

Durational and Dispositional Departures Under the Kansas Sentencing Guidelines Act: The Kansas Supreme Court's Uneasy Passage Through *Apprendi*-land [*State v. Carr*, 53 P.3d 843 (Kan. 2002)]

Steven J. Crossland*

*Confusion now hath made his masterpiece!*¹

I. INTRODUCTION

Macduff's famous lament aptly describes the efforts of the Kansas Supreme Court to interpret and apply the United States Supreme Court's now three-year-old ruling in *Apprendi v. New Jersey*² to the Kansas Sentencing Guidelines Act (KSGA).³ The *Apprendi* Court adopted a bright-line rule specifying that a defendant has a constitutional right under the Fifth and Sixth Amendments to have a jury determine, beyond a reasonable doubt, any fact that would increase the defendant's punishment beyond the prescribed statutory sentencing range for a criminal offense, prior convictions excepted.⁴ The Fourteenth Amendment makes this constitutional rule applicable to the states when a state sentencing statute is at issue.⁵

The Kansas Supreme Court began its journey in what Supreme Court Justice Antonin Scalia has described as "*Apprendi*-land"⁶ in May 2001, when it declared in *State v. Gould*⁷ that the Kansas sentencing method for imposing upward departure sentences under the KSGA was facially unconstitutional.⁸ In *State v. Carr*,⁹ the court considered whether to extend its *Gould* holding to apply the *Apprendi* rule to a sentence in which a defendant convicted of a felony offense received a prison term, even though he had qualified for presumptive

* B.A. 1982, St. Mary's University (Minnesota); M.S. 1998, University of Kansas; J.D. Candidate 2004, Washburn University School of Law. I thank Professor Mary Kreiner Ramirez, Kari Nelson, and the *Washburn Law Journal* editors for their counsel and support. I dedicate this work to my wife, Robin, and to our families.

1. WILLIAM SHAKESPEARE, *MACBETH* act 2, sc. 3.

2. 530 U.S. 466 (2000) (5-4 decision).

3. KAN. STAT. ANN. §§ 21-4701 to -4728 (1995 & Supp. 2002).

4. *Apprendi*, 530 U.S. at 476.

5. *Id.*

6. *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Scalia, J., concurring).

7. 23 P.3d 801 (Kan. 2001).

8. *Id.* at 814.

9. 53 P.3d 843 (Kan. 2002). The Kansas Supreme Court accepted *Carr* for review through transfer from the Kansas Court of Appeals. KAN. STAT. ANN. § 20-3018(b) (1995 & Supp. 2002). No additional briefs aside from those submitted to the court of appeals were filed with the supreme court. Therefore, it is the *Carr* appellant and appellee briefs filed with the court of appeals that are the sources for the case description that follows.

probation under the KSGA.¹⁰ Such a sentence is referred to in the KSGA scheme as an upward dispositional departure.¹¹

The Kansas Supreme Court affirmed the judgment of the Kansas Court of Appeals that Carr's prison sentence should be vacated and remanded for re-sentencing because the sentencing court failed to give proper notice, as required by the guidelines, of its intent to issue an upward departure sentence.¹² However, the Kansas Supreme Court declined Carr's invitation to find that the dispositional nature of the departure sentence was unconstitutional under the *Apprendi* rule.¹³ The court found that the United States Supreme Court did not intend that the *Apprendi* rule apply to upward dispositional departure sentences under the KSGA.¹⁴ The Kansas Supreme Court further determined that presumptive sentencing under the KSGA did not disturb its long-standing precedent that probation was not a sentence but a judicial "act of grace"¹⁵ that was "separate and distinct" from the sentencing process.¹⁶ Hence, the court declared, only a sentencing judge may grant probation to a criminal defendant, regardless of any statutory presumption that the defendant should receive probation.¹⁷

A Kansas legal commentator has observed that the *Apprendi* rule served to clarify "that the determination whether there should be an upward departure [sentence] beyond the statutory maximum sentence belongs to the jury."¹⁸ In exempting dispositional departure sentences from *Apprendi* requirements, the Kansas Supreme Court sought to create a simple distinction that would preserve its case precedent and maintain the facade that traditional judicial discretion to grant probation was unrelated to the KSGA. This distinction, however, is one not applied in any other state that utilizes criminal sentencing guidelines for felony offenses.¹⁹ Unfortunately, the court's failure to explain why the Fifth and Sixth Amendment requirements inherent in the *Apprendi* rule do not apply to dispositional departures does not simplify *Apprendi*, but only confuses and undermines the rule's underlying constitutional philosophy.

10. Carr, 53 P.3d at 846.

11. *Id.* at 845.

12. *Id.* at 850-51.

13. *See id.* at 845.

14. *See id.* at 848.

15. *Id.* at 850.

16. *Id.*

17. *Id.*

18. Stephanie B. Stewart, *Apprendi v. New Jersey: Protecting the Constitutional Rights of Criminals at Sentencing*, 49 U. KAN. L. REV. 1193, 1217 (2001).

19. This is based on search of *Apprendi*-related state cases conducted via Westlaw in February 2003.

II. CASE DESCRIPTION

On February 18, 2000, the District Attorney for the Eighteenth Judicial District, in Sedgwick County Kansas, charged Timothy Carr with criminal possession of a firearm, classified as a severity level eight non-person felony as defined in section 21-4204(c) of the Kansas Statutes.²⁰ Before trial, further investigation revealed that Carr had pled guilty in Sedgwick County Juvenile Court in April 1999, to the felony offenses of possession of cocaine and possession of drugs with no tax stamp.²¹ The juvenile court adjudicated Carr a juvenile offender and remanded him to the custody of the Youth Center at Topeka (YCAT).²² Officials at YCAT released Carr twenty-six days before his arrest for the criminal possession of a firearm offense because he had reached the maximum age allowed for a YCAT resident.²³

After plea negotiations with the State, Carr pled guilty as charged in Sedgwick County District Court on March 14, 2000.²⁴ Since Carr's offense was a felony, the KSGA controlled his sentencing procedure.²⁵ In exchange for Carr's plea, the State agreed to recommend at sentencing that the court impose a mid-range sentence in the applicable sentencing guideline grid box.²⁶ The sentencing court determined that Carr's criminal history placed him in category E, due to his three prior non-person felony convictions.²⁷ Both Carr and the State agreed that the criminal history score and offense severity level were correct.²⁸ Carr's criminal history score, coupled with the severity level of his present offense, placed him in grid box 8E, which called for a term of imprisonment anywhere within a range of thirteen to fifteen months with a presumptive punishment of probation.²⁹

The sentencing guidelines require that a court impose a presumptive punishment unless "substantial and compelling reasons" exist for the court to depart from the guidelines and impose an alternative punishment.³⁰ In Carr's case, the sentencing court declined, without giving prior notice, to impose the sentence requested by the parties and

20. KAN. STAT. ANN. § 21-4204(c) (1995 & Supp. 2002); Brief of Appellant at 2, *State v. Carr*, 28 P.3d 436 (Kan. Ct. App. 2001) (No. 00-85238-A).

21. Brief of Appellee at 3, *Carr* (No. 00-85238-A).

22. *Id.*

23. *State v. Carr*, 53 P.3d 843, 845 (Kan. 2002); Brief of Appellant at 3, *Carr* (No. 00-85238-A).

24. Brief of Appellant at 2, *Carr* (No. 00-85238-A).

25. KAN. SENTENCING GUIDELINES DESK REFERENCE MANUAL 20 (2002) [hereinafter GUIDELINES MANUAL].

26. Brief of Appellee at 3, *Carr* (No. 00-85238-A).

27. *Carr*, 53 P.3d at 845. The two 1999 juvenile felonies plus the present felony offense equaled Carr's three offenses. *Id.*

28. *Id.*

29. *Id.*; GUIDELINES MANUAL, *supra* note 25, app. G at 2.

30. KAN. STAT. ANN. § 21-4716(a) (1995 & Supp. 2002).

imposed a dispositional departure sentence sua sponte.³¹ The court sentenced Carr to fifteen months in prison,³² listing three substantial and compelling reasons for departure.³³ First, Carr committed the firearm offense within thirty days of his release from state custody.³⁴ Second, he did not successfully complete a term of juvenile probation.³⁵ Finally, Carr had a “lengthy criminal history of drug possession.”³⁶

Carr timely filed a notice of appeal and sought reversal of his dispositional departure sentence before the Kansas Court of Appeals.³⁷ The court of appeals held that, although the district court had substantial and compelling reasons to depart from the guidelines, the district court failed to provide sufficient notice to the parties of its intention to depart as required under section 21-4718(b) of the Kansas Statutes.³⁸ The court of appeals, therefore, vacated Carr’s sentence and remanded for resentencing on the notice issue alone.³⁹ As for the *Apprendi* issue, the court of appeals held that the *Gould* holding pertained only to sentences that increase the length of the imposed prison term.⁴⁰ The court of appeals concluded that *Gould* (and by implication *Apprendi*) did not apply in Carr’s case because the sentence involved imposition of a prison term rather than presumptive probation, a situation the *Apprendi* rule allegedly did not contemplate.⁴¹

Carr petitioned the Kansas Supreme Court for review of the appellate ruling regarding application of the *Apprendi* rule to dispositional departure sentences. The Kansas Supreme Court accepted the case for review pursuant to section 20-3018(b) of the Kansas Statutes.⁴²

31. Brief of Appellee at 3-4, *Carr* (No. 00-85238-A); see KAN. STAT. ANN. § 21-4718(a)(2)(B).

32. Brief of Appellee at 4, *Carr* (No. 00-85238-A).

33. *Carr*, 53 P.3d at 845.

34. *Id.*

35. *Id.*

36. *Id.*

37. Brief of Appellee at 4, *Carr* (No. 00-85238-A).

38. *Carr*, 28 P.3d. at 438-39.

39. *Id.* at 439.

40. *Id.* at 440.

41. *Id.*

42. *State v. Carr*, 53 P.3d 843, 845 (Kan. 2002). Section 20-3018(b) specifies that any party “aggrieved” by a court of appeals ruling may petition the supreme court for review of that decision. KAN. STAT. ANN. § 20-3018(b) (1995 & Supp. 2002). A litigant must file such a petition within thirty days of the court of appeals’ decision. *Id.* The Kansas Supreme Court considers several criteria in determining whether to grant such review, including the “general importance” of the question at issue and the “existence of a conflict between the decision sought to be reviewed and a prior decision of the . . . court.” *Id.*

III. BACKGROUND

The right to a trial by a jury of one's peers predates the United States Constitution and even the Declaration of Independence.⁴³ When the Constitutional Convention convened in Philadelphia in 1787, creation of a constitutional right to jury trial in criminal prosecutions was possibly “the most consistent point of agreement” among the founding fathers.⁴⁴ Alexander Hamilton noted in the *Federalist Papers* that “[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; . . . the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”⁴⁵

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . to be informed of the nature and cause of the accusation; [and] to be confronted with the witnesses against him.”⁴⁶ The United States Supreme Court has held that this right also applies to the states as part of the Fourteenth Amendment.⁴⁷ The Court declared in *Apprendi* that the Sixth Amendment goes hand-in-hand with the Fifth, and that together the two Amendments require that a jury determine whether a criminal defendant is guilty beyond a reasonable doubt of every element of the crime charged.⁴⁸ Such elements include an accusation made in an “indictment, information, or appeal.”⁴⁹

In his *Apprendi* concurring opinion, Justice Clarence Thomas asserted that “when a statute increases punishment for some core crime based on the fact of a prior conviction, the core crime and the fact of the prior crime together create a new, aggravated crime” that must be presented to a jury for consideration.⁵⁰ Such a *fact* would thus become an *element* of a separate legal offense that could “expose a defendant to a punishment greater than that otherwise legally prescribed.”⁵¹

43. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994) (noting that the First Continental Congress included a right to jury trial in its 1774 Declaration of Rights).

44. *Id.* at 871.

45. THE FEDERALIST NO. 83 (Alexander Hamilton).

46. U.S. CONST. amend. VI.

47. *See generally* Pointer v. Texas, 380 U.S. 400 (1965).

48. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

49. *Id.*

50. *Id.* at 507-08 (Thomas, J., concurring).

51. *Id.* at 483 n.10.

As with the right to a criminal trial by jury, the principle of judicial discretion also has its roots in early American common law.⁵² At the time of American independence, English judges had little discretion in sentencing criminal offenders.⁵³ The criminal law provided a specific sanction or punishment for “every distinguishable criminal offense.”⁵⁴ With the exception of fines and corporal punishments (such as whippings) in misdemeanor cases,⁵⁵ the English trial judge of that era was expected to merely impose that sentence predetermined by law and was not allowed to impose his imprimatur upon the disposition.⁵⁶ In contrast, American judges since colonial times have been permitted at least some room for maneuver in criminal sentencing.⁵⁷ Before the Civil War, such judicial discretion was limited to imposing those specific punishments prescribed by legislatures.⁵⁸

Shortly after the war ended, however, a movement toward broader judicial sentencing discretion began with the introduction of so-called “indeterminate” sentencing schemes⁵⁹ that permitted judges to impose prison terms, or other punishments, from a wider statutory sentencing range.⁶⁰ Such schemes had the practical effect of increasing a sentencing judge’s discretion to consider factors other than the mere severity of the offense in imposing a prison term, so long as the

52. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001).

53. *Apprendi*, 530 U.S. at 479.

54. Erron W. Smith, *Apprendi v. New Jersey: The United States Supreme Court Restricts Judicial Sentencing Discretion and Raises Troubling Constitutional Questions Concerning Sentencing Statutes and Reforms Nationwide*, 54 ARK. L. REV. 649, 658 (2001).

55. *Id.* at 660 (citing *Apprendi*, 530 U.S. at 480 n.7).

56. *Id.* at 658 (citing *Apprendi*, 530 U.S. at 479). “The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law.” *Apprendi*, 530 U.S. at 479-80 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *396). However, English juries often exercised authority to mitigate any unduly severe statutorily prescribed sentence “when the circumstances of a case indicated political abuse of the criminal process by the prosecution or an unusually harsh, disproportionate penalty.” Smith, *supra* note 54, at 658 n.71.

57. Smith, *supra* note 54, at 660; see also *Williams v. New York*, 337 U.S. 241, 246 (1949).

58. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990). In the early nineteenth century, several jurisdictions allowed judges to consider aggravating and mitigating circumstances that affected an offender’s participation in a crime and to select a prison term from a legislatively-defined sentencing range. *Id.* at 892-93.

59. Smith, *supra* note 54, at 660-61. This movement coincided with a philosophical shift regarding the purpose of incarceration from that of strict punishment toward one of offender rehabilitation. Nagel, *supra* note 58, at 893.

60. Under the pre-KSGA indeterminate sentencing system, felony crimes in Kansas were grouped into five statutory classifications (A, B, C, D, and E), with different sentence ranges for each classification. KAN. SENTENCING COMM’N, RECOMMENDATIONS OF THE KANSAS SENTENCING COMMISSION 29 (1991). Judges were required to impose a minimum and a maximum sentence range. Howard Klink, *A Guide to Sentencing Reform in Kansas: Will Judicial Discretion Survive?*, in THE ROLE OF DISCRETION IN THE KANSAS COURT SYSTEM 43, 52 (C.K. Rowland ed., 1984). For example, the minimum prison term for a Class C felony was not less than three nor more than five years, and a maximum of not less than ten nor more than twenty years. *Id.* Once an offender served the minimum sentence, the Parole Board had the power to release the offender whenever it wished up to the maximum term imposed, depending on whether the Board was satisfied with the offender’s progress in prison. *Id.*

judge imposed a sentence from within a statutorily specified range.⁶¹ Judges could place offenders in prison for lengthier terms to ensure the maximum rehabilitative effect,⁶² or indeed could decide to impose no jail time whatsoever.⁶³ Since procedural safeguards that existed for defendants at the trial level did not extend to sentencing hearings, judges enjoyed virtually unfettered discretion in conducting criminal sentencing.⁶⁴ In 1949, the United States Supreme Court in *Williams v. New York*⁶⁵ voiced its approval of indeterminate sentencing philosophy, by stating that “a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him” within statutory bounds.⁶⁶ The popularity of indeterminate sentencing grew during the first half of the twentieth century to the extent that every state had such a system in place by the 1960s.⁶⁷

Judicial discretion was a vital element of indeterminate sentencing, and the use of probation as a sentencing option played a key role in the exercise of this discretion.⁶⁸ The concept of probation as a judicial “act of grace” materialized in the mid-1930s, when indeterminate sentencing was emerging as the dominant philosophy.⁶⁹ In *Escoe v. Zerbst*,⁷⁰ the United States Supreme Court first described the judicial grant of probation as an “act of grace.”⁷¹ Under this legal premise, a grant of probation was not subject to constitutional scrutiny at imposition, and no right of appeal attached.⁷² Any person convicted of a crime had no constitutional right to expect anything less than the maximum statutory penalty for that offense.⁷³ Sentencing judges thus assumed “untrammelled [sic] discretion” to either bestow or deny

61. Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 *YALE L.J.* 933, 938 (1994).

62. Nagel, *supra* note 58, at 893-94.

63. Bunzel, *supra* note 61, at 938.

64. Thomas M. Morrow, Note, Apprendi v. New Jersey: *In the “ Sleeper Decision of 2000,” the Supreme Court Restores Constitutional Protections to (Some) Criminal Defendants*, 38 *HOUS. L. REV.* 1065, 1081 (2001). During the early 1970s, the United States Supreme Court issued several holdings that restored to criminal offenders some measure of procedural due process rights in the sentencing process. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (holding that a state statute requiring defendant to prove element of crime used as sentencing factor improperly shifted burden of proof from government to defendant, violating Due Process Clause); *In re Winship*, 397 U.S. 358, 361-62 (1970) (holding that due process requires prosecution to provide proof under reasonable-doubt standard of all facts that constitute criminal offense).

65. 337 U.S. 241 (1949).

66. *Id.* at 246; see also Smith, *supra* note 54, at 662.

67. Nagel, *supra* note 58, at 894.

68. Bunzel, *supra* note 61, at 938.

69. Nagel, *supra* note 58, at 894.

70. 295 U.S. 490 (1935).

71. *Id.* at 492.

72. Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 *WASH. & LEE L. REV.* 75, 88 (2000).

73. *Id.* at 89 (citing Louis K. Polonsky, Note, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 *GA. L. REV.* 466, 468 (1974)).

probation to an offender.⁷⁴ Since this discretion was solely within the judge's purview, the theory went, the judge could grant probation subject to any conditions the judge alone saw fit to impose.⁷⁵

The probationer, being grateful for such an "act of leniency"⁷⁶ on the part of a benevolent court, "will not be heard to complain . . . even though the conditions imposed are arbitrary, unfair, vague, or otherwise invalid."⁷⁷ Probation as a sentence "was a privilege, not a right," and thus a sentence in which the judge could grant or revoke without legislative interference.⁷⁸

Legal commentators, as well as some state and federal courts, have debunked the "act of grace" premise as a discredited approach to criminal offender sentencing.⁷⁹ The United States Supreme Court itself discarded this theory thirty years ago when it declared that "[i]t is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, that probation is an 'act of grace.'"⁸⁰ During passage of the Sentencing Reform Act of 1984, which created the federal criminal sentencing guidelines,⁸¹ Congress declared that probation was its own sentence and not a judicial action detached from the sentencing process.⁸² While the "act of grace"

74. *Id.*

75. *Id.*

76. *Id.* at 88.

77. *Id.* at 89.

78. Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 839 (1999).

79. See *id.* at 839-40. "[It is] unrealistic to approach a probation case as one of unusual clemency when probation is in fact resorted to by the trial courts in the majority of cases." Horwitz, *supra* note 72, at 89 (quoting *State v. Martin*, 580 P.2d 536, 539 n.3 (Or. 1978)); see also Jeffrey N. Hurwitz, Comment, *House Arrest: A Critical Analysis of an Intermediate-level Penal Sanction*, 135 U. PA. L. REV. 771, 793 (1987) (observing that some lower courts maintained superficial reliance on the "act of grace" doctrine, but citing commentary holding that the doctrine had become discredited).

80. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (citation omitted).

81. Jack H. McCall, Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 486 (1993). Law review commentators have spilled much ink speculating as to *Apprendi's* eventual effect upon the departure provisions of the federal sentencing guidelines. Some agree that a narrow interpretation of *Apprendi* would not invalidate the guidelines, but that a broad application, similar to that advocated by Justice Clarence Thomas in his *Apprendi* concurrence, would render the guidelines unconstitutional. See, e.g., Andrew J. Fuchs, Note, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1438 (2001); Smith, *supra* note 54, at 693. The *Apprendi* majority declined to comment on the constitutionality of the guidelines since the issue was not before the Court. *Apprendi v. New Jersey*, 530 U.S. 466, 497 n.21 (2000).

82. *Developments in the Law — The Legality of Innovative Alternative Sanctions for Nonviolent Crimes*, 111 HARV. L. REV. 1944, 1949-50 (1998); see also S. REP. NO. 98-225, at 59 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3242 (noting that the underlying bill "treats probation as a form of sentence with conditions rather than as a deferral of imposition or execution of sentence").

maxim presently enjoys little support,⁸³ it clings to life in some jurisdictions,⁸⁴ including Kansas.⁸⁵

By the mid-1970s, the concept of indeterminate sentencing was reaching the end of its heyday.⁸⁶ Prison officials grumbled that the system was causing overcrowding in correctional institutions nationwide.⁸⁷ A number of studies confirmed that “rampant and often irrational variation” existed in criminal sentencing in both state and federal courts for unexplainable reasons.⁸⁸ Offender characteristics such as race, income, and level of education were found to have some impact upon sentencing decisions.⁸⁹ Judicial discretion under the indeterminate sentencing system was becoming synonymous with racial discrimination.⁹⁰

In response to this rising unease about such “unreviewable discretion,”⁹¹ the federal government and a number of state governments began implementing sentencing guideline systems that required judges to impose only determinate, fixed sentences.⁹² Such determinate sentencing schemes were administered through legislatively created sentencing commissions⁹³ and designed to reduce judicial discretion to deviate from the statutorily required sentence for a specific offense.⁹⁴ Many of these guideline schemes included enhancement procedures that permitted judges to impose a sentence other than that specified in the guidelines in certain circumstances.⁹⁵ In *McMillan v. Pennsylvania*,⁹⁶ the United States Supreme Court upheld the constitutionality of a Pennsylvania statute that required the sentencing judge to determine whether an offender possessed a firearm while committing a specified felony offense.⁹⁷ If the sentencing court found that the offender did possess a firearm, that court was required to impose a

83. Kelly, *supra* note 78, at 839-40.

84. Sandra L. Moser, Comment, *Anti-Prostitution Zones: Justification for Abolition*, 91 J. CRIM. L. & CRIMINOLOGY 1101, 1110 (2001).

85. The Kansas Supreme Court majority opinion in *Carr* firmly declared that the “act of grace” doctrine was settled law within its jurisdiction: “This court has repeatedly held that probation is separate and distinct from the sentence.” *State v. Carr*, 53 P.3d 843, 850 (Kan. 2002) (citations omitted).

86. See Smith, *supra* note 54, at 662-63.

87. Nagel, *supra* note 58, at 895 (citing Alan Dershowitz, *Let the Punishment Fit the Crime*, N.Y. TIMES, Dec. 28, 1975, at 7).

88. Smith, *supra* note 54, at 663.

89. Nagel, *supra* note 58, at 895.

90. *Id.*

91. Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 265 (2001).

92. *Id.*

93. *Id.*

94. *Id.* By the end of the 1990s, approximately one-third of the states had sentencing guidelines in place. Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 426 (2000).

95. John M. Parse, Case Note, *Putting the Tail Between the Dog's Legs: The Danger of Apprendi v. New Jersey*, 21 QUINNIPIAC L. REV. 645, 647 (2002).

96. 477 U.S. 79 (1986).

97. *Id.* at 81.

minimum five-year sentence for the underlying felony, provided the sentence did not exceed that otherwise allowed for the offense.⁹⁸ The Court held that since any evidence of firearm possession was a sentencing factor and not an element included in the statutory definition of the offense,⁹⁹ a court could consider such evidence under a preponderance-of-evidence standard.¹⁰⁰ Accordingly, the state was not required to prove such evidence beyond a reasonable doubt before a jury.¹⁰¹

Although the Pennsylvania statute passed constitutional muster, the United States Supreme Court cautioned that there were constitutional limitations that states should observe in developing sentence-enhancement schemes.¹⁰² The ultimate lesson of *McMillan* was that any state scheme that “keeps from the jury facts that expose defendants to greater or additional punishment” could raise constitutional issues that would be cause for review.¹⁰³

In *McMillan*, the United States Supreme Court first used the term “sentencing factor”¹⁰⁴ to describe “a fact that was not found by a jury but that could affect the sentence imposed by the judge.”¹⁰⁵ Twelve years later, in *Almendarez-Torres v. United States*,¹⁰⁶ the Court upheld a federal statute that permitted the use of a defendant’s repeat criminal behavior as a sentencing factor for enhancement purposes.¹⁰⁷ The Court found that the sentencing factor at issue was not an element of the crime requiring mention in the defendant’s criminal indictment¹⁰⁸ and rejected the proposition that any statute permitting longer prison terms for recidivist behavior was unconstitutional.¹⁰⁹ However, the following year the Court drew the line on its deference to state and federal sentence enhancement statutes when, in *Jones v. United States*,¹¹⁰ it struck down as unconstitutional a federal carjacking statute that permitted the sentencing judge to consider certain elements of the crime as sentencing factors for enhancement purposes.¹¹¹

98. *Id.* (citing 42 PA. CONS. STAT. § 9712(b) (1998)).

99. *Id.* at 85-86.

100. B. Patrick Costello, Jr., Comment, *Apprendi v. New Jersey: “Who Decides What Constitutes a Crime?” An Analysis of Whether a Legislature Is Constitutionally Free to “Allocate” an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205, 1223 (2002).

101. *McMillan*, 477 U.S. at 86.

102. *Id.*; see also Smith, *supra* note 54, at 667.

103. Smith, *supra* note 54, at 667.

104. *McMillan*, 477 U.S. at 86.

105. *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000).

106. 523 U.S. 224 (1998).

107. *Id.* at 236.

108. *Id.* at 226-27.

109. *Id.* at 246.

110. 526 U.S. 227 (1999).

111. *Id.* at 229. In *Jones*, the carjacking statute at issue provided for sentence enhancement if death or serious bodily injury resulted from the criminal action. *Id.* The Court held that “death” and “serious bodily injury” were statutory elements and not usable for sentence en-

In dicta that would serve as the basis for its *Apprendi* holding the following year, the Court declared that “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”¹¹²

In *Apprendi*, the United States Supreme Court again tackled the question of judicial discretion versus procedural due process.¹¹³ Petitioner Charles C. Apprendi, Jr. had pled guilty in a New Jersey state court to several firearm violations after he had admitted firing bullets into an African-American family’s residence.¹¹⁴ Apprendi received an extended prison sentence under a New Jersey hate crime law that permitted judicial discretion to enhance a sentence beyond the statutory maximum.¹¹⁵ The New Jersey statute allowed for sentence enhancement if the court found by a preponderance of the evidence that the defendant “acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”¹¹⁶ In considering Apprendi’s appeal, the specific question presented was whether the New Jersey enhancement mechanism violated the Due Process Clause because it permitted imposition of an increase in the statutory maximum sentence using evidence not proven beyond a reasonable doubt before a jury.¹¹⁷ A slim Court majority invalidated the New Jersey statute.¹¹⁸

In his *Apprendi* majority opinion, Justice John Paul Stevens observed that, although judges have historically had discretion in sentencing, such discretion has been limited to imposition of sentences within statutory limitations.¹¹⁹ He stated that the *Apprendi* decision would not affect a judge’s sentencing discretion so long as the judgment imposed remained within the statutorily prescribed range.¹²⁰ However, the judicial sentencing prerogative was limited to consideration of only those facts alleged in an indictment and submitted to a jury.¹²¹ Therefore, he concluded that, under the Sixth Amendment, a jury must consider facts that would subject a defendant to a sentence beyond that sentence prescribed by statute because such facts constitute elements of an individual criminal offense.¹²²

hancement purposes unless each element was charged by indictment and proven to a jury beyond a reasonable doubt. *Id.* at 235-36.

112. *Id.* at 243 n.6.

113. *See generally* Apprendi v. New Jersey, 530 U.S. 466 (2000).

114. *Id.* at 469.

115. *Id.* at 470.

116. N.J. STAT. ANN. § 2C:44-3(e) (West 1995 & Supp. 2003).

117. *Apprendi*, 530 U.S. at 468-69.

118. *See generally id.*

119. *Id.* at 481.

120. *Id.*

121. *Id.* at 483 n.10.

122. *Id.*

Justice Stevens explained the principles behind the *Apprendi* rule by noting that, at common law, judges were allowed to exercise sentencing discretion,¹²³ but still were expected to impose the exact sentence indicated for a specific crime.¹²⁴ Many modern criminal sentencing schemes, however, allowed judges to determine aggravating factors that could result in longer prison sentences.¹²⁵ Justice Stevens concluded that any sentencing scheme “that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone” does not pass Sixth Amendment muster.¹²⁶ Therefore, the Sixth and Fourteenth Amendments required that only a jury may determine aggravating factors that are used to extend a defendant’s sentence, enabling the defendant to confront the evidence against him and preserve the defendant’s due process rights.¹²⁷

The principal *Apprendi* dissent, by Justice Sandra Day O’Connor, criticized the majority for, in effect, stifling judicial discretion in determinate sentencing systems where a legislature had already limited such discretion by specifying factors a court may consider in assessing sentence.¹²⁸ Justice O’Connor predicted that *Apprendi* would usher in “a lengthy period of considerable confusion” for judges, prosecutors and defense attorneys.¹²⁹ Justice Stephen Breyer complained in a separate dissent that the new rule would hamstring the sentencing process and thwart state legislatures that had developed sentencing enhancement procedures based on *McMillan* and other Court precedents.¹³⁰ However, Justice Clarence Thomas wrote in concurrence that a bifurcation procedure, in which a jury in a separate proceeding considers evidence, including criminal history, in determining an enhanced sentence would satisfy *Apprendi* scrutiny without unduly interfering with sentencing procedures.¹³¹

123. Judges usually exercised such discretion only in those situations where the prescribed sentence was so inappropriate that a commutation of sentence was clearly indicated. *Id.* at 479.

124. *Id.*

125. *Id.* at 564-65 (Breyer, J., dissenting).

126. *Id.* at 482-83.

127. *See id.* at 476.

128. *Id.* at 546 (O’Connor, J., dissenting).

129. *Id.* at 552 (O’Connor, J., dissenting).

130. *Id.* at 565 (Breyer, J., dissenting).

131. *Id.* at 521 n.10 (Thomas, J., concurring). The 2002 Kansas Legislature provided for a bifurcation procedure similar to what Justice Thomas had in mind. *See* KAN. STAT. ANN. § 21-4718(b)(4)-(7) (1995 & Supp. 2002). Justice Thomas also pushed for a broader application of *Apprendi* than the majority desired, arguing that the definition of a crime includes “every fact that is by law a basis for imposing or increasing punishment.” *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). Such a rule effectively makes “all aggravating sentencing factors elements of their respective crimes, whether or not the increased sentence imposed on the defendant remains within the statutory range.” Smith, *supra* note 54, at 694 (emphasis added).

Although the Court's decision received little notice when announced, coming as it did amid the usual rush of term-ending opinions, *Apprendi* has since become one of the Court's most controversial and high-impact decisions in recent years.¹³² Legal commentators have agreed with Justice Breyer that the *Apprendi* rule will eventually cause a dismantling or restructuring of state criminal sentencing guidelines, providing for enhanced sentences for specified types of criminal offenders and crimes,¹³³ many designed in reliance on *McMillan*.¹³⁴ Although Justice Stevens acknowledged, then rejected, the possibility that *Apprendi* would severely limit judicial discretion in sentencing, some observers remain unconvinced.¹³⁵

While *Apprendi*'s ultimate impact is not yet fully determined,¹³⁶ it is clear that *Apprendi* has launched "scores of challenges to various sentencing schemes,"¹³⁷ forcing states to reevaluate, and in some cases reorganize, criminal sentencing schemes to ensure that defendants receive the prescribed constitutional protections.¹³⁸ As of March 2003, the Kansas Supreme Court had addressed no fewer than thirty-three *Apprendi*-related challenges to the KSGA on a variety of sentencing issues.¹³⁹

Before examining the *Apprendi* rule's relevance to departure sentencing under the KSGA, a review of the history and application

132. Alan Ellis et al., *Apprehending and Appreciating Apprendi*, 15 CRIM. JUST. 16, 17 (2001).

133. See, e.g., William J. Rich, *Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue*, 11 KAN. J.L. & PUB. POL'Y 693, 709 (2002); Smith, *supra* note 54, at 693; Stewart, *supra* note 18, at 1194.

134. See *Apprendi*, 530 U.S. at 565 (Breyer, J., dissenting). In her *Apprendi* dissenting opinion, Justice Sandra Day O'Connor charged that the majority was overruling *McMillan*. *Id.* at 533 (O'Connor, J., dissenting). The majority, distinguishing *McMillan*, contended that *McMillan*'s strictures did not apply to sentencing statutes permitting judges to extend defendant sentences *beyond* the statutory maximum. *Id.* at 387 n.13. Therefore, commentators assert that *McMillan* applies only when a judge enhances a sentence *within* the specified statutory range. See, e.g., Analisa Swan, Note, *Apprendi v. New Jersey: The Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights; How Far Is Too Far?*, 29 PEPP. L. REV. 729, 753 (2002).

135. See, e.g., Costello, *supra* note 100, at 1268 ("This situation has the potential to return our system to the very disparities and incongruous sentences that the sentencing reform initiatives of the past three decades were designed to erase."); Smith, *supra* note 54, at 650 ("[B]y shifting the burden of considering the existence of aggravating sentencing factors from the judge to the jury, the Court has disregarded a long-recognized tradition of judicial sentencing discretion.").

136. See Rich, *supra* note 133, at 709.

137. David G. Savage, *Sentence Structure: Court Takes Another Look at Roles of Judges and Juries in Deciding Punishment*, 88 A.B.A. J. 32 (2002).

138. Stewart, *supra* note 18, at 1194.

139. See, e.g., *State v. Walker*, 60 P.3d 937 (Kan. 2003) (holding that the sentencing judge's extension of post-release supervision period based on nature of offense did not offend *Apprendi*); *State v. Kendall*, 58 P.3d 660 (Kan. 2002) (holding that no *Apprendi* violation occurred where defendant's two prior DUI convictions were used to enhance classification of a new DUI offense from misdemeanor to felony, thus increasing sentence); *State v. Bramlett*, 41 P.3d 796 (Kan. 2002) (holding that imposition of consecutive presumptive sentences did not provide an increased penalty beyond statutory maximum); *State v. Ivory*, 41 P.3d 781 (Kan. 2002) (holding that *Apprendi* does not apply where sentence imposed was based in part upon a defendant's criminal history score).

of the Kansas sentencing guidelines is in order. The Kansas legislature enacted the KSGA in response to political pressures that made it impossible for the state to retain its indeterminate sentencing system.¹⁴⁰ During the late 1980s, the Kansas inmate population began to routinely exceed institutional capacity.¹⁴¹ A state investigation determined that judicial sentencing discretion contributed to a “systemic bias” in felony offender sentencing.¹⁴² In addition, a federal judge ruled in April 1989, that inmate overcrowding in Kansas violated the Eighth Amendment’s prohibition on cruel and unusual punishment.¹⁴³ The state responded with an ambitious prison expansion and construction program that restrained, but failed to stop inmate overcrowding.¹⁴⁴

As the 1990s dawned, Kansas’s political powers conceded that the time had come to scrap the existing indeterminate sentencing system.¹⁴⁵ To address these issues, the Kansas legislature created a state sentencing commission with a mandate to “[d]evelop a sentencing guideline model or grid based on fairness and equity . . . [and] establish rational and consistent sentencing standards which reduce sentence disparity, to include, but not be limited to, racial and regional biases which may exist under current sentencing practices.”¹⁴⁶ In 1991, the Kansas Sentencing Commission issued a final report to the legislature in which it recommended imposition of a determinate sentencing system for felony offenders.¹⁴⁷ Implicit in this recommendation were two assumptions: that incarceration “should be reserved for serious offenders,” and that the “primary purposes of a prison sentence are incapacitation and punishment.”¹⁴⁸ The legislature duly passed the KSGA during the 1992 general session and the act took effect on July 1, 1993.¹⁴⁹

In adopting the KSGA, Kansas followed a national trend where several states, as well as the federal government, scuttled indeterminate sentencing systems in favor of determinate systems that specified

140. See David J. Gottlieb, *A Review and Analysis of the Kansas Sentencing Guidelines*, 39 U. KAN. L. REV. 65, 66-68 (Criminal Procedure ed., 1991).

141. *Id.* at 67. The Kansas prison population increased from 2,416 in 1979 to 6,172 in 1989. *Id.* Nationwide, the increase in average prison population between 1975 and 1985 was greater than the entire increase for the previous fifty-year period. Jeff Bleich, Comment, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125, 1146 (1989).

142. KAN. SENTENCING COMM’N, RECOMMENDATIONS OF THE KANSAS SENTENCING COMMISSION 26 (1991).

143. See Gottlieb, *supra* note 140, at 67-68.

144. *Id.* at 68.

145. *Id.*

146. KAN. STAT. ANN. § 74-9101(b)(1) (2002).

147. See Michael R. O’Neal, Legislative Update, *Criminal Law*, J. KAN. BAR ASS’N, Aug. 1992, at 31.

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

149. *Id.*

presumptive prison and probation terms based on the severity of the crime and the offender's criminal history.¹⁵⁰ The district court is required to sentence all felony offenders using a grid¹⁵¹ containing criminal history categories on a horizontal axis and crime severity categories on a vertical axis.¹⁵² A dispositional line separates unshaded grid boxes, designated as presumptive prison sentences, from shaded grid boxes representing presumptive probation sentences.¹⁵³ Three numbers in each grid box signify months of imprisonment that represent a sentencing range.¹⁵⁴ In a given case, where the criminal history axis and crime severity axis converge, the court may assess a term of incarceration using any of the three numbers within the presumptive sentencing range.¹⁵⁵ The middle of the three numbers is considered the "standard number" and is suggested as "the appropriate sentence for typical cases."¹⁵⁶ The court may use the upper or lower of the three numbers for cases "involving aggravating or mitigating factors insufficient to warrant a departure."¹⁵⁷ The grid is structured so that probation is the presumed disposition for non-violent offenders, and prison is the presumed disposition for violent offenders.¹⁵⁸

Thus, judicial discretion in Kansas felony sentencing became more restrictive than that exercised under the old indeterminate system. However, the KSGA did not completely eliminate such discretion because the new guidelines contained a mechanism that allowed judges to depart from the new sentencing restraints for certain offenders.¹⁵⁹

Departure sentencing is a fundamental component of the KSGA. One method of departure sentencing is a *durational* departure, which allows the court to depart upward or downward from the designated grid box numbers upon the motion of either the prosecutor or defendant.¹⁶⁰ The guidelines permit the court to depart upward and impose a sentence up to double the amount noted in the appropriate grid box.¹⁶¹ In the case of upward durational departures, the court may

150. Gottlieb, *supra* note 140, at 67.

151. The KSGA utilizes two sentencing grids, one solely for felony drug offenses and one for all other felony crimes, with the exception of first-degree murder and treason, which are off-grid crimes that carry a term of life imprisonment. See GUIDELINES MANUAL, *supra* note 25, at 18. The district court used the non-drug grid to sentence Carr. For a view of the non-drug grid's physical structure, see Appendix G of the GUIDELINES MANUAL.

152. GUIDELINES MANUAL, *supra* note 25, at 18.

153. *Id.*

154. *Id.* at 19.

155. *See id.*

156. *Id.*

157. *Id.*

158. *See id.* at 24-25.

159. *Id.* at 19.

160. *See id.* at 63, 66.

161. GUIDELINES MANUAL, *supra* note 25, at 19.

impose such sentences only if substantial and compelling reasons exist to impose a non-presumptive sentence.¹⁶²

A second method of departure sentencing is a *dispositional* departure in which the court imposes a prison sentence instead of presumptive probation or imposes probation if the guidelines call for a presumptive prison sentence.¹⁶³ In a dispositional departure situation, the prison term cannot exceed the maximum number within the range prescribed in the appropriate sentencing grid box.¹⁶⁴ Again, the sentencing judge must state substantial and compelling reasons for departure.¹⁶⁵ Notice requirements are the same as those for a durational departure.¹⁶⁶

A nonexclusive listing of aggravating or mitigating factors that the court may consider in determining whether departure is appropriate is included in the statute.¹⁶⁷ Potential aggravating factors include: victim vulnerability because of age, physical infirmity or diminished mental capacity;¹⁶⁸ whether the offender demonstrated “excessive brutality” toward the victim;¹⁶⁹ and whether the motivation for the offense was the “race, color, religion, ethnicity, national origin or sexual orientation of the victim.”¹⁷⁰ Potential mitigating factors include: whether the offender’s participation in the crime was minor or passive;¹⁷¹ whether the amount of harm or loss sustained was “significantly less than typical” for the alleged offense;¹⁷² and whether the defendant had “suffered a continuing pattern of physical or sexual abuse” at the hands of the victim, and the offense was a direct response to that abuse.¹⁷³

The sentencing judge is required to give notice of intent to depart.¹⁷⁴ Such notice requires that the court inform all parties and arrange for a formal hearing to consider evidence regarding imposition of a departure sentence.¹⁷⁵ If the judge decides to depart *sua sponte*, the court is required to notify all parties and allow reasonable time for response from the parties.¹⁷⁶

162. KAN. STAT. ANN. § 21-4716(a) (1995 & Supp. 2002).

163. GUIDELINES MANUAL, *supra* note 25, at 63.

164. KAN. STAT. ANN. § 21-4719(c)(2).

165. The sentencing judge must provide substantial and compelling reasons for any departure sentence, whether the sentence involves an upward or downward departure. *Id.* § 21-4716(a).

166. *See id.* § 21-4718(a)(3).

167. *Id.* § 21-4716(c)(1).

168. *Id.* § 21-4716(c)(2)(A).

169. *Id.* § 21-4716(c)(2)(B).

170. *Id.* § 21-4716(c)(2)(C).

171. *Id.* § 21-4716(c)(1)(B).

172. *Id.* § 21-4716(c)(1)(E).

173. *Id.* § 21-4716(c)(1)(D).

174. *Id.* § 21-4718(a)(3).

175. *Id.* § 21-4718(a)(1).

176. *Id.* § 21-4718(a)(3).

The Kansas Supreme Court addressed the *Apprendi* rule for the first time in *State v. Conley*.¹⁷⁷ In *Conley*, a defendant convicted of premeditated first-degree murder received a minimum forty-year prison sentence under the Kansas “hard-40” sentencing law.¹⁷⁸ On appeal, the defendant asserted that a person convicted of premeditated first-degree murder is usually parole eligible after serving twenty-five years.¹⁷⁹ However, a court may impose a mandatory, forty-year sentence before a defendant is parole eligible, if the court finds that certain aggravating circumstances existed during commission of the offense.¹⁸⁰ Conley contended that changing his parole eligibility from twenty-five to forty years unconstitutionally altered the length of his sentence because a judge and not a jury determined whether certain aggravating factors existed.¹⁸¹ Therefore, Conley argued that, under the *Apprendi* rule, the sentencing court could not consider these factors because they were not proven to a jury beyond a reasonable doubt.¹⁸² The Kansas Supreme Court held that Conley’s forty-year sentence did not violate the *Apprendi* rule.¹⁸³ The court found that because the defendant’s forty-year sentence did not increase the statutory maximum sentence, and instead limited the statutory minimum sentence, the “hard-40” law was consistent with the United States Supreme Court’s decision in *McMillan* and did not violate the Sixth Amendment.¹⁸⁴

In May 2001, the Kansas Supreme Court applied the *Apprendi* rule to the KSGA for the first time in *State v. Gould*.¹⁸⁵ In *Gould*, the defendant was convicted of three counts of child abuse, each a severity level five person felony.¹⁸⁶ The defendant’s criminal history score was category I, since she had no prior record.¹⁸⁷ The authorized sentencing range for each count was thirty-one, thirty-two, and thirty-four months.¹⁸⁸ The district court granted the State’s motion for an upward durational departure sentence under section 21-4716(a) of the

177. 11 P.3d 1147 (Kan. 2000).

178. *Id.* at 1151; *see also* KAN. STAT. ANN. § 21-4635.

179. *Conley*, 11 P.3d at 1157.

180. *Id.* Such aggravating factors may include an arranged murder for hire, a murder committed in a “heinous, atrocious or cruel manner,” or the murder of a witness in a criminal proceeding. KAN. STAT. ANN. § 21-4636 (a)-(f).

181. *Conley*, 11 P.3d at 1157.

182. *Id.*

183. *Id.* at 1159.

184. *Id.* at 1158-59.

185. 23 P.3d 801 (Kan. 2001).

186. *Id.* at 804; *see also* KAN. STAT. ANN. § 21-3609 (1995 & Supp. 2002).

187. *Gould*, 23 P.3d at 806.

188. *Id.* Gould’s case fell into one of three “border boxes” on the guidelines sentencing grid. In such cases, a prison sentence is presumed, but the court is free to impose a non-prison sentence upon finding that placement of the offender in a readily available treatment program will better serve “community safety interests by promoting offender reformation.” GUIDELINES MANUAL, *supra* note 25, at 35.

Kansas Statutes.¹⁸⁹ Citing several substantial and compelling reasons for departure, the district court sentenced Gould to sixty-eight months on each of two counts, to run consecutive to each other.¹⁹⁰ On the remaining count, Gould was sentenced to thirty-four months, to run concurrently with the other two counts, for a total sentence of 136 months.¹⁹¹

Gould appealed to the Kansas Supreme Court and attacked her sentence, arguing that the *Apprendi* rule had rendered section 21-4716 unconstitutional.¹⁹² Gould contended that the statute improperly allowed the district court to impose an upward departure in excess of the sentence range prescribed for her crime on the basis of substantial and compelling reasons not submitted to a jury or proven beyond a reasonable doubt.¹⁹³ The court, in Justice Fred Six's majority opinion, agreed:

The district court made findings as to certain aggravating factors which increased Gould's sentence beyond the statutory maximum. The district court, rather than the jury, made these findings as required by K.S.A. 21-4716(a). *Apprendi* requires that such findings be made by the jury beyond a reasonable doubt. Because Kansas law authorizing upward departure sentences directly contravenes this requirement, the law is unconstitutional.¹⁹⁴

Justice Six observed that "*Apprendi* dictates our conclusion that Kansas' scheme for imposing upward departure sentences, embodied in [section] 21-4716, violates the due process and jury trial rights contained in the Sixth and Fourteenth Amendments to the United States Constitution."¹⁹⁵ The court vacated Gould's sentence and remanded for resentencing.¹⁹⁶

The *Gould* majority opinion also touched on public policy as a basis for concluding that Gould's sentence went beyond constitutional bounds.¹⁹⁷ The majority noted that a fundamental purpose of the KSGA was "to promote uniformity and standardize sentences so that similarly situated offenders would be treated in the same way."¹⁹⁸ The Kansas Supreme Court also recognized that another intention of

189. *Gould*, 23 P.3d at 806.

190. *Id.*

191. *Id.* Departure reasons cited included the victims' vulnerability, the defendant's "excessive brutality" toward the victims, and the fiduciary relationship that existed at the time between the defendant and the victims. *Id.*

192. *See id.* at 804.

193. *Id.* at 813.

194. *Id.* at 814.

195. *Id.* Justice Six further noted that the KSGA was "silent on a burden of proof to be utilized by the district judge to establish a substantial and compelling reason to depart." *Id.* at 812. "Facts 'established for use in sentencing require less evidentiary weight than facts asserted for conviction.'" *Id.* (quoting *State v. Spain*, 953 P.2d. 1004, 1009 (Kan. 1998)).

196. *Id.* at 814.

197. *See id.* at 811.

198. *Id.*

sentencing guidelines was to reduce prison overcrowding and sentencing disparity by distinguishing more serious violations from those that were less serious.¹⁹⁹ The majority charged that the statutory allowance for upward durational departures strayed from the original purpose of the guidelines by permitting judicial discretion to “impose a sentence not based exclusively on offense severity and criminal history.”²⁰⁰

In dissent, Justice Bob Abbott asserted that Gould “merely received more than the standard sentence because certain sentencing factors were present,” one factor being the existence of a fiduciary relationship between defendant and victims.²⁰¹ Since there was no dispute that such a relationship existed in Gould’s case, Justice Abbott argued that any sentencing error was “harmless because it is clear beyond a reasonable doubt that a rational jury would have found that a fiduciary relationship existed.”²⁰² Finding *Apprendi* a “disturbing” decision, Justice Abbott predicted that the new standard would have “considerable impact” on the criminal justice system in general and sentencing guidelines in particular.²⁰³

In response to the *Gould* decision, the 2002 Kansas Legislature amended the procedures for upward durational departure sentence consideration specified in the KSGA.²⁰⁴ The prosecuting attorney now must file a motion to seek an upward durational departure sentence not less than thirty days before the date of trial.²⁰⁵ The district court is required to screen evidence supporting an upward durational departure sentence and must allow presentation of such evidence to a jury for its consideration either during the trial or after determination of the defendant’s guilt.²⁰⁶ The jury must find any factor used to impose the upward durational departure sentence beyond a reasonable doubt.²⁰⁷ The sentencing court may conduct an upward durational departure proceeding separate from the actual trial, but that court must use the same jury that heard evidence in the trial hearing.²⁰⁸ If the jury is unable to arrive at a unanimous verdict regarding whether a durational departure sentence is warranted, the trial judge must dismiss the jury and impose a sentence according to law.²⁰⁹

199. Stewart, *supra* note 18, at 1210.

200. *Gould*, 23 P.3d at 812.

201. *Id.* at 815 (Abbott, J., dissenting).

202. *Id.* (Abbott, J., dissenting).

203. *Id.* at 814 (Abbott, J., dissenting).

204. H.B. 2154, 2002 Leg., Reg. Sess. (Kan. 2002).

205. KAN. STAT. ANN. § 21-4718(b)(1) (1995 & Supp. 2002).

206. *Id.* § 21-4718(b)(2).

207. *Id.*

208. *Id.* § 21-4718(b)(4).

209. *Id.* § 21-4718(b)(7).

In summary, through its adoption of the KSGA, Kansas followed a national trend that saw the federal government and many states steer away from traditional indeterminate sentencing systems in favor of sentencing guidelines designed to eliminate felony sentencing disparities caused by racial and geographical bias. The KSGA was significant in that it required judges to sentence qualified felony defendants to probation unless substantial and compelling reasons existed for the district court to sentence the defendant to prison. The United States Supreme Court did not intend *Apprendi* to dismantle such state sentencing guideline systems, so long as those systems permitted judges to impose sentences only from within a statutory range. Nor did the Court seek to eliminate the type of sentence enhancement statutes it approved of in *McMillan* and its progeny. *Apprendi* applied to those sentencing systems that permitted a judge to increase a defendant's sentence beyond the statutory maximum because of factors that the judge alone decided were relevant to the issue. In *Carr*, the Kansas Supreme Court had to reconcile the *Apprendi* rule with its long line of precedent cases that upheld probation as a judicial "act of grace" and to determine whether the doctrine survived enactment of the KSGA.

IV. ANALYSIS

Carr petitioned the Kansas Supreme Court for review regarding the application of *Apprendi* and *Gould* to dispositional departure sentences under the KSGA, and whether there were sufficient substantial and compelling reasons for imposing the dispositional departure sentence.²¹⁰ The crucial question before the court was whether a legal distinction existed between durational and dispositional departure sentences that would allow judicial discretion to impose dispositional departures under the KSGA without offending *Apprendi* and *Gould*.²¹¹

A. Parties' Arguments

1. Timothy Carr

Carr raised three issues on appeal. First, he contended that the district court erred in sentencing him to an upward dispositional departure without providing advance notice to or reasonable time for counsel to respond.²¹² He asserted that the district court decided to impose a dispositional departure sentence on its own volition with ab-

210. State v. Carr, 53 P.3d 843, 845 (Kan. 2002).

211. *Id.* at 849.

212. Brief of Appellant at 3, State v. Carr, 28 P.3d 436 (Kan. Ct. App. 2001) (No. 00-85238-A).

solutely no advance notice to either party.²¹³ Carr argued the Kansas Supreme Court's previous holding in *State v. Alderson*²¹⁴ entitled him to adequate, advance notice of a district court's intention to impose either a durational or a dispositional departure sentence.²¹⁵

Second, Carr alleged that the district court's reasons for imposing a dispositional departure sentence were not substantial and compelling.²¹⁶ He argued that the KSGA did not specifically state that the district court could consider a crime committed following release from incarceration as an aggravating factor for sentencing departure purposes.²¹⁷ Carr asserted that his criminal history was not informative regarding his ability to complete a term of probation.²¹⁸

Finally, Carr argued the primary issue of his appeal: whether the United States Supreme Court intended *Apprendi* to apply to upward dispositional departures under the KSGA.²¹⁹ In support of this argument, Carr asserted that the sentencing scheme invalidated in *Apprendi* was virtually identical to that used under the KSGA.²²⁰ The New Jersey hate crime statute in *Apprendi* permitted "imposition of an extended term of imprisonment in much the same manner as does the Kansas departure scheme."²²¹ Under both sentencing schemes, "the determination of whether to impose an enhanced sentence is divorced from the determination of guilt."²²² In both states, the judge determined the factors required for sentence enhancement, not the jury.²²³ Therefore, the Kansas statute permitted only judges, and not juries, to determine, under a preponderance-of-evidence standard, the presence of factors used to impose an upward departure sentence upon a criminal defendant.²²⁴ Such a scheme, Carr argued, was facially unconstitutional under *Apprendi*.²²⁵

213. *Id.* at 5.

214. 922 P.2d 435 (Kan. 1996).

215. Brief of Appellant at 4, *Carr* (No. 00-85238-A) (citing *Alderson*, 922 P.2d at 435). As previously noted, the court of appeals accepted this argument, and the Supreme Court did not address the notice issue in *Carr* because the State did not cross-petition the court of appeals' finding. *Carr*, 53 P.3d at 845. The court did note at the end of its majority opinion that it affirmed the court of appeals' decision vacating Carr's sentence and remanded for resentencing "because the district court failed to give adequate notice of its intent to depart." *Id.* at 850-51.

216. Brief of Appellant at 6, *Carr* (No. 00-85238-A).

217. *Id.* at 9.

218. *Id.* at 8.

219. *Id.* at 9.

220. *Id.* at 11.

221. *Id.*

222. *Id.*

223. *Id.* at 11-12.

224. *See id.* at 12.

225. *Id.*

2. The State of Kansas

The State argued that *Apprendi* was inapplicable because Carr's guilty plea in itself proved the essential facts that were the basis for his departure sentence beyond a reasonable doubt.²²⁶ Citing the United States Supreme Court's holding in *McMillan* and the Kansas Supreme Court's holding in *Conley*, the State further contended that Carr's due process rights were not violated because the KSGA does not permit judicial discretion for sentence enhancement beyond the statutorily prescribed maximum sentence.²²⁷ The State further asserted that while the KSGA does not allow judicial discretion to sentence offenders beyond the statutory maximum, *Apprendi* does allow the "traditional exercise of broad discretion" to impose sentences that are within the specified statutory range.²²⁸ The State also contended that a proper interpretation of *Apprendi* allowed a district court to use a defendant's criminal history to sentence an offender "outside a maximum range set by a legislature."²²⁹ In summary, the State concluded that the KSGA remained "constitutionally sound,"²³⁰ and that Carr's departure sentence was a proper exercise of judicial discretion.²³¹

B. Majority Opinion

The Kansas Supreme Court agreed that the district court had stated substantial and compelling reasons for imposing a departure sentence, but that the district court failed to provide adequate notice to the parties to take such action.²³² The court declined to expand *Gould* to sanction application of the *Apprendi* rule to upward dispositional departures as well as to durational departures.²³³

Justice Tyler C. Lockett's majority opinion concluded that the United States Supreme Court could not have intended the *Apprendi* rule to apply to upward dispositional departure sentences.²³⁴ Justice Lockett distinguished *Gould* by noting that a grant of probation was an "act of grace" solely within the judge's discretion and an action "separate and distinct from the sentence."²³⁵ According to the court, "[p]robation . . . unless otherwise required by law, is a privilege and not a matter of right."²³⁶ Therefore, a denial of presumptive proba-

226. Brief of Appellee at 15, *Carr* (No. 00-85238-A).

227. *Id.* at 17.

228. *Id.* at 24.

229. *Id.* at 23.

230. *Id.* at 26-27.

231. *See id.* at 33.

232. *State v. Carr*, 53 P.3d 843, 850-51 (Kan. 2002).

233. *Id.* at 850.

234. *See id.*

235. *Id.*

236. *Id.*

tion does not increase an offender's sentence beyond the statutory maximum, rendering *Apprendi* irrelevant.²³⁷

The majority cited several additional considerations for its decision. First, although the district court refused to grant Carr a probation term for which he was eligible, his prison sentence was within the statutory-maximum penalty prescribed by the KSGA.²³⁸ Second, whether Carr qualified to receive presumptive probation made no difference because a person placed on probation could receive a term of supervised probation longer or shorter than the underlying prison sentence.²³⁹ Third, the fact that Carr's conviction was the result of a plea and not a jury determination did not affect the supreme court's analysis with respect to the dispositional departure.²⁴⁰ Finally, the majority noted that "no federal or state court has applied *Apprendi* to the question of granting dispositional departures that result in imprisonment rather than probation."²⁴¹

C. Dissenting Opinion

Justice Six, joined by Justice Edward Larson,²⁴² argued in dissent that *Gould* had rendered the current KSGA procedures for imposing *all* upward departure sentences unconstitutional, regardless of whether the departures were dispositional or durational in nature.²⁴³ Justice Six dismissed the majority's probation right versus privilege distinction by noting that the legislature, in passing the KSGA, had defined which punishments would result in prison or probation.²⁴⁴ Most importantly, Justice Six asserted that the use of judicial discretion to impose a prison term in lieu of presumptive probation was facially unconstitutional under the *Apprendi* rule.²⁴⁵ He argued that the trial court's finding that Carr was not suitable for probation was a "court-made finding by a preponderance of the evidence" that had the

237. *Id.*

238. *Id.*

239. *Id.* As further evidence of the "separate and distinct" nature of a grant of probation, Justice Lockett explained that a district court may revoke an offender's probation at any time before the scheduled discharge date, and that, if probation is revoked, an offender "must still serve the entire length of the underlying prison sentence." *Id.* He further observed that it was purely a defendant's choice to "either accept probation and be subject to serving the entire sentence" in the event of revocation, or to reject probation and serve the underlying sentence. *Id.*

240. *Id.* at 846 (citing *State v. Cody*, 35 P.3d 800 (Kan. 2001)). Justice Lockett observed that since *Carr* involved a *dispositional* departure, the defendant's guilty plea was irrelevant to the majority's *Apprendi* analysis. *Id.* However, in *Cody*, the court held that a defendant's guilty plea to the elements of a criminal offense does not constitute an admission or waiver of due process under *Apprendi*. *Cody*, 35 P.3d at 802.

241. *Carr*, 53 P.3d at 850.

242. *Id.* at 853 (Six, J., dissenting).

243. *Id.* at 851 (Six, J., dissenting).

244. *Id.* at 853 (Six, J., dissenting).

245. *Id.* (Six, J., dissenting).

effect of increasing the penalty for Carr's crime beyond the statutory presumption of probation.²⁴⁶

Justice Six explained that the majority's view seemed to rest upon the premise that the sentencing court has "historical latitude" in granting probation.²⁴⁷ He contended that such a philosophy "ignores the sweeping changes made by the legislature in crafting the KSGA"²⁴⁸ because the KSGA "radically changed the Kansas sentencing paradigm by limiting the scope of judicial discretion."²⁴⁹ Rather, the guidelines dictated whether the sentencing court should impose prison or probation given the severity level of the offense and the offender's criminal history.²⁵⁰ Such limits were not merely advisory to the sentencing court.²⁵¹

In this case, Carr received a prison sentence even though the severity level of his offense coupled with his criminal history score placed him in a presumptive probation grid box.²⁵² Such a sentence, Justice Six concluded, "is outside the sentencing range for his crime and beyond the purview of the district court's discretion."²⁵³

D. Commentary

The United States Supreme Court attempted in *Apprendi* to establish a bright-line constitutional standard that would remove all doubt as to the proper allocation of fact-finding between a judge and jury in criminal offender sentencing.²⁵⁴ Similarly, the Kansas Supreme Court tried also to create a bright-line rule that would insulate traditional judicial discretion to grant probation from *Apprendi*'s reach. In doing so, the *Carr* majority declared that probation, regardless of whether imposed for a felony or misdemeanor offense, is purely the product of judicial discretion.²⁵⁵ Therefore, the concept of probation is not relevant for *Apprendi* analysis because it is a "separate and distinct" function from the KSGA sentencing procedure.²⁵⁶ Upon closer examination, however, it is apparent that support for the *Carr* court's distinction between probation and the sentencing process is not as clear as the court believes.

246. *Id.* (Six, J., dissenting). The majority opinion took Justice Six to task for this comment, asserting that his dissent cited "no state or federal legislative act to support its broad claim that other jurisdictions provide *Apprendi* protections when probation is presumed but not granted." *Id.* at 850.

247. *Id.* at 852 (Six, J., dissenting).

248. *Id.* at 851 (Six, J., dissenting).

249. *Id.* at 852 (Six, J., dissenting).

250. *Id.* (Six, J., dissenting).

251. *See id.* at 851 (Six, J., dissenting).

252. *Id.* at 853 (Six, J., dissenting).

253. *Id.* (Six, J., dissenting).

254. Stewart, *supra* note 18, at 1217.

255. *Carr*, 53 P.3d at 850.

256. *Id.*

1. Probation Is a Sentence and Not Separate and Distinct From the Sentencing Process

The Kansas Supreme Court has defined a “sentence” as a court judgment that informs the defendant of the legal consequences of conviction or confession of guilt.²⁵⁷ Given this definition, it is sensible to consider that a grant of presumptive probation for a felony offense subject to the KSGA constitutes a sentence, and that the Kansas legislature intended this result in creating the KSGA. The legislature’s mandate to the Kansas Sentencing Commission is the best evidence of this intent. The Sentencing Commission is statutorily required to present to the legislature “various alternatives that would either adjust sentence lengths or limit admissions to state correctional facilities whenever the prison population is expected to exceed capacity.”²⁵⁸

To fulfill this directive, the Sentencing Commission has required that district courts submit all sentencing journal entries to the commission to allow it to compile sentencing data that includes the number of departure sentences issued in each judicial district.²⁵⁹ These statistics are included in the Sentencing Commission’s annual reports to the Kansas legislature.²⁶⁰ Since the Sentencing Commission has the power to make recommendations that directly affect judicial sentencing discretion under the KSGA, the commission has, in effect, legislative license to exert considerable influence over the sentencing process. If district judges were found to impose a significant number of upward departure sentences, and this fact was the basis for a substantial increase in the state’s prison population, it is likely that the Sentencing Commission would recommend measures to a cost-conscious legislature to keep the prison population at a fiscally manageable level.²⁶¹ Consequently, the Sentencing Commission obliquely

257. *State v. Van Winkle*, 889 P.2d 749, 753 (Kan. 1995).

258. NAT’L ASS’N OF SENTENCING COMM’N, *Kansas Sentencing Commission Endures Difficult Session*, SENTENCING GUIDELINE, July 2000, at 11, <http://www.ussc.gov/states/nasc07-00.pdf>.

259. During the three fiscal years immediately prior to the June 2000 *Apprendi* decision, Kansas district judges imposed approximately 475 upward dispositional and durational departure sentences. Stewart, *supra* note 18, at 1216 (citing Roger Myers, *Supreme Court Ruling Will Force Sentencing Procedures Review*, TOPEKA CAP. J., Oct. 8, 2000, at 13A). The Sentencing Commission reported that in fiscal year 2001 there were 793 dispositional departure sentences out of 7,076 KSGA sentencing cases. KAN. SENTENCING COMM’N, ANNUAL REPORT FY 2001: ANALYSIS OF SENTENCING GUIDELINES IN KANSAS 42 (2002) [hereinafter ANNUAL REPORT]. Almost forty-two percent (330 cases) were upward departures. *Id.* The level of upward departure sentences imposed in Kansas has been described as “an issue of serious concern for Kansas’s courts.” Stewart, *supra* note 18, at 1216.

260. See, e.g., ANNUAL REPORT, *supra* note 259.

261. For example, the 2003 Kansas legislature considered a Sentencing Commission initiative that would require judges to place those convicted solely of drug possession into community-based treatment programs rather than prison. See S.B. 123, 2003 Leg., Reg. Sess. (Kan. 2003). Estimates indicated that the cost of such mandatory treatment would save the state anywhere from \$13,000 to \$17,000 per offender when comparing the annual cost of incarceration against the cost of treatment. Editorial, *Prison v. Treatment – A Fair Trade*, TOPEKA CAP. J., Feb. 9, 2003, at 4A. Those convicted of manufacturing or selling drugs or person felony offenses would not qualify for such a sentence. Chris Grenz, *House Panel Hears Divisive Drug Treatment Bill*,

encourages district judges to impose whatever presumptive sentence is indicated for a particular defendant and discourages upward departure sentencing, except when substantial and compelling reasons exist.²⁶² Notably, the Sentencing Commission embraces probation as a sentence in its annual report to the legislature.²⁶³

The Kansas Supreme Court has observed that “[d]eparture sentences by definition challenge the notion of uniformity.”²⁶⁴ Only under exceptional circumstances is a district court allowed to exercise discretion and “impose a sentence not based exclusively on offense severity and criminal history.”²⁶⁵ Given the Kansas Supreme Court’s contention that the state judiciary should embrace sentencing guidelines providing for presumptive probation, it is surprising that the court would undermine this principle by insisting that a probation term imposed under the KSGA is the result of a procedure unrelated to the sentencing process.

There is little agreement among state jurisdictions as to whether or not probation is a sentence.²⁶⁶ Moreover, those states that do not recognize probation as a sentence differ on how to define it.²⁶⁷ Since there is no common-law consensus on the issue, and because the KSGA has, in effect, required judges to grant probation to qualified defendants, the Kansas Supreme Court’s position that probation is not a sentence and is unrelated to the sentencing process is not tenable.

2. Probation Is Not an “Act of Grace”

The Kansas Supreme Court’s reliance on the “act of grace” doctrine is unsound because this legal theory cannot co-exist with the legislative intent behind the KSGA’s presumptive probation sentencing scheme. One reason is that the *Carr* majority ignored mandatory lan-

TOPEKA CAP. J., Mar. 19, 2003, at 3C. The Commission’s executive director testified enthusiastically in support of the proposal, calling it “a responsible option” and “the right thing to do.” *Id.*

262. None of the reasons cited by the sentencing judge in denying Carr presumptive probation are included in the non-exclusive list of aggravating departure factors noted in the KSGA. *See* KAN. STAT. ANN. § 21-4716(c) (1995 & Supp. 2002). As noted earlier, the Kansas Supreme Court affirmed the court of appeals’ finding that the stated reasons for the departure sentence in *Carr* were substantial and compelling. *State v. Carr*, 53 P.3d 843, 845 (Kan. 2002). “[B]oth the frequency of Carr’s past criminal activity and the fact he was released from the youth facility such a short time before his arrest for his current crime constituted substantial and compelling reasons for departure.” *Id.* at 850.

263. ANNUAL REPORT, *supra* note 259, at 45.

264. *State v. Gould*, 23 P.3d 801, 811 (Kan. 2001).

265. *Id.* at 812.

266. *Compare* *Holcomb v. Sunderland*, 894 P.2d 457, 460 (Or. 1995), and *Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994) (holding that probation is a sentence), with *Commonwealth v. Bruzzese*, 773 N.E.2d 921 (Mass. 2002), and *State v. Ramirez*, 62 S.W.3d 356, 358 (Tex. Crim. App. 2001) (holding that probation is not a sentence).

267. *See, e.g.*, *Prince George’s County v. Viera*, 667 A.2d 898, 899 n.1 (Md. 1995) (holding that probation is a “final disposition”); *Sherwin v. Hogan*, 401 A.2d 895, 896-97 (Vt. 1979) (concluding that probation is contractual in nature); *State v. Foley*, 417 N.W.2d 920, 926 (Wis. Ct. App. 1987) (finding that probation is not a sentence but part of sentencing process).

guage in the KSGA that obliges district judges to impose presumptive probation sentences if an offender so qualifies. The statute states that sentencing judges “shall impose the presumptive sentence provided by the sentencing guidelines . . . unless the judge finds substantial and compelling reasons to impose a departure.”²⁶⁸ The Kansas Supreme Court has identified the word “shall” as an example of unambiguous statutory interpretation.²⁶⁹ No language authorizing sentencing judges to impose probation as an “act of grace” separately from the KSGA sentencing procedure is included in the statute.²⁷⁰ Since it is a fundamental principle of statutory construction that “shall” signifies “mandatory intent,”²⁷¹ a judicial grant of probation under the KSGA is more of a statutory imperative than an “act of grace.”

The Kansas Supreme Court’s “act of grace” rationale loses further steam upon a close examination of the KSGA sentencing grid structure. As earlier noted, the KSGA provided for a dispositional line in the sentencing grid to separate shaded presumptive prison grid boxes from unshaded presumptive probation grid boxes. Any offense classified in a grid box below the dispositional line carries a presumptive probation disposition.²⁷² Conversely, any offense classified in a grid box above the line carries a presumptive imprisonment penalty.²⁷³ The mere existence of the dispositional line is a strong indication that the Kansas legislature intended the district courts to adhere to the distinction that the dispositional line represents.²⁷⁴

Certainly, the Kansas Supreme Court is not alone in continuing to recognize probation as an “act of grace” in felony sentencing. A few other state courts still subscribe to the “act of grace” theory of probation.²⁷⁵ Utah, for example, has defined probation in its code of criminal procedure as “an act of grace suspending the imposition or execution of a convicted offender’s sentence upon prescribed conditions.”²⁷⁶ Some other states permit broad judicial discretion in granting felony probation, even though they have adopted presumptive

268. KAN. STAT. ANN. § 21-4716(a) (1995 & Supp. 2002) (emphasis added).

269. See, e.g., *P.W. v. Kansas Dept. of Soc. & Rehabilitation Serv’s*, 877 P.2d 430, 436-37 (Kan. 1994).

270. On the other hand, the KSGA does refer to a “presumptive probation sentence.” KAN. STAT. ANN. § 21-4704(i) (emphasis added). See also Lewis, *supra* note 148, at 352 (analyzing potential racial discrepancies in KSGA probation sentences).

271. *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997).

272. KAN. STAT. ANN. § 21-4704(f).

273. *Id.*

274. Justice Six opined that the shading of the grid boxes to reflect presumptive sentences, in effect, defined probation as a maximum sentence for certain crimes. *State v. Carr*, 53 P.3d 843, 853 (Kan. 2002) (Six, J., dissenting).

275. See, e.g., *State v. Hicks*, No. E2001-00990-CCA-R3-CD, 2002 WL 1315569, at *6 (Tenn. Crim. App. June 18, 2002) (stating that probation is an act of grace available to eligible and worthy defendants); *State v. Shaw*, 541 S.E.2d 21, 24 (W. Va. 2000) (stating that “probation is a privilege of conditional liberty bestowed upon a criminal defendant through the grace of the circuit court”).

276. UTAH CODE ANN. § 77-27-1 (1999).

sentencing schemes similar to that used in Kansas. Tennessee is one such example. However, that state's presumptive sentencing law does not provide for presumptive probation.²⁷⁷ Minnesota and Oregon, two states that currently utilize determinate sentencing schemes with presumptive probation, do not recognize probation as the product of a judicial "act of grace" either in their statutes or in case law.²⁷⁸

The concept of probation as an "act of grace" is not viable when applied to a sentencing statute that prescribes probation for felony offenses as part of a regimented procedure backed by unambiguous mandatory language. The Kansas Supreme Court has recognized that legislative intent controls "when [such] intent can be ascertained from the statute."²⁷⁹ Simply put, the legislature did not intend the KSGA to serve merely as an advisory tool subject to individual judicial interpretation. While the "act of grace" maxim is still applicable under the Kansas misdemeanor sentencing scheme,²⁸⁰ it has no relevance when applied to the KSGA.

3. An Upward Dispositional Departure Sentence Is an Increased Penalty

In *Gould*, the Kansas Supreme Court held that the KSGA's scheme for allowing upward departures based on a judge's finding of an aggravating factor by a preponderance of evidence violated the *Apprendi* rule.²⁸¹ The *Carr* majority concluded, however, that this preponderance-of-evidence standard applies only to upward durational departure sentences.²⁸² If Carr had been an offender already on probation, and the question presented was whether he should have had that probation revoked and a prison sentence imposed, a prepon-

277. See TENN. CODE ANN. § 40-35-210 (1997 & Supp. 2001).

278. See MINN. STAT. ANN. § 244 app. (West 1992 & Supp. 2003); OR. ADMIN. R. 213-004-0001 (2003).

279. *In re W.H.*, 57 P.3d 1, 4 (Kan. 2002) (quoting *State v. Vega-Fuentes*, 955 P.2d 1235, 1237 (Kan. 1998)).

280. No misdemeanor offenses are included in the KSGA scheme. Judges impose misdemeanor sentences in a manner similar to the old indeterminate system for felony offenses. For example, the offense of theft under \$500 is classified as a Class A non-person misdemeanor. KAN. STAT. ANN. § 21-3701(b)(4) (1995 & Supp. 2002). An offender may receive a sentence of anywhere up to one year in custody, and/or fines. *Id.* §§ 21-4502, -4503. If not granted probation, the offender would serve this sentence or a portion thereof in a county jail, not in a state-run correctional facility. *Id.* § 21-4502. Since no presumptive probation or jail terms exist for misdemeanor offenses in Kansas, judges enjoy almost unlimited sentencing discretion, provided defendants do not receive more than the maximum sentence.

281. See *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001).

282. *State v. Carr*, 53 P.3d 843, 850 (Kan. 2002). The Tenth Circuit has held that a preponderance-of-evidence standard "is sufficient proof of facts relevant to sentencing." *United States v. Segien*, 114 F.3d 1014, 1021 (10th Cir. 1997). However, the Tenth Circuit has also noted in dicta that a higher standard of proof may be required if there is significant disparity between a guideline sentence and a departure sentence. *United States v. St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990).

derance-of-evidence standard would prevail.²⁸³ A probation revocation proceeding is not a criminal charge in itself and not all procedural due process protections apply in such hearings.²⁸⁴ However, the issue in *Carr* was whether the defendant should have received the presumptive probation in the first place, not whether the trial court should have revoked a pre-existing probation term.

The Kansas Supreme Court has acknowledged that there is a significant difference between probation and prison.²⁸⁵ For example, an offender placed on probation must accept certain limitations upon personal freedom, but the offender may still move about freely in the community. The probationer may generally work in the employment or career of his or her choice, travel, vote, and engage in any lawful social activity to the extent that court restrictions allow. In contrast, a person confined in prison cannot participate in any of these basic societal activities. Based on such “obvious and striking” differences,²⁸⁶ it is hard to argue that an upward dispositional departure prison sentence decided upon a preponderance-of-evidence standard should not qualify as an increased penalty beyond presumptive probation and offend *Apprendi*.

4. The United States Supreme Court Intended *Apprendi* to Apply to All Upward Departure Sentences

As the United States Supreme Court recognized in *Apprendi*, a sentencing guideline scheme that allows judicial consideration of uncharged or unconvicted conduct for sentencing purposes may encroach upon a defendant’s due process rights.²⁸⁷ Although a criminal defendant does not have a Sixth Amendment right to jury sentencing, the potential for unfair results exists whenever a sentencing judge decides to impose a disproportionate punishment based on factors not considered during the trial stage.²⁸⁸

The Kansas Supreme Court in *Carr* characterized the statute considered in *Apprendi* as a durational departure statute.²⁸⁹ The *Carr* majority suggested that because the *Apprendi* opinion made no specific reference to upward dispositional departure sentences, the

283. See, e.g., *Morishita v. Morris*, 702 F.2d 207, 210 (10th Cir. 1983) (stating that standard of proof for a probation revocation is a preponderance of the evidence); *State v. Lumley*, 977 P.2d 914, 918 (Kan. 1999) (stating that the preponderance of evidence standard is sufficient to establish that a probation violation occurred). Since *Morishita* was decided, the Tenth Circuit has applied an even-lower “reasonably satisfied” standard in probation or supervised release revocation cases. See, e.g., *United States v. Madden*, No. 95-M-9212-01, 1998 WL 46395, at *1 n.1 (D. Kan. Jan. 27, 1998). All other federal circuit courts have adopted this standard. *Id.*

284. See *State v. Billings*, 39 P.3d 682, 684 (Kan. 2002).

285. See *Hudson v. State*, 42 P.3d 150, 154 (Kan. 2002).

286. *Carr*, 53 P.3d at 851 (Six, J., dissenting).

287. *Id.*

288. Parese, *supra* note 95, at 649.

289. *Carr*, 53 P.3d at 847.

United States Supreme Court could not have intended that the *Apprendi* rule would apply to upward dispositional departures.²⁹⁰ However, this interpretation is suspect because there are no references in the *Apprendi* opinion limiting its scope to upward durational departure sentencing. True, *Apprendi* addressed a durational departure issue: whether the New Jersey sentence enhancement statute was constitutional because it permitted judges to impose sentences beyond the maximum sentence for the specific offense charged.²⁹¹ However, the United States Supreme Court explicitly stated that the *Apprendi* rule applied to any fact aside from criminal history that increases the maximum *penalty* for a crime.²⁹² The Court did not expressly limit such penalties to only jail or prison sentences.

Black's Law Dictionary defines the word "penalty" as "[p]unishment imposed on a wrong-doer."²⁹³ A Kansas felony probation sentence easily meets this definition. Defendants placed on probation for a felony offense are required to comply with statutory conditions that may include payment of fines²⁹⁴ or restitution,²⁹⁵ community service,²⁹⁶ and counseling.²⁹⁷ A probationer may move about in the community, but may not travel outside the state without court permission.²⁹⁸ The United States Supreme Court has distinguished between the constitutional rights available to an ordinary citizen and the diminished constitutional rights of a probationer.²⁹⁹ While a probation term provides an opportunity for personal rehabilitation, it is also a penalty established for felony offenses under the KSGA.³⁰⁰ In summary, since a probation sentence generally does not require a defendant to serve jail or prison time,³⁰¹ a jail or prison sentence is a

290. Since no other courts have applied *Apprendi* to the issue of upward dispositional departure sentencing, the Kansas Supreme Court used this fact to support its conclusion that *Apprendi* applies only to durational departure sentences. *Id.* at 850.

291. *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000).

292. *Id.* at 490.

293. BLACK'S LAW DICTIONARY 1153 (7th ed. 1999).

294. KAN. STAT. ANN. § 21-4610(c)(7) (1995 & Supp. 2002).

295. *Id.* § 21-4610(d)(1).

296. *Id.* § 21-4610(c)(10).

297. *See id.* § 21-4610(c)(9).

298. *Id.* § 21-4610(c)(6).

299. *See Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (noting that probation supervision "is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public").

300. Justice Lockett noted in the *Carr* majority opinion that a defendant has the option to either accept probation with court-imposed conditions, or reject it and serve the underlying jail or prison sentence. *State v. Carr*, 53 P.3d 843, 850 (Kan. 2002). While it is true that a defendant has, in a sense, a choice, common sense dictates that the average criminal defendant, when confronted with the choice of prison or probation, will choose the latter even if the probation order contains conditions with which the defendant disagrees.

301. However, a district court may require a defendant placed on felony probation to serve a period of "shock" time in a county jail, not to exceed sixty days. KAN. STAT. ANN. § 21-4610(c)(14).

greater penalty than a probation sentence. Here, the *Apprendi* rule implicates probation as well as prison sentences.

The *Carr* majority tried to rationalize that applying *Apprendi* to upward dispositional departures would “require a jury to make a finding beyond a reasonable doubt before any defendant falling within a presumptive probation gridbox could be denied probation.”³⁰² The majority noted that the KSGA provided sentencing judges with discretion to deny presumptive probation to otherwise qualified defendants “[a]s a further safeguard of public safety.”³⁰³ If such discretion were unavailable, “offenders of certain crimes would always be granted probation.”³⁰⁴

The Kansas Supreme Court implied in *Carr* that judges would choose to impose presumptive probation sentences, even if substantial and compelling reasons existed to impose upward dispositional departures, simply to avoid compliance with *Apprendi*-required procedures. Such sentencing, the court hinted, would in turn lead to some defendants receiving probation who are a risk to the public well-being. Such fears notwithstanding, neither a judge’s ability to impose an upward dispositional departure sentence nor the public security will suffer if the *Apprendi* rule is extended to cover dispositional departure sentences. *Apprendi* will not prevent district judges from imposing upward dispositional departure sentences any more than it prevents upward durational departures. A defendant who has exhibited prior non-conviction behavior that may warrant an upward dispositional departure can still receive such a sentence under *Apprendi*, provided that evidence of such behavior is brought before a jury and its existence proven beyond a reasonable doubt.

Nothing in the *Apprendi* rule would prevent a Kansas district judge from issuing an upward dispositional departure sentence. However, that court would have to submit any departure factors, other than criminal history, to a jury for a finding that the defendant was guilty of those factors beyond a reasonable doubt. It is possible that judicial compliance with the *Apprendi* rule would result in fewer upward dispositional departures. The more likely outcome, however, is that sentencing judges will become even more circumspect about imposing upward dispositional departures, and will reserve them for exceptional defendants, such as those who have demonstrated a high potential for violent behavior in the community. Such an approach would address the Kansas Supreme Court’s stated policy that district

302. *Carr*, 53 P.3d at 849.

303. *Id.*

304. *Id.*

judges should depart from the sentencing guidelines only in extraordinary circumstances.³⁰⁵

In defense of its decision, the *Carr* majority could have argued that, even if the *Apprendi* rule were applied in his case, Carr could still have received a constitutional upward dispositional departure sentence. Because the sentencing court cited Carr's criminal history as a departure factor, Carr could have received an upward dispositional departure sentence on that basis alone.³⁰⁶ The upward departure would have been permissible because the *Apprendi* rule does not include prior criminal convictions as a sentencing factor subject to a reasonable-doubt standard.³⁰⁷ This argument assumes that probation is a maximum sentence under the KSGA and that a dispositional departure prison sentence is an enhancement that would trigger *Apprendi* protections.

One final due process consideration deserves mention. The United States Supreme Court has stated in dicta that a criminal justice system that allows defendants to serve sentences on either probation or parole may create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.³⁰⁸ The Court observed that a state may create such a liberty interest by using mandatory language in a statute that restricts official discretion or creates a presumption of release.³⁰⁹ The mandatory language contained in the KSGA could give rise to such a claim in situations where the sole reason for the upward dispositional departure sentence is not specifically defined by statute.³¹⁰ In this context, the language of the KSGA could expose

305. *State v. Gould*, 23 P.3d 801, 811-12 (Kan. 2001).

306. The KSGA statute does not include in its non-exclusive listing of possible aggravating departure factors any of the three factors considered by the *Carr* sentencing court. See KAN. STAT. ANN. § 21-4716(c)(2). The Kansas Supreme Court identified two of the three factors – Carr's recidivist behavior and his arrest for a new offense within days of his release from custody for an earlier crime – as substantial and compelling reasons for an upward dispositional departure. See *Carr*, 53 P.3d at 850. Although the Kansas Supreme Court ignored the third factor – Carr's previous failure at probation – the court has held that lack of amenability to probation is a substantial and compelling reason for departure. *State v. Rodriguez*, 8 P.3d 712, 724 (Kan. 2000).

307. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

308. *Board of Pardons v. Allen*, 482 U.S. 369, 373 n.3 (1987) (citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 24-25 (1979) (Marshall, J., dissenting in part)). "This liberty interest derived solely from the existence of a system that permitted criminal offenders to serve their sentences on probation or parole." *Greenholtz*, 442 U.S. at 24-25 (Marshall, J., dissenting in part).

309. *Allen*, 482 U.S. at 377-78. In *Allen*, the United States Supreme Court held that the wording of a state parole regulation created a liberty interest for a prison inmate denied release even though the inmate had met all requirements for parole eligibility. *Id.* at 380-81. While the United States Supreme Court has not applied *Allen* in a probation sentence context, the Court has observed that "the Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985).

310. See King & Klein, *supra* note 52, at 1524 (summarizing legal commentary arguing that the Constitution requires application of criminal procedural guarantees to "all facts designated by statute as affecting criminal liability," including those facts designated as "sentencing enhancers").

the statute to the very due process violations that the legislature designed it to prevent. A defendant denied presumptive probation under the KSGA could argue that an upward dispositional departure sentence subjects him to “more punishment than he bargained for when he committed the crime,”³¹¹ giving rise to an *Apprendi* due process violation.

While the United States Supreme Court fashioned the *Apprendi* rule to counteract a sentencing statute that provided for enhancement of prison sentences, there is no evidence that the Court intended to limit its reach to only prison sentences. The Court required that a jury and not a judge consider all facts, excluding criminal history, that provide for an increased penalty beyond the statutory maximum for a crime.³¹² The penalties provided for felony offenses in the KSGA are not limited to the prison sentence ranges listed in each grid box. Because probation under the KSGA is presumptive in nature, a probation sentence is a penalty that falls within the *Apprendi* safeguards. Moreover, because district judges may consider evidence of either uncharged or unconvicted conduct, and/or conduct not specifically identified in the KSGA as an aggravating departure factor, the *Apprendi* rule must apply to upward dispositional departures. The irony is that, even if the district court had sentenced Carr while applying the *Apprendi* rule, Carr could still have received an upward dispositional departure sentence based on his prior felony criminal history.

5. The Kansas Supreme Court Should Apply *Apprendi* to Upward Dispositional Departures

The *Carr* majority criticized the dissent for not citing state or federal legislative authority to support the contention that *Apprendi* and *Gould* should apply to dispositional departures³¹³ and complained that applying the *Apprendi* rule to dispositional departures would require major legislative changes to the KSGA’s sentencing structure.³¹⁴ Why the Kansas Supreme Court felt it necessary to express such anxiety is baffling, since it did not announce such concerns in striking down upward departures in *Gould*.³¹⁵ In fact, nine months before *Gould* was decided, the Kansas criminal justice system began preparations to address the implications of *Apprendi* for the KSGA.

311. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

312. See generally *id.*

313. *State v. Carr*, 53 P.3d 843, 850 (Kan. 2002).

314. *Id.* “[T]he dissent here fails to recognize that a change in a sentencing structure to apply *Apprendi* protections to dispositional departures would require either a judicial decision or a legislative act.” *Id.*

315. See generally *State v. Gould*, 23 P.3d 801 (Kan. 2001).

Two months after the United States Supreme Court announced its *Apprendi* ruling, the Kansas Sentencing Commission formed a subcommittee charged with assessing the decision's possible impact upon the sentencing guidelines and recommending corrective legislation.³¹⁶ Shortly after the Kansas Supreme Court released its *Gould* decision, this subcommittee developed a draft bill for the 2002 legislature that proposed the adoption of a bifurcated trial and sentencing procedure for upward departure sentences.³¹⁷ The legislature duly amended the KSGA to reflect the *Gould* decision, but limited its application to upward durational departure sentences.³¹⁸ In expressing its unease about further expansion of *Apprendi* without prior legislative assent, the Kansas Supreme Court directly contradicted the approach it took in *Gould* when it invalidated the KSGA's upward departure scheme.³¹⁹

If the *Carr* majority had held that the *Apprendi* rule applied to dispositional departures, its effect upon the Kansas criminal justice system would have been significant, but hardly crippling. During legislative consideration of the 2002 KSGA amendments, the Kansas Bar Association expressed concern that the *Apprendi* and *Gould* decisions would place "significant new financial and staffing burdens on the court system."³²⁰ While judicial economy is obviously an important consideration with any tinkering of the sentencing guidelines, the notion that the *Apprendi* rule will add unsupportable procedural layers to an already overloaded system is a speculative one. In the year that *Gould* was decided, Kansas' district judges were issuing departure sentences in about thirteen to fourteen percent of all felony cases.³²¹ The executive director of the Sentencing Commission characterized amending the guidelines to conform to *Apprendi's* requirements as "relatively easy."³²²

316. See Roger Myers, *Supreme Court Ruling Will Force Sentencing Procedures Review*, TOPEKA CAP. J., Oct. 8, 2000, at 13A.

317. KAN. LEGISLATIVE RESEARCH DEP'T, SPECIAL COMM. ON JUDICIARY, UPWARD DEPARTURE OF SENTENCES 2 (2001), http://skyways.lib.ks.us/ksleg/KLRD/2001CR_Upward_Departure_of_Sentences.pdf [hereinafter SPECIAL COMM. ON JUDICIARY].

318. Section 21-4716(b) of the Kansas Statutes was amended to state: "[A]ny fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt." KAN. STAT. ANN. § 21-4716(b) (1995 & Supp. 2002). As noted earlier, the legislature also extensively amended section 21-4718 of the Kansas Statutes to reflect the new bifurcation procedure, which is specifically limited to upward durational departure sentences. See *supra* notes 204-09 and accompanying text.

319. *Gould*, 23 P.3d at 814.

320. SPECIAL COMM. ON JUDICIARY, *supra* note 317, at 2.

321. Roger Myers, *Sentencing Leeway Curbed*, TOPEKA CAP. J., May 26, 2001, at 1A.

322. *Id.*

While administrative expenses are an “obvious and significant consequence of any change in the departure system,”³²³ there is not enough evidence yet to indicate that any court should bar application of the *Apprendi* rule to dispositional departures on grounds of judicial efficiency. Although fears exist that the *Apprendi* rule will alter judicial behavior and chill departure sentencing,³²⁴ there is no evidence to suggest that this has occurred in Kansas. It is still too early to fully assess the impact of *Gould* and its progeny. However, the fact that judges issue relatively few upward departure sentences statewide would tend to indicate that the new bifurcation procedure is not likely to suffer from overuse.

The *Apprendi* rule has caused state legislatures to rethink their sentencing enhancement statutes, but it has not taken away from Congress or state legislatures the authority to provide for sentencing guidelines that allow departures.³²⁵ Given the decisive response of the Sentencing Commission and the legislature to the *Apprendi* and *Gould* decisions, the Kansas Supreme Court need not fear, as it apparently did in *Carr*,³²⁶ that the legislative process cannot provide an equally rapid, viable solution to the question of jury consideration of dispositional departure sentences.

There is little doubt that the *Apprendi* decision is not the last word on the issue of judicial sentencing discretion. The United States Supreme Court has sought to further refine the *Apprendi* rule in several recent cases,³²⁷ and there are signs that the Court has begun to

323. Ethan Glass, Comment, *Whatever Happened to the Trial by Jury? The Unconstitutionality of Upward Departures Under the United States Sentencing Guidelines*, 37 GONZ. L. REV. 343, 370 (2001/2002).

324. See *id.* at 369.

325. See Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775, 780 (2002) (“Apprendi [sic] will probably do little to curb legislative authority over criminal procedure”). However, Standen also predicted that *Apprendi* would nevertheless encourage the dismantling of sentencing guideline schemes because “tough-on-crime legislators” would enact higher statutory maximum sentences with increased judicial discretion. See *id.* at 781-84; see also Rich, *supra* note 133, at 709 (“If legislatures choose that course of action, the practical results would undermine due process and disrupt efforts to establish more rational sentencing policies”).

Justice Stevens also recognized this possibility in his *Apprendi* majority opinion, noting that a state could, in theory, “undertake to revise its entire criminal code . . . [and extend] all statutory maximum sentences to, for example, 50 years and [give] judges guided discretion as to a few specially selected factors within that range.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) (citations omitted). However, Justice Stevens expressed confidence that such legislative maneuvering would not occur because “structural democratic constraints” would not permit legislatures to enact statutes exposing every defendant convicted of a specific crime (such as *weapons possession*) to a maximum sentence that is not “generally proportional to the crime.” *Id.* In *Gould*, Justice Abbott expressed similar sentiments, warning that the legislature “can play games with sentencing guidelines and amend them so that *Apprendi* would not apply to most sentences.” *State v. Gould*, 23 P.3d 801, 814-15 (Kan. 2001) (Abbott, J., dissenting).

326. *State v. Carr*, 53 P.3d 843, 850 (Kan. 2002).

327. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that states may not adopt death penalty statutes in which a judge, and not a jury, determines whether aggravating factors are present to warrant imposition of death sentence); *Harris v. United States*, 536 U.S. 545, 565-66 (2002) (holding that *Apprendi* does not apply to facts that increase the minimum sentence for

restrain *Apprendi*'s reach while upholding its core principle.³²⁸ The Court has not spoken to the specific question of whether *Apprendi* should cover dispositional departure schemes such as that used in Kansas. However, the Kansas legislature has an obligation to precisely state what constitutes "permissible discretion" under sentencing guidelines.³²⁹ To avoid further confusion – and litigation – over the question of the *Apprendi* rule's application to dispositional departure sentencing, the Kansas Sentencing Commission and the legislature should take a proactive rather than a reactive approach to the issue.³³⁰

V. CONCLUSION

The Kansas Supreme Court held that the United States Supreme Court's *Apprendi* rule does not extend to dispositional departure criminal sentencing.³³¹ Thus, in Kansas, discretion to impose or not to impose probation instead of prison in felony cases remains within the exclusive purview of the district judge. The *Carr* majority based this judgment upon the legal maxim that probation is a grant of privilege only available to the sentencing judge, and that this privilege has nothing at all to do with the type of sentencing procedure the *Apprendi* rule contemplates.³³² While many courts at one time accepted this "act of grace" as a truism, its future usefulness is questionable in light of Kansas' commitment to a determinate criminal sentencing structure for felony offenses. Indeed, substantial evidence indicates that the "act of grace" theory has lost its vitality in modern sentencing jurisprudence, given its incompatibility with determinate sentencing schemes such as the KSGA. Although probation remains a true "act of grace" in misdemeanor cases not subject to the sentencing guidelines, the KSGA has inextricably linked probation together with the

an offense without increasing the maximum sentence — such facts may be treated as sentencing factors rather than offense elements); see also Stephanos Bibas, *Back From The Brink*, LEGAL TIMES, Aug. 5, 2002, at 59 ("[T]he Court [this term] has caged the ravenous *Apprendi* tiger that threatened to devour modern sentencing law. *Harris* tells us that we need not abandon two centuries of judicial sentencing discretion in favor of jury sentencing. *Apprendi* will still reshape . . . [sentencing enhancements] but will leave most determinate sentencing untouched.").

328. *Constitutional Law — Leading Cases*, 116 HARV. L. REV. 230, 238 (2002). In *Sattazahn v. Pennsylvania*, 123 S. Ct. 732 (2003) (*United States Reports* pagination not available at time of publication), the most recent *Apprendi*-related case decided by the Court, the majority opinion firmly stated, "[p]ut simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact — no matter how the State labels it — constitutes an element, and must be found by a jury beyond a reasonable doubt." *Id.* at 739.

329. Rich, *supra* note 133, at 709.

330. For example, the Sentencing Commission should reactivate its *Apprendi* subcommittee to investigate the applicability of the *Apprendi* rule to dispositional departures and report to the Legislature with recommendations for application of the *Apprendi* rule to dispositional departure sentences. These recommendations should include statutory language reaffirming that dispositional departures, as well as durational departures, should occur only in extreme circumstances and are restricted only to the criteria defined in plain language in the statute.

331. *Carr*, 53 P.3d at 845.

332. See *id.* at 850.

felony sentencing process. The Kansas Supreme Court would do well to recognize the existence of this relationship.

The *Carr* majority further staked its position on *Apprendi*'s non-application to dispositional departures on another equally tenuous ground: that no federal or state court has applied *Apprendi* to the issue of whether judges have discretion to impose departure sentences resulting in imprisonment rather than probation.³³³ However, "[t]he obvious counterpoint is that no federal or state court has refused to apply *Apprendi* to dispositional departures."³³⁴

While the Kansas Supreme Court's decision in *Carr* is within its precedents, there is no rational basis for the court to apply due process guarantees solely to durational departures. Denial of presumptive probation based on a preponderance-of-evidence standard raises the appearance of a conflict with the Due Process Clause and is at odds with the spirit, if not the letter, of the *Apprendi* decision. Nothing in the *Apprendi* rule justifies the *Carr* majority's insistence that a defendant who received a prison sentence, despite meeting statutory requirements for a presumptive probation sentence, is not entitled to the rule's protections, so long as the rule remains the law of the land.

As the Kansas Supreme Court continues its march through *Apprendi*-land, it will undoubtedly face more challenges to its sentencing jurisprudence. As Kansas legal professionals struggle with the intricacies of the *Apprendi* rule, the court must provide clear and consistent direction even at the risk of upsetting some of its most cherished doctrines.

333. *Id.*

334. *Id.* at 851 (Six, J., dissenting).

