stat. ch. 924.06(3)* and *Fla. R. Crim. P. 3.172(c)* precluded an appeal after defendant's guilty plea was entered. *Ross v. State, 566 So. 2d 356, 1990 Fla. App. LEXIS 6622, 15 Fla. L. Weekly D 2210 (Fla. Dist. Ct. App. 4th Dist. 1990).*

15. Defendant's appeal of his conviction on the basis of the denial of his motion to suppress dismissed because defendant pleaded guilty to the charges against him; by pleading guilty defendant waived his right to directly appeal the denial of his motion to suppress. *Newbold v. State, 521 So. 2d 279, 1988 Fla. App. LEXIS 838, 13 Fla. L. Weekly 593 (Fla. Dist. Ct. App. 2d Dist. 1988).*

16. Defendant who pled guilty on a plea agreement could not appeal directly from a judgment and sentence under *Fla. Stat. ch. 924.06(3)* simply because the sentence was not as kind as he thought it would be or the state recommended. *Wohlhuter v. State, 515 So. 2d 362, 1987 Fla. App. LEXIS 10948, 12 Fla. L. Weekly 2613 (Fla. Dist. Ct. App. 4th Dist. 1987).*

17. Pursuant to *Fla. Stat. ch. 924.06(3)* there was no right to a direct appeal from a judgment and sentence entered upon a guilty plea; the statute required that defendant could obtain review by means of collateral attack. *McGinty v. State, 463 So. 2d 495, 1985 Fla. App. LEXIS 14088, 10 Fla. L. Weekly 371 (Fla. Dist. Ct. App. 2d Dist. 1985).*

18. Where defendant was convicted on a negotiated plea of guilty to a charge of false imprisonment, the defendant had no

right to direct appeal, except for such matters as would have invalidated the plea itself, pursuant to *Fla. Stat. ch. 924.06(3). Eisaman v. State, 440 So. 2d 470, 1983 Fla. App. LEXIS 23537 (Fla. Dist. Ct. App. 5th Dist. 1983).*

19. *Fla. Stat. ch. 924.06(3)* does not apply where the error assigned on appeal was the denial of a motion to withdraw a plea of guilty. *Hollis v. State, 374 So. 2d 1164, 1979 Fla. App. LEXIS 15528 (Fla. Dist. Ct. App. 4th Dist. 1979).*

20. Defendant who pleaded guilty to an aggravated assault charge was not entitled to review of the conviction on direct appeal under *Fla. Stat. ch. 924.06(3)* because a valid guilty plea conclusively disposed of all prior issues presented in the case. *Robinson v. State, 373 So. 2d 898, 1979 Fla. LEXIS 4743 (Fla. 1979),* questioned by *Maddox v. State, 708 So. 2d 617, 1998 Fla. App. LEXIS 2420, 23 Fla. L. Weekly D 720 (Fla. Dist. Ct. App. 5th Dist. 1998).*

21. Defendant, who pled guilty to an aggravated assault charge, was not entitled to review of the conviction on direct appeal because a valid guilty plea conclusively disposed of all prior issues presented in the case. *Robinson v. State, 373 So. 2d 898, 1979 Fla. LEXIS 4743 (Fla. 1979).*

22. Once a defendant enters a plea of guilty, the only points available for an appeal concern actions which took place contemporaneously with the plea. A plea of guilty cuts off any right to an appeal from court rulings that preceded the plea in the criminal process including independent claims relating to deprivations of constitutional rights that occur prior to the entry of the guilty plea. *Robinson v. State, 373 So. 2d 898, 1979 Fla. LEXIS 4743 (Fla. 1979).*

23. There is an exclusive and limited class of issues which occur contemporaneously with the entry of a plea that may be the proper subject of an appeal. They would include only the following: (1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea. *Robinson v. State, 373 So. 2d 898, 1979 Fla. LEXIS 4743 (Fla. 1979).*

24. There is an exclusive and limited class of issues which occur contemporaneously with the entry of a plea that may be the proper subject of an appeal. They would include only the following: (1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea. *Robinson v. State, 373 So. 2d 898, 1979 Fla. LEXIS 4743 (Fla. 1979).*

25. Defendant's appeal was dismissed because defendant gave up the right to appeal in the plea form, and the attorney's untimely statement about reserving the right to appeal did not identify, with particularity, the point of law reserved for appeal as required by *Fla. R. App. P. 9.140(b)(2)(A)(i). Prince v. State, 2004 Fla. App. LEXIS 16429, 29 Fla. L. Weekly D 2463 (Fla. Dist. Ct. App. 4th Dist. Nov. 3 2004).*

6. *Fla. Stat. ch. 924.06(3)* and *Fla. R. App. P. 9.140(b)(2)(A)(i)* clearly provide that a criminal defendant has no right to appeal following his or her entry of a nolo contendere plea in the absence of a reservation of the right to appeal an order which is legally dispositive; however, even if defendant had reserved his right to appeal, the appeals court would not have held the lack of a finding of dispositiveness against him as defense counsel expressly asked for a finding of dispositiveness and it was the trial court's duty to thereafter rule. *Hawk v. State, 848 So. 2d 475, 2003 Fla. App. LEXIS 10141, 28 Fla. L. Weekly D 1558 (Fla. Dist. Ct. App. 5th Dist. 2003).*

27. *Fla. Stat. ch. 924.06(3)* provides that a defendant who pleads nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal. *Trujillo-Pentate v. State, 609 So. 2d 72, 1992 Fla. App. LEXIS 11740, 17 Fla. L. Weekly D 2657 (Fla. Dist. Ct. App. 1st Dist. 1992),* quashed by *620 So. 2d 1231, 1993 Fla. LEXIS 1097, 18 Fla. L. Weekly S 431 (Fla. 1993).*

28. State's motion under *Fla. Stat. ch. 924.06* to dismiss appeal after defendant entered a nolo contendere plea was denied as premature, where counsel for defendant had not yet filed an Anders brief and the defendant had not had the opportunity to file a pro se brief. *Ford v. State, 575 So. 2d 1335, 1991 Fla. App. LEXIS 1730, 16 Fla. L. Weekly D 561 (Fla. Dist. Ct. App. 1st Dist. 1991),* review denied by *581 So. 2d 1310, 1991 Fla. LEXIS 762 (Fla. 1991).*

29. Defendant's conviction for possession and purchase of cocaine was affirmed because defendant failed to preserve relevant issues for appeal during trial; Under *Fla. Stat. ch. 924.06(3)* a defendant who pled nolo contendere without making an express reservation of the right to appeal had no right to direct appeal, but had to obtain review by means of collateral attack. *Ford v. State, 556 So. 2d 483, 1990 Fla. App. LEXIS 586, 15 Fla. L. Weekly D 327 (Fla. Dist. Ct. App. 2d Dist. 1990).*

30. Defendant could not appeal his judgment and sentence after defendant entered an unconditional plea of nolo contendere to the charges, even though though his sentence as an accessory after the fact was a lengthier sentence than the principal received. *Westermeier v. State, 395 So. 2d 231, 1981 Fla. App. LEXIS 18852 (Fla. Dist. Ct. App. 5th Dist. 1981).*

31. Appellate court denied the state's motion to dismiss defendant's appeal where the motion was based on the contention that a judgment entered on a plea of guilty ordinarily could not be reviewed by appeal; defendant's appeal was derived solely from *Fla. Stat. ch. 924.06*, which stated that an appeal could be taken by defendant only from a final judgment of conviction; anything said in *Gibson v. State, 196 So. 2d 188 (Fla. Dist. Ct. App. 1965)* in conflict with the appellate court's ruling was superseded. *Ramey v. State, 199 So. 2d 104, 1967 Fla. App. LEXIS 4821 (Fla. Dist. Ct. App. 2d Dist. 1967).*

32. Where appellant entered a plea of guilty in open court, then he filed a notice of appeal, and thereafter filed his motion to withdraw his plea in the trial court, the appellate court found that the trial court had been divested of jurisdiction to consider the motion to withdraw and that appellant had not preserved his right to appeal the issue of whether he could withdraw his plea and, accordingly, the appeal required dismissal pursuant to *Fla. Stat. ch. 924.051(4)* and *Fla. Stat. ch. 924.06(3)*; the court noted that, without having preserved the argument that his plea was involuntary by having made a motion to withdraw the plea, the grounds which appellant could assert in his appeal were limited pursuant to *Fla. R. App. P. 9.140(b)(2)(A). Kearse v. State, 858 So. 2d 1247, 2003 Fla. App. LEXIS 17382, 28 Fla. L. Weekly D 2622 (Fla. Dist. Ct. App. 5th Dist. 2003).*

33. *Fla. Stat. ch. 924.06(3)* does not apply where the error assigned on appeal was the denial of a motion to withdraw a plea of guilty. *Hollis v. State, 374 So. 2d 1164, 1979 Fla. App. LEXIS 15528 (Fla. Dist. Ct. App. 4th Dist. 1979).*

34. Where an inmate claimed in a *Fla. R. Crim. P. 3.800* motion for postconviction relief that the trial court improperly imposed a sentence based upon the inmate's refusal to admit guilt and express remorse, the issue was cognizable on appeal under *Fla. Stat. ch. 924.06(1)(d)*, and should have been identified and addressed by appellate counsel. *Ritter v. State, 2004 Fla. App. LEXIS 15149, 29 Fla. L. Weekly D 2313 (Fla. Dist. Ct. App. 1st Dist. Oct. 15 2004).*

35. Pursuant to *Fla. Stat. chs. 921.002(1)(g)* and *924.06*, for crimes committed after October 1998, there is no upward sentencing departure limitation or requirement of written reasons or right of a defendant to appeal same, so long as the sentence is within the statutory maximum. In order to challenge a sentence which is within the statutory maximum, a defendant can only argue vindictiveness on the part of the sentencing judge. *Willingham v. State, 781 So. 2d 512, 2001 Fla. App. LEXIS 4506, 26 Fla. L. Weekly D 950 (Fla. Dist. Ct. App. 5th Dist. 2001).*

36. Defendant's due process rights were not violated by *Fla. Stat. ch. 924.07(1)(i)* that allowed the state to appeal a downward departure sentence but did not allow defendant to appeal an upward departure sentence because the Criminal Punishment Code provided for the establishment of the lowest permissible sentence, and defendant could appeal a sentence that was illegal or violated the statutory maximum under *Fla. Stat. ch. 924.06(1)(d). Hall v. State, 773 So. 2d 99, 2000 Fla. App. LEXIS 15179, 25 Fla. L. Weekly D 2720 (Fla. Dist. Ct. App. 1st Dist. 2000).*

37. State of Florida could appeal pursuant to *Fla. Stat. ch. 924.06* a sentence imposed outside the sentencing guidelines where the court failed to provide written reasons for the downward departure. *State v. Kepner, 560 So. 2d 251, 1990 Fla. App. LEXIS 1615, 15 Fla. L. Weekly D 695 (Fla. Dist. Ct. App. 3d Dist. 1990),* quashed by *577 So. 2d 576, 1991 Fla.*

LEXIS 497, 16 Fla. L. Weekly S 227 (Fla. 1991).

38. Defendant was entitled to a resentencing under *Fla. Stat. ch. 924.06(1)(d)* because the trial court erred in using separate scoresheets to sentence defendant and in including additional points for the prior same-category misdemeanor offense. *Kelly v. State, 490 So. 2d 1336, 1986 Fla. App. LEXIS 8677, 11 Fla. L. Weekly 1470 (Fla. Dist. Ct. App. 1st Dist. 1986).*

39. Defendant or state may appeal as a matter of right from a sentence which is outside the range specified by the guidelines, pursuant to *Fla. Stat. ch. 924.06(1)(e), Fla. Stat. ch. 921.001(5),* and *Fla. R. App. P. 9.140(b)(1)(E). Mitchell v. State, 458 So. 2d 10, 1984 Fla. App. LEXIS 15536, 9 Fla. L. Weekly 2107 (Fla. Dist. Ct. App. 1st Dist. 1984),* review denied by *464 So. 2d 556, 1985 Fla. LEXIS 3304 (Fla. 1985),* overruled by *State v. Koopman, 519 So. 2d 613, 1988 Fla. LEXIS 117, 13 Fla. L. Weekly 57 (Fla. 1988),* disapproved by *State v. Stanley, 519 So. 2d 613, 1988 Fla. LEXIS 124, 13 Fla. L. Weekly 57 (Fla. 1988),* overruled by *State v. Whitfield, 487 So. 2d 1045, 1986 Fla. LEXIS 2078, 11 Fla. L. Weekly 182 (Fla. 1986),* criticized by *Stanley v. State, 507 So. 2d 1131, 1987 Fla. App. LEXIS 7633, 12 Fla. L. Weekly 964 (Fla. Dist. Ct. App. 5th Dist. 1987).*

40. After violating a condition of her probation, defendant could not challenge that probation condition on appeal from an order revoking probation for the violation of that condition, because *Fla. Stat. ch. 924.06(2)* limited appeal to review of proceedings that occurred after the entry of the order of probation; once defendant enjoyed the benefits of probation without challenging the legality of her sentence, she was thereafter precluded from complaining that the sentence was illegal in an appeal from an order revoking probation. *Matthews v. State, 736 So. 2d 72, 1999 Fla. App. LEXIS 7546, 24 Fla. L. Weekly D 1366 (Fla. Dist. Ct. App. 4th Dist. 1999).*

41. In an appeal of a probation revocation on grounds that the trial court lacked jurisdiction because the defendant was incompetent to enter his initial plea, the appellate court lacked jurisdiction to review the appeal; an appeal of an order revoking probation may only review proceedings after the order of probation. *Stuart v. State, 353 So. 2d 165, 1977 Fla. App. LEXIS 17180 (Fla. Dist. Ct. App. 3d Dist. 1977).*

42. Defendant maintained his right to appeal from an order of probation pursuant to *Fla. Stat. ch. 924.06* regardless of whether or not he objected to the condition of probation at sentencing, his silence did not act as a waiver of objection. *Coulson v. State, 342 So. 2d 1042, 1977 Fla. App. LEXIS 15098 (Fla. Dist. Ct. App. 4th Dist. 1977).*

43. Defendant was precluded from attacking the conditions of probation after defendant had been found guilty of violating a condition and probation had been revoked. *Brown v. State, 305 So. 2d 309, 1974 Fla. App. LEXIS 7463 (Fla. Dist. Ct. App. 4th Dist. 1974).*

44. *Fla. Stat. ch. 924.06* required that a defendant's attacks on the sufficiency of the evidence in his probation hearing could or should have been raised by direct appeal from the order that placed him on probation. *Hardrick v. State, 293 So. 2d 135, 1974 Fla. App. LEXIS 7608 (Fla. Dist. Ct. App. 2d Dist. 1974),* reversed by *313 So. 2d 695, 1975 Fla. LEXIS 3323 (Fla. 1975).*

45. Where defendant appealed his sentences imposed pursuant to a written plea agreement, arguing that the trial court abused its discretion in failing to impose a downward departure sentence, that the scoresheet applicable to his grand theft charge contained errors, and that the trial court erred in imposing a discretionary cost, the reviewing court had jurisdiction over his appeal, under *Fla. R. App. P. 9.030(b)(1)(A)* and *Fla. R. App. P. 9.140*; however, under *Fla. Stat. ch. 924.06(1),* the trial court's discretionary decision to deny a downward departure was not within the scope of review. *Patterson v. State, 796 So. 2d 572, 2001 Fla. App. LEXIS 12551, 26 Fla. L. Weekly D 2171 (Fla. Dist. Ct. App. 2d Dist. 2001).*

46. A defendant who pled nolo contendere to various drug charges could not challenge the validity of her drug convictions on direct appeal; however, *Fla. Stat. ch. 924.06(3)* did not bar defendant from raising a colorable direct challenge to the validity of her sentence. *Walker v. State, 579 So. 2d 348, 1991 Fla. App. LEXIS 4603, 16 Fla. L. Weekly D 1366 (Fla. Dist.*

Ct. App. 1st Dist. 1991).

47. Under *Fla. Stat. ch. 924.06*, the court had no jurisdiction over defendant's appeal of the imposition of a period of probation in addition to his concurrent sentences for violating his probation and trafficking in cocaine where defendant pled guilty in exchange for concurrent sentences within the guidelines range and did not seek to withdraw his guilty plea when the trial court imposed the probation term. *Williams v. State, 541 So. 2d 764, 1989 Fla. App. LEXIS 1924, 14 Fla. L. Weekly 928 (Fla. Dist. Ct. App. 5th Dist. 1989).*

48. Defendant who pleaded guilty to an offense had the right to appeal a sentence that was imposed outside of the guidelines. *Fla. Stat. chs. 924.06(1)* and *921.001(5). Knowlton v. State, 466 So. 2d 278, 1985 Fla. App. LEXIS 12503, 10 Fla. L. Weekly 457 (Fla. Dist. Ct. App. 4th Dist. 1985),* review denied by *476 So. 2d 675, 1985 Fla. LEXIS 3817 (Fla. 1985).*

49. In ascertaining the meaning and effect to be given the word "or" the legislative intent is the determining factor, and the conjunctive "or" is often used to join two aspects of the same entity rather than two separate entities; thus, the language used by the legislature in *Fla. Stat. ch. 924.06* may be sensibly construed to mean that a sentence is excessive when it exceeds the punishment prescribed. *Infante v. State, 197 So. 2d 542, 1967 Fla. App. LEXIS 5119 (Fla. Dist. Ct. App. 3d Dist. 1967).*

50. Where defendant appealed his sentences imposed pursuant to a written plea agreement, arguing that the trial court abused its discretion in failing to impose a downward departure sentence, that the scoresheet applicable to his grand theft charge contained errors, and that the trial court erred in imposing a discretionary cost, the reviewing court had jurisdiction over his appeal, under *Fla. R. App. P. 9.030(b)(1)(A)* and *Fla. R. App. P. 9.140*; however, under *Fla. Stat. ch. 924.06(1)*, the trial court's discretionary decision to deny a downward departure was not within the scope of review. *Patterson v. State, 796 So. 2d 572, 2001 Fla. App. LEXIS 12551, 26 Fla. L. Weekly D 2171 (Fla. Dist. Ct. App. 2d Dist. 2001).*

51. Where, on a plea of guilty, defendant was convicted and sentenced for kidnapping in violation of Fla. Stat. ch. 805.01, defendant was entitled to appeal a sentence that was based on a statute that was not in effect at the time of the kidnapping because *Fla. Stat. ch. 924.06(3)* only restricted direct appeals from any error which occurred prior to the acceptance of the plea by the court, or from any error in the acceptance itself, and *Fla. Stat. ch. 924.06(1)(d)* and ch. 924.06(3) read together did not mean to cut off a defendant's right to direct appeal from an illegal sentence imposed after conviction on a guilty plea. *Smith v. State, 358 So. 2d 1164, 1978 Fla. App. LEXIS 15637 (Fla. Dist. Ct. App. 2d Dist. 1978).*

52. Where an inmate claimed in a *Fla. R. Crim. P. 3.800* motion for postconviction relief that the trial court improperly imposed a sentence based upon the inmate's refusal to admit guilt and express remorse, the issue was cognizable on appeal under *Fla. Stat. ch. 924.06(1)(d)*, and should have been identified and addressed by appellate counsel. *Ritter v. State, 2004 Fla. App. LEXIS 15149, 29 Fla. L. Weekly D 2313 (Fla. Dist. Ct. App. 1st Dist. Oct. 15 2004).*

53. State of Florida could appeal pursuant to *Fla. Stat. ch. 924.06* a sentence imposed outside the sentencing guidelines where the court failed to provide written reasons for the downward departure. *State v. Kepner, 560 So. 2d 251, 1990 Fla. App. LEXIS 1615, 15 Fla. L. Weekly D 695 (Fla. Dist. Ct. App. 3d Dist. 1990),* quashed by *577 So. 2d 576, 1991 Fla. LEXIS 497, 16 Fla. L. Weekly S 227 (Fla. 1991).*

54. Notice and an opportunity to be heard must be given a defendant before restitution can be mandated as a condition of probation; where a defendant has not been furnished prior notice, and he objects to the court requiring restitution as a condition of his probation, he must be given an opportunity to be heard; if the defendant objects or otherwise contests the order of restitution, the trial judge must suspend the hearing for a reasonable time and allow the defendant to be heard on issues relevant to restitution; however, if a defendant chooses to silently accept the court's resolution of the questions

concerning restitution, the trial court's order of restitution will not be reversed merely because the trial court did not furnish advance notice that restitution may be imposed as a condition of probation. *Miller v. State, 407 So. 2d 959, 1981 Fla. App. LEXIS 21885 (Fla. Dist. Ct. App. 4th Dist. 1981).*

55. Where no notice that restitution was a possibility was given, and defendant contended on appeal that he did not know how the trial court arrived at the amount of restitution required, the ends of justice were best served by remanding the cause to the trial court so that the court might afford defendant a hearing. *Miller v. State, 407 So. 2d 959, 1981 Fla. App. LEXIS 21885 (Fla. Dist. Ct. App. 4th Dist. 1981).*

56. Under *Fla. Stat. ch. 924.06(3)*, defendant could not directly appeal from a judgment and habitual offender sentence entered on a plea of nolo contendere because he did not expressly reserve the right of appeal or identify with particularity the point of law being reserved, and therefore he could obtain review only by collateral attack. *Williams v. State, 691 So. 2d 484, 1997 Fla. App. LEXIS 130, 22 Fla. L. Weekly D 209 (Fla. Dist. Ct. App. 4th Dist. 1997).*

57. Defendant was precluded from attacking the conditions of probation after defendant had been found guilty of violating a condition and probation had been revoked. *Brown v. State, 305 So. 2d 309, 1974 Fla. App. LEXIS 7463 (Fla. Dist. Ct. App. 4th Dist. 1974).*

58. Where trial court sentenced defendants on remand, trial court had jurisdiction, notwithstanding appeal by defendant for excessive sentence before the state supreme court on other grounds. *Collins v. State, 83 So. 2d 6, 1955 Fla. LEXIS 3994 (Fla. 1955).*

59. *Fla. Stat. ch. 924.06(3)* and *Fla. R. App. P. 9.140(b)(2)(A)(i)* clearly provide that a criminal defendant has no right to appeal following his or her entry of a nolo contendere plea in the absence of a reservation of the right to appeal an order which is legally dispositive; however, even if defendant had reserved his right to appeal, the appeals court would not have held the lack of a finding of dispositiveness against him as defense counsel expressly asked for a finding of dispositiveness and it was the trial court's duty to thereafter rule. *Hawk v. State, 848 So. 2d 475, 2003 Fla. App. LEXIS 10141, 28 Fla. L. Weekly D 1558 (Fla. Dist. Ct. App. 5th Dist. 2003).*

60. Where defendant appealed his sentences imposed pursuant to a written plea agreement, arguing that the trial court abused its discretion in failing to impose a downward departure sentence, that the scoresheet applicable to his grand theft charge contained errors, and that the trial court erred in imposing a discretionary cost, the reviewing court had jurisdiction over his appeal, under *Fla. R. App. P. 9.030(b)(1)(A)* and *Fla. R. App. P. 9.140*; however, under *Fla. Stat. ch. 924.06(1)*, the trial court's discretionary decision to deny a downward departure was not within the scope of review. *Patterson v. State, 796 So. 2d 572, 2001 Fla. App. LEXIS 12551, 26 Fla. L. Weekly D 2171 (Fla. Dist. Ct. App. 2d Dist. 2001).*

61. Defendant's due process rights were not violated by *Fla. Stat. ch. 924.07(1)(i)* that allowed the state to appeal a downward departure sentence but did not allow defendant to appeal an upward departure sentence because the Criminal Punishment Code provided for the establishment of the lowest permissible sentence, and defendant could appeal a sentence that was illegal or violated the statutory maximum under *Fla. Stat. ch. 924.06(1)(d). Hall v. State, 773 So. 2d 99, 2000 Fla. App. LEXIS 15179, 25 Fla. L. Weekly D 2720 (Fla. Dist. Ct. App. 1st Dist. 2000).*

62. *Fla. Stat. ch. 924.051(4)*, governing appeals on a guilty or nolo contendere plea, is not a jurisdictional bar to appellate review; *Fla. Stat. ch. 924.051(3)* does not constitute a limit on the subject-matter jurisdiction of appellate courts; a defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal; such a defendant shall obtain review by means of collateral attack under *Fla. Stat. ch. 924.06(3). Leonard v. State, 760 So. 2d 114, 2000 Fla. LEXIS 900, 25 Fla. L. Weekly S 377 (Fla. 2000).*

63. *Fla. Stat. Ann. § 924.06(1)(a)* provides that a criminal defendant may appeal from a final judgment of conviction

when probation has not been granted, even if the offense of conviction is based on violation of a municipal ordinance. *Waite v. City of Fort Lauderdale, 681 So. 2d 901, 1996 Fla. App. LEXIS 11110, 21 Fla. L. Weekly D 2281 (Fla. Dist. Ct. App. 4th Dist. 1996).*

64. State's motion, under *Fla. Stat. ch. 924.06*, to dismiss defendant's appeal of the revocation of his probation was denied where defendant did not plead guilty to the alleged violation of probation, but rather was found to have violated probation after an evidentiary hearing. *Blair v. State, 636 So. 2d 784, 1994 Fla. App. LEXIS 3666, 19 Fla. L. Weekly D 949 (Fla. Dist. Ct. App. 1st Dist. 1994).*

65. Although defendant had pled guilty to child abuse, the state's motion under *Fla. Stat. ch. 924.06* to dismiss defendant's appeal from an order revoking his probation was denied; defendant did not plead guilty to the alleged violation of probation, but rather was found to have violated probation after an evidentiary hearing. *Titus v. State, 635 So. 2d 1027, 1994 Fla. App. LEXIS 3673, 19 Fla. L. Weekly D 950 (Fla. Dist. Ct. App. 1st Dist. 1994).*

66. Defendant's direct appeal of his burglary conviction was dismissed when defendant failed to expressly reserve his right to appeal when he entered a plea of nolo contendere because the language in *Fla. Stat. ch. 924.06(3)* i.e. "with no express reservation of the right to appeal," specifically modified "nolo contendere" pleas and not "guilty" pleas. *Norman v. State, 634 So. 2d 212, 1994 Fla. App. LEXIS 2627, 19 Fla. L. Weekly D 670 (Fla. Dist. Ct. App. 4th Dist. 1994).*

67. A defendant may maintain a direct appeal under *Fla. Stat. ch. 924.06*, despite entering a nolo contendere plea, if he raises issues occurring at the time the plea is entered, including a question as to the legality of the sentence. *Simmons v. State, 1992 Fla. App. LEXIS 3561, 17 Fla. L. Weekly D 829 (Fla. Dist. Ct. App. 1st Dist. Mar. 27 1992).*

68. Where a defendant pleaded guilty to the charges for which he was convicted and makes no allegation that his sentence was illegal or that the trial court lacked subject matter jurisdiction or that the state failed to abide by a plea agreement, he was barred from obtaining relief on direct appeal from his judgment and sentence, pursuant to *Fla. Stat. ch. 924.06(3). Daniels v. State, 568 So. 2d 63, 1990 Fla. App. LEXIS 4889, 15 Fla. L. Weekly D 1786 (Fla. Dist. Ct. App. 1st Dist. 1990).*

69. Defendant or state may appeal as a matter of right from a sentence which is outside the range specified by the guidelines, pursuant to *Fla. Stat. ch. 924.06(1)(e), Fla. Stat. ch. 921.001(5)*, and *Fla. R. App. P. 9.140(b)(1)(E). Mitchell v. State, 458 So. 2d 10, 1984 Fla. App. LEXIS 15536, 9 Fla. L. Weekly 2107 (Fla. Dist. Ct. App. 1st Dist. 1984)*, review denied by *464 So. 2d 556, 1985 Fla. LEXIS 3304 (Fla. 1985)*, overruled by *State v. Koopman, 519 So. 2d 613, 1988 Fla. LEXIS 117, 13 Fla. L. Weekly 57 (Fla. 1988)*, disapproved by *State v. Stanley, 519 So. 2d 613, 1988 Fla. LEXIS 124, 13 Fla. L. Weekly 57 (Fla. 1988)*, overruled by *State v. Whitfield, 487 So. 2d 1045, 1986 Fla. LEXIS 2078, 11 Fla. L. Weekly 182 (Fla. 1986)*, criticized by *Stanley v. State, 507 So. 2d 1131, 1987 Fla. App. LEXIS 7533, 12 Fla. L. Weekly 964 (Fla Dist. Ct. App. 5th Dist. 1987).*

70. Defendant who pleaded guilty to an aggravated assault charge was not entitled to review of the conviction on direct appeal under *Fla. Stat. ch. 924.06(3)* because a valid guilty plea conclusively disposed of all prior issues presented in the case. *Robinson v. State, 373 So. 2d 898, 1979 Fla. LEXIS 4743 (Fla. 1979)*, questioned by *Maddox v. State, 708 So. 2d 617, 1998 Fla. App. LEXIS 2420, 23 Fla. L. Weekly D 720 (Fla. Dist. Ct. App. 5th Dist. 1998).*

71. Defendant's right to appeal an order of probation was granted by *Fla. Stat. ch. 924.06*. That right of appeal was not contingent upon the registering of objections at the time that probation was granted. *Di Orio v. State, 359 So. 2d 45, 1978 Fla. App. LEXIS 15742 (Fla. Dist. Ct. App. 2d Dist. 1978)*, overruled in part by *Goodson v. State, 400 So. 2d 791, 1981 Fla. App. LEXIS 20107 (Fla. Dist. Ct. App. 2d Dist. 1981).*

72. Where, on a plea of guilty, defendant was convicted and sentenced for kidnapping in violation of Fla. Stat. ch. 805.01, defendant was entitled to appeal a sentence that was based on a statute that was not in effect at the time of the kidnapping because *Fla. Stat. ch. 924.06(3)* only restricted direct appeals from any error which occurred prior to the acceptance of the plea by the court, or from any error in the acceptance itself, and *Fla. Stat. ch. 924.06(1)(d)* and ch. 924.06(3) read together did not mean to cut off a defendant's right to direct appeal from an illegal sentence imposed after conviction on a guilty plea. *Smith v. State, 358 So. 2d 1164, 1978 Fla. App. LEXIS 15637 (Fla. Dist. Ct. App. 2d Dist. 1978).*

73. In defendant's appeal from an order that denied defendant's motion for a supersedeas bond pending appeal, the court reversed because *Fla. Stat. ch. 924.06(2)* granted defendant the right to appeal from an order that granted probation in the same manner and scope as if a judgment of conviction had been entered, and if defendant was entitled to be at liberty on bail pending appeal, defendant was equally entitled to be at liberty under terms of a supersedeas bond pending appeal from an order of probation. *Murphy v. State, 231 So. 2d 263, 1970 Fla. App. LEXIS 6915 (Fla. Dist. Ct. App. 4th Dist. 1970).*

74. A defendant's appeal from an order denying his motion to grant jail time credit was not permitted by *Fla. Stat. ch. 924.06* or Fla. R. Crim. P. 1.850; the appeal was from neither a judgment of conviction without probation, an order granting or revoking probation, an excessive or illegal sentence, nor an order denying vacation of sentence. *James v. State, 226 So. 2d 468, 1969 Fla. App. LEXIS 5335 (Fla. Dist. Ct. App. 2d Dist. 1969).*

75. Appellate court denied the state's motion to dismiss defendant's appeal where the motion was based on the contention that a judgment entered on a plea of guilty ordinarily could not be reviewed by appeal; defendant's appeal was derived solely from *Fla. Stat. ch. 924.06*, which stated that an appeal could be taken by defendant only from a final judgment of conviction; anything said in *Gibson v. State, 196 So. 2d 188 (Fla. Dist. Ct. App. 1965)* in conflict with the appellate court's ruling was superseded. *Ramey v. State, 199 So. 2d 104, 1967 Fla. App. LEXIS 4821 (Fla. Dist. Ct. App. 2d Dist. 1967).*

76. The current statutory scheme under *Fla. Stat. ch. 924.06(1)* does not give a Florida Court of Appeal the power to review a trial court's discretionary decision to deny a downward departure at sentencing for trafficking in amphetamines and possession of *MDMA. Jorquera v. State, 868 So. 2d 1250, 2004 Fla. App. LEXIS 3756, 29 Fla. L. Weekly D 708 (Fla. Dist. Ct. App. 4th Dist. 2004).*

77. Under *Fla. Stat. ch. 924.06* appellate courts have jurisdiction to consider those appeals in which defendants plead nolo contendere, and whose written probation orders include special conditions of probation that were not orally pronounced at the sentencing hearing. *Christobal v. State, 598 So. 2d 325, 1992 Fla. App. LEXIS 5843, 17 Fla. L. Weekly D 1384 (Fla. Dist. Ct. App. 1st Dist. 1992)*, criticized in *Burdo v. State, 667 So. 2d 874, 1996 Fla. App. LEXIS 563, 21 Fla. L. Weekly D 281 (Fla. Dist. Ct. App. 3d Dist. 1996).*

78. Defendant could not appeal his judgment and sentence after defendant entered an unconditional plea of nolo contendere to the charges, even though though his sentence as an accessory after the fact was a lengthier sentence than the principal received. *Westermeier v. State, 395 So. 2d 231, 1981 Fla. App. LEXIS 18852 (Fla. Dist. Ct. App. 5th Dist. 1981).*

79. In an appeal of a probation revocation on grounds that the trial court lacked jurisdiction because the defendant was incompetent to enter his initial plea, the appellate court lacked jurisdiction to review the appeal; an appeal of an order revoking probation may only review proceedings after the order of probation. *Stuart v. State, 353 So. 2d 165, 1977 Fla. App. LEXIS 17180 (Fla. Dist. Ct. App. 3d Dist. 1977).*

80. Where defendant did not expressly reserve the right to appeal in entering his nolo contendere plea, under *Fla. Stat. ch. 924.06(3)* collateral attack was the only avenue of appeal. *Williams v. State, 691 So. 2d 484, 1997 Fla. App. LEXIS 130, 22 Fla. L. Weekly D 209 (Fla. Dist. Ct. App. 4th Dist. 1997)*, criticized in *Joyce v. State, 713 So. 2d 1053, 1998 Fla. App. LEXIS 7557, 23 Fla. L. Weekly D 1555 (Fla. Dist. Ct. App. 2d Dist. 1998)*, criticized by *Thompson v. State, 706 So. 2d 1361, 1998 Fla. App. LEXIS 78, 23 Fla. L. Weekly D 260 (Fla. Dist. Ct. App. 2d Dist. 1998)*, criticized by *Thompson v. Florida, 23 Fla. L. Weekly D 260* (Fla. Dist. Ct. App. 2d Dist. Jan. 9, 1998).

81. Appellate court lacked jurisdiction to consider defendant's nolo contendere conviction on direct appeal because defendant's plea of nolo contendere was made without reservation of the right to appeal. *Nettles v. State, 673 So. 2d 547, 1996 Fla. App. LEXIS 4780, 21 Fla. L. Weekly D 1159 (Fla. Dist. Ct. App. 4th Dist. 1996).*

82. An appellate court lacks jurisdiction to consider whether a trial court erred in accepting a defendant's plea of nolo contendere when the plea was made without reservation of the right to appeal. *Nettles v. State, 673 So. 2d 547, 1996 Fla.*

App. LEXIS 4780, 21 Fla. L. Weekly D 1159 (Fla. Dist. Ct. App. 4th Dist. 1996).

83. A defendant does not have a right to a general review of his guilty or nolo contendere plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived; such an automatic right would in effect eliminate both the necessity for a defendant to move for a withdrawal of his plea and the obligation to show a manifest injustice or prejudice as ground for such a plea withdrawal after sentence. *Nettles v. State, 673 So. 2d 547, 1996 Fla. App. LEXIS 4780, 21 Fla. L. Weekly D 1159 (Fla. Dist. Ct. App. 4th Dist. 1996).*

84. Where the state conceded that the affidavit of violation of community control was filed after the expiration of defendant's community control term, the trial court lacked jurisdiction to revoke community control notwithstanding defendant's failure to particularly identify the trial court's lack of jurisdiction in the reservation of appellate rights as required by *Fla. R. App. P. 9.140(b)(1)* and *Fla. Stat. ch. 924.06. Evans v. State, 647 So. 2d 180, 1994 Fla. App. LEXIS 6311, 19 Fla. L. Weekly D 1397 (Fla. Dist. Ct. App. 1st Dist. 1994).*

85. No right of direct appeal existed under *Fla. Stat. ch. 924.06(3)* as to defendant's allegations of prosecutorial misconduct and violation of double jeopardy where defendant's allegations arose out of circumstances which preceded a plea agreement and there was no express reservation of a right to appeal on those issues. *Fields v. State, 575 So. 2d 1377, 1991 Fla. App. LEXIS 2193, 16 Fla. L. Weekly D 718 (Fla. Dist. Ct. App. 5th Dist. 1991),* quashed by *586 So. 2d 341, 1991 Fla. LEXIS 1705, 16 Fla. L. Weekly S 674 (Fla. 1991).*

86. Defendant's conviction for possession and purchase of cocaine was affirmed because defendant failed to preserve relevant issues for appeal during trial; Under *Fla. Stat. ch. 924.06(3)* a defendant who pled nolo contendere without making an express reservation of the right to appeal had no right to direct appeal, but had to obtain review by means of collateral attack. *Ford v. State, 556 So. 2d 483, 1990 Fla. App. LEXIS 586, 15 Fla. L. Weekly D 327 (Fla. Dist. Ct. App. 2d Dist. 1990).*

87. Where, on a plea of guilty, defendant was convicted and sentenced for kidnapping in violation of Fla. Stat. ch. 805.01, defendant was entitled to appeal a sentence that was based on a statute that was not in effect at the time of the kidnapping because *Fla. Stat. ch. 924.06(3)* only restricted direct appeals from any error which occurred prior to the acceptance of the plea by the court, or from any error in the acceptance itself, and *Fla. Stat. ch. 924.06(1)(d)* and ch. 924.06(3) read together did not mean to cut off a defendant's right to direct appeal from an illegal sentence imposed after conviction on a guilty plea. *Smith v. State, 358 So. 2d 1164, 1978 Fla. App. LEXIS 15637 (Fla. Dist. Ct. App. 2d Dist. 1978).*

88. *Fla. Stat. ch. 924.06* required that a defendant's attacks on the sufficiency of the evidence in his probation hearing could or should have been raised by direct appeal from the order that placed him on probation. *Hardrick v. State, 293 So. 2d 135, 1974 Fla. App. LEXIS 7608 (Fla. Dist. Ct. App. 2d Dist. 1974),* reversed by *313 So. 2d 695, 1975 Fla. LEXIS 3323 (Fla. 1975).*

89. *Fla. Stat. ch. 924.06(3)* provides that a defendant who pleads nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal. *Trujillo-Pentate v. State, 609 So. 2d 72, 1992 Fla. App. LEXIS 11740, 17 Fla. L. Weekly D 2657 (Fla. Dist. Ct. App. 1st Dist. 1992),* quashed by *620 So. 2d 1231, 1993 Fla. LEXIS 1097, 18 Fla. L. Weekly S 431 (Fla. 1993).*

90. State's motion under *Fla. Stat. ch. 924.06* to dismiss appeal after defendant entered a nolo contendere plea was denied as premature, where counsel for defendant had not yet filed an Anders brief and the defendant had not had the opportunity to file a pro se brief. *Ford v. State, 575 So. 2d 1335, 1991 Fla. App. LEXIS 1730, 16 Fla. L. Weekly D 561 (Fla. Dist. Ct. App. 1st Dist. 1991),* review denied by *581 So. 2d 1310, 1991 Fla. LEXIS 762 (Fla. 1991).*

91. Where defendant waived the right to appeal by failing to reserve the right prior to pleading nolo contendere to the charge, defendant could obtain review by means of collateral attack pursuant to *Fla. Stat. ch. 924.06(3). Willis v. Wainwright, 375 So. 2d 3, 1979 Fla. App. LEXIS 14548 (Fla. Dist. Ct. App. 4th Dist. 1979).*

92. In ascertaining the meaning and effect to be given the word "or" the legislative intent is the determining factor, and the conjunctive "or" is often used to join two aspects of the same entity rather than two separate entities; thus, the language used by the legislature in *Fla. Stat. ch. 924.06* may be sensibly construed to mean that a sentence is excessive when it exceeds the punishment prescribed. *Infante v. State, 197 So. 2d 542, 1967 Fla. App. LEXIS 5119 (Fla. Dist. Ct. App. 3d Dist. 1967).*

HIERARCHY NOTES:

93. *Fla. Stat. Ann. § 924.06(1)(a)* provides that a criminal defendant may appeal from a final judgment of conviction when probation has not been granted, even if the offense of conviction is based on violation of a municipal ordinance. *Waite v. City of Fort Lauderdale, 681 So. 2d 901, 1996 Fla. App. LEXIS 11110, 21 Fla. L. Weekly D 2281 (Fla. Dist. Ct. App. 4th Dist. 1996).*