IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 121,956

STATE OF KANSAS,
Appellee,

v.

BRADY ALLEN NEWMAN-CADDELL,
Appellant.

SYLLABUS BY THE COURT

1.

A court does not err in applying the extreme sexual violence departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) when sentencing a defendant for an aggravated kidnapping involving a nonconsensual act of sexual intercourse or sodomy.

2.

A motion to correct an illegal sentence may not be used to litigate a constitutional due process claim.

3.

An appellate court may affirm a departure sentence as long as one or more of the factors relied on by the sentencing court was substantial and compelling.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 22, 2021. Appeal from Johnson District Court; BRENDA M. CAMERON, judge. Opinion filed April 21, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Korey A. Kaul, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jacob M. Gontesky, assistant district attorney, argued the cause, and *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: After entering a guilty plea to one count of aggravated kidnapping, two counts of rape, and one count of aggravated sodomy, Brady Newman-Caddell appeals his aggravated kidnapping sentence. The district court judge doubled the presumptive sentence after finding two aggravating factors: (1) Newman-Caddell committed a crime of extreme sexual violence and was a sexual predator and (2) he posed a risk of future dangerousness to society. On appeal, Newman-Caddell argues the judge erred because neither aggravating factor applies.

He first contends his aggravated kidnapping conviction is not a crime of extreme sexual violence as defined by the departure sentence statute. Under that statute, a crime of extreme sexual violence is a felony "crime involving a nonconsensual act of sexual intercourse or sodomy with any person." K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a). Newman-Caddell pleaded guilty to rape and sodomy, both of which are crimes of extreme sexual violence. But he contends the departure factor cannot apply to aggravated kidnapping because it does not include an element of sexual violence.

We reject Newman-Caddell's contention that the elements of aggravated kidnapping must include an act of extreme sexual violence for K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) to apply. Nothing in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) explicitly imposes that requirement; instead, it extends the aggravating factor to any crime *involving* a nonconsensual act of sexual intercourse or sodomy. The kidnapping statute

contemplates that a kidnapping will involve other crimes. The Legislature has defined kidnapping to include "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person: . . . (2) to facilitate flight or the commission of *any* crime." (Emphasis added.) K.S.A. 2022 Supp. 21-5408(a). Any crime may include a crime of extreme sexual violence.

Consistent with the kidnapping provision, the State charged Newman-Caddell with "unlawfully, knowingly, and feloniously tak[ing] or confin[ing] a person . . . with the intent to hold such person to facilitate the commission of a crime, to wit: rape and/or aggravated sodomy." Newman-Caddell stipulated to facts supporting his plea to rape and aggravated sodomy and to an aggravated kidnapping in which he took or confined a person with the intent to commit rape, a nonconsensual act of sexual intercourse, or sodomy. In other words, Newman-Caddell committed an aggravated kidnapping involving crimes of extreme sexual violence. We thus hold the district court judge did not err in applying the statutory departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i).

Because we affirm Newman-Caddell's sentence based on the first departure factor, we need not—and do not—address his second argument that increasing his sentence based solely on a nonstatutory aggravating factor of future dangerousness to society would violate his due process rights. We affirm his sentences.

FACTUAL AND PROCEDURAL BACKGROUND

Newman-Caddell was convicted of one count of aggravated kidnapping, two counts of rape (one as an aider and abettor and the second as the assailant), and one count of aggravated sodomy (as an aider and abettor). The focus of this appeal is on the upward durational departure sentence for his aggravated kidnapping conviction.

The State charged Newman-Caddell with aggravated kidnapping in the criminal complaint by alleging:

> "COUNT I - That between the 7th day of October, 2016 and the 8th day of October, 2016, [in the] County of Johnson and State of Kansas, BRADY ALLEN NEWMAN-CADDELL, did then and there unlawfully, knowingly and feloniously take or confine a person, to-wit: H.J., by force, threat or deception, with the intent to hold such person to facilitate the commission of a crime, to-wit: rape and/or aggravated sodomy, as defined in K.S.A. 21-5503, 21-5504, and/or to inflict bodily injury or to terrorize the victim, and did inflict bodily harm on such person, a severity level 1 person felony, in violation of K.S.A. 21-5408(b), K.S.A. 21-6804 and K.S.A. 21-6807. (aggravated kidnapping)"

Factual Basis for Plea

At the plea hearing, the State recited a factual basis for the plea. The criminal activities began when a male assailant struck H.J. in the head and then forced her into a car driven by Newman-Caddell. The assailant raped and sodomized H.J. while Newman-Caddell drove around. Eventually, the car stopped, and the men switched places. Newman-Caddell then inserted something in H.J.'s vagina; she could not tell if it was his penis or fingers. After driving for a considerable time, the men eventually let H.J. out of the car and drove away.

DNA evidence, the discovery of some of H.J.'s belongings in Newman-Caddell's possession, and other evidence led to him being charged. On the eve of trial, Newman-Caddell entered a guilty plea, without a plea agreement, and stipulated to the factual basis for the plea. Although he waived his right to have a jury determine whether he was guilty, he requested a jury determine whether the State met its burden to prove beyond a reasonable doubt the two departure factors it had set out in a motion seeking an upward durational departure sentence.

Departure Motion and Sentencing

In the State's departure motion filed before Newman-Caddell entered his guilty plea, the State asserted two departure factors applied: (1) "[T]he current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender" and (2) "substantial and compelling facts" show "the defendant presents risk of future dangerousness to the public safety."

Before the trial on the departure motions, Newman-Caddell waived his right to have a jury determine whether the State met its burden to prove the two aggravating factors beyond a reasonable doubt. His waiver included a stipulation "that sufficient facts exist to prove the existence of aggravating factors number 1 and number two in the State's Notice of Intent and Motion for Upward Durational Departure." He also stipulated that evidence proved beyond a reasonable doubt that substantial and compelling reasons support an upward durational departure and that these aggravating circumstances outweigh any mitigating circumstances. He recognized his sentence could be up to 660 months total and he would have to register as a sex offender.

The district court judge reviewed Newman-Caddell's waiver on the record. Newman-Caddell confirmed he signed the waiver and initialed, read, and understood each paragraph. The judge walked through each paragraph to confirm Newman-Caddell understood and agreed with the statements in the document he had signed. The judge then accepted the waiver and stipulation but still set the case for an evidentiary hearing on the State's upward durational departure motion.

At the departure hearing, H.J. testified about the crimes committed against her. Her testimony detailed the facts of the two men kidnapping and raping her and of

Newman-Caddell's co-assailant sodomizing her. She discussed being hit and choked which caused pain, mental trauma, and bodily harm.

The State also called T.H., who testified about a different incident when multiple men, including Newman-Caddell, broke into her apartment and sexually assaulted her in the presence of her young daughter. Newman-Caddell and another man repeatedly raped and sodomized her for about 30 minutes to an hour. A third man then joined the sexual assault. All three penetrated or tried to penetrate T.H. at the same time. DNA connected Newman-Caddell to the crimes against T.H. When confronted with the DNA evidence, Newman-Caddell admitted penetrating T.H.'s vagina. Newman-Caddell also acknowledged T.H.'s two-year-old was in bed next to her while this was going on and the child awoke during the rape.

The State also presented the testimony of two women who had been in abusive domestic relationships with Newman-Caddell in which he had caused them physical harm and threatened to kill them.

Finally, the State presented expert testimony from a board-certified psychiatrist and neurologist, who concluded Newman-Caddell posed a threat of future dangerousness that neither drugs nor therapy would lessen. The expert identified Newman-Caddell as a leader in the assault, pointing to Newman-Caddell's role in saying when the assault was over and letting H.J. leave the car.

In arguments before sentencing, Newman-Caddell's counsel acknowledged his client's conduct was egregious. But counsel argued the sentence should be less than the maximum departure requested by the State because "any objective analysis would conclude that [Newman-Caddell's co-assailant's] conduct . . . was the more egregious" and H.J. told detectives she thought the outcome would have been worse if Newman-

Caddell had not been in the car. He pointed out that Newman-Caddell was an aider and abettor on two of the counts. Counsel also noted that Newman-Caddell had cooperated with law enforcement.

Newman-Caddell spoke before sentencing. He apologized to H.J. and her family. Describing himself as sick and weak and ruined by drug addiction, he said he was ashamed and regretted his actions. He promised to make himself a better person in prison and asked that any sentence provide him a chance to "rectify my life and my mistakes."

Following these arguments and statements, the judge explained her decision to grant the upward durational departure, noting, "It's hard to put into words truly how horrific this case is. There really are no words. No words to adequately describe the horror that [H.J.] endured." The judge also stated, "[T]here are no words to describe how dangerous this defendant is." Although acknowledging that Newman-Caddell was not as aggressive as his co-assailant, the judge also found that "[t]he defendant was not a minor participant at all. He was, in fact, a leader in this."

The judge ended her discussion of the circumstances of the crime by saying, "The crimes in this case are particularly heinous and cruel. In and of themselves, [Newman-Caddell] has shown to be a tremendous risk and a predator, but that's not all." The judge then turned to the testimony of the other witnesses, noting T.H. had testified to Newman-Caddell's "horrific" conduct and the two domestic violence victims had testified "about the pain they suffered in his hands."

The judge then discussed the testimony of the State's psychiatrist and stated she "was moved by how very dangerous Mr. Newman-Caddell is." She found that Newman-Caddell had exhibited predatory aggression and a history of violence since he was 16. She also cited the psychiatrist's opinion about various risk factors for future

dangerousness observed in Newman-Caddell's history. The judge also noted that the psychiatrist found "psychopathic traits, which makes him much more likely to commit crimes again." Further the psychiatrist "didn't know of anything to treat this sort of disorder, and the defendant has a longstanding trait in this defendant not usually responsive to medication, and he doesn't see any decrease in dangerousness for this defendant." Continuing to address Newman-Caddell's future dangerousness, the judge observed that the psychiatrist "testified the defendant is a sexual predator, and he's even concerned for the women who work in the Department of Corrections, as well as the pets in pet therapy."

Based on this evidence the judge found that Newman-Caddell was a "predator. He is a great risk to women in our community, as well as women in the Department of Corrections. He is a great risk to future harm, absolutely a predator and a risk to future harm." The judge ended her findings by saying, "This crime was horrific, and Mr. Newman-Caddell is extremely dangerous. He deserves every single minute of every single day that I can give."

The district court sentenced Newman-Caddell to the maximum 165-month sentence on Count 1, aggravated kidnapping, then doubled it to 330 months. The district court imposed the 165-month sentence for Count 2, rape, then doubled it to 330 months. The district court explained it departed on Counts 1 and 2 based "upon the fact the defendant is a predator and future harm." The district court ordered the sentences be consecutive for a 660-month term. The district court imposed a 165-month sentence for Count 3, rape, to run consecutive to Count 1 and concurrent to Count 2. The district court imposed a 165-month sentence for Count 4, aggravated criminal sodomy, to run consecutive to Count 1 and concurrent to Counts 2 and 3.

Appeal

Newman-Caddell timely appealed. The Court of Appeals affirmed the departure sentence, holding Newman-Caddell committed a crime of extreme sexual violence by kidnapping H.J. to facilitate rape and sodomy. The panel concluded it need not address the district court's findings of future dangerousness because the extreme sexual violence aggravating factor alone supported the district court's departure sentence. See *State v. Newman-Caddell*, No. 121,956, 2021 WL 4932035, at *6 (Kan. App. 2021) (unpublished opinion).

Newman-Caddell timely petitioned for review. The State filed a conditional cross appeal, urging us to reach the issue of Newman-Caddell's future dangerousness and to affirm the judge on that basis if we reject Newman-Caddell's argument that his aggravated kidnapping conviction was not a crime of extreme sexual violence. This court granted the petition and cross-petition and has jurisdiction. See K.S.A. 20-3018(b) (providing for jurisdiction over petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

The revised Kansas Sentencing Guidelines Act (KSGA) applies to Newman-Caddell's sentence. See K.S.A. 2022 Supp. 21-6801; K.S.A. 2022 Supp. 21-6802. The KSGA provides that a district court "shall impose the presumptive sentence provided by the sentencing guidelines unless the judge finds substantial and compelling reasons to impose a departure sentence." K.S.A. 2022 Supp. 21-6815(a). The statute provides a nonexclusive list of aggravating factors that may support an upward departure sentence. See *State v. Nguyen*, 304 Kan. 420, 426, 372 P.3d 1142 (2016) (recognizing statutory

factors are nonexclusive). Here, the State relied on the crime of extreme sexual violence statutory factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). It also presented the nonstatutory factor of future dangerousness to society. See *State v. Yardley*, 267 Kan. 37, 44, 978 P.2d 886 (1999) ("Future dangerousness may constitute a factor for an upward departure.").

Newman-Caddell's petition for review first focuses on the Court of Appeals' ruling upholding the district court's decision to depart because Newman-Caddell committed a crime of extreme sexual violence. Newman-Caddell argues his sentence was illegal because aggravated kidnapping is not a crime of extreme sexual violence. He asks us to limit crimes of extreme sexual violence as defined by K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) to those explicitly including a statutory element requiring a nonconsensual act of sexual intercourse or sodomy. K.S.A. 2022 Supp. 21-5408(a), defining kidnapping and aggravated kidnapping, does not refer to nonconsensual acts of sexual intercourse or sodomy. Newman-Caddell thus argues his departure sentence was illegal because it depended on an erroneous application of K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i).

Illegal Sentence Considerations and Standard of Review

Newman-Caddell presents this issue for the first time on appeal. Usually, a party may not raise an issue for the first time on appeal. This general rule does not apply, however, when a defendant frames the issue on appeal as an illegal sentence claim because a defendant may raise an illegal sentence claim at any time while serving the sentence. See K.S.A. 2022 Supp. 22-3504(a); *State v. Eubanks*, 316 Kan. 355, 360, 516 P.3d 116 (2022).

A sentence is illegal if (1) a court without jurisdiction imposes it, (2) it fails to conform to the applicable statutory provision in character or term of authorized punishment, or (3) it is ambiguous as to the time and manner it is to be served. K.S.A. 2022 Supp. 22-3504(c). Newman-Caddell's argument hinges on the second basis for sentence illegality. He contends the sentence fails to conform to the applicable statutory provision because the phrase "a crime of extreme sexual violence" does not encompass the offense of aggravated kidnapping. See K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). Sentence legality poses a question of law subject to unlimited review. *State v. Jamerson*, 309 Kan. 211, 214, 433 P.3d 698 (2019).

Newman-Caddell's stipulation that facts supported the departure factor also does not foreclose his appeal because the appeal presents a question of law. It is well-settled Kansas law that stipulations "cannot be invoked to bind or circumscribe a court in its determination of questions of law." *In re Estate of Maguire*, 204 Kan. 686, 691, 466 P.2d 358 (1970).

We thus consider the question of the legality of the sentence for the first time on appeal. At the heart of this question of law is the meaning of K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). Statutory interpretation also presents a question of law subject to unlimited review. *Jamerson*, 309 Kan. at 214.

Well-established principles guide courts when interpreting a statute. First, we recognize that legislative intent controls. To discern that intent, we consider the statute's words. When the statutory language is plain and unambiguous, we apply the language as written. But when the language is not plain but ambiguous, we may determine legislative intent by considering other sources, such as legislative history, canons of construction, and background considerations. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020).

We recently clarified a point that applies when, as with K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i), other statutory provisions may help determine legislative intent. The doctrine of *in pari materia* means that statutes relating to the same matter may be read together to discern intent. While the doctrine is sometimes applied to an ambiguous statute, courts may also use it "to assess whether the statutory language is plain and unambiguous in the first instance." *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). Courts may look to the context in which the Legislature used the language and the broader context of the entire statute to discern legislative intent. In this way, the doctrine "can provide substance and meaning to a court's plain language interpretation of a statute." 316 Kan. at 224.

If, however, we conclude the statutory language in a criminal statute is ambiguous, courts may apply the rule of lenity by strictly construing the provision and resolving any reasonable doubt as to the meaning in the defendant's favor. "But this is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative intent." *State v. Griffin*, 312 Kan. 716, 720, 479 P.3d 937 (2021).

With these principles in mind, we consider the sentencing scheme that applies to upward durational departure sentences and the offense of aggravated kidnapping.

Crime of Extreme Sexual Violence Aggravating Factor

The statutory provision we here interpret allows a departure from the presumptive sentence if the "current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender." K.S.A. 2022 Supp. 21-6815(c)(2)(F). The statute defines what crimes a court may consider to be a "crime of extreme sexual violence" with a list of criteria. The only criteria potentially applicable here is "a crime involving a

nonconsensual act of sexual intercourse or sodomy with any person." See K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a).

Newman-Caddell stipulated to the existence of this statutory factor before the district court. Now on appeal, he does not dispute the district court judge's finding that he is a predator, but he does contend his crime of aggravated kidnapping is not a crime of extreme sexual violence. As we have noted, he argues the statutory definition of a crime of extreme sexual violence requires the crime include or incorporate elements of a nonconsensual act of sexual intercourse or sodomy, which aggravated kidnapping does not.

Reading the definition of crime of extreme sexual violence *in pari materia*, we conclude this is too narrow a reading. K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) states:

> "(i) 'Crime of extreme sexual violence' is a felony limited to the following:
>
> "(a) A crime involving a nonconsensual act of sexual intercourse or sodomy with any person;
>
> "(b) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is 14 or more years of age but less than 16 years of age and with whom a relationship has been established or promoted for the primary purpose of victimization;
>
> "(c) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is less than 14 years of age;
>
> "(d) aggravated human trafficking, as defined in K.S.A. 21-5426(b), and amendments thereto, if the victim is less than 14 years of age; or

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

Unlike subpart (a), which is at issue, subparts (d) and (e) include the phrase "as defined in" and then refer to a specific statute that sets out elements of a crime. This wording thus incorporates the elements defined by those statutes—the outcome Newman-Caddell seeks under subpart (a).

Subparts (a), (b), and (c) do not include similar wording, however, and instead describe crimes *involving* specified acts. "Involving" is the gerund of the verb involve. "Involve" has different meanings, including "to have within or as part of itself: include"; "to require as a necessary accompaniment: entail"; "affect"; "to relate closely: connect." See Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/involve; American Heritage Dictionary 923 (5th ed. 2011).

In subparts (c)(2)(F)(i)(a), (c)(2)(F)(i)(b), and (c)(2)(F)(i)(c), the Legislature defined the crime as "involving" certain described sexual acts but without incorporating elements of a crime. Rather than describe or incorporate elements, each describes facts that must exist. Subpart (a) requires the facts establish that nonconsensual intercourse or sodomy occurred. Subparts (b) and (c) also apply when there is proof of sexual intercourse or sodomy. But, unlike subpart (a), they do not require a lack of consent and apply only when the victim of a prescribed sexual act is of an age within a specified range. Although subparts (a), (b), and (c) have differences, in each, the Legislature used the word "involving" before specifying a sex act, an age of the victim, or another circumstance to define whether the charged crime is a crime of extreme sexual violence. The Legislature thus intended consideration of the facts involved, not the elements delineated in a statute defining a crime.

Other uses of the verb "involve" in parts of K.S.A. 2022 Supp. 21-6815(c)(2) other than (F)(i), the extreme sexual violence provision, confirm this interpretation. For example, (c)(2)(D) provides that an aggravating factor may be found when the "offense involved a fiduciary relationship which existed between the defendant and the victim." This subsection uses the term "involved" to preface a description of the factual relationship that must be found to exist for the aggravating factor to apply. Cf. *State v. Horn*, 40 Kan. App. 2d 687, 697, 196 P.3d 379 (2008) (existence of fiduciary relationship determined on case-by-case basis), *rev'd on other grounds by* 291 Kan. 1, 11-12, 238 P.3d 238 (2010).

These various provisions considered *in para materia* reveal that the Legislature could have narrowed the scope of K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a) to specific crimes as it did in (c)(2)(F)(i)(d) and (c)(2)(F)(i)(e) if that had been its intent. Instead, it drafted (a) broadly enough to encompass those instances, such as this one, when a crime, as committed, involves nonconsensual acts of sex or sodomy even when the statute defining the crime of conviction did not prescribe such conduct as a necessary element of the offense.

At oral argument, Newman-Caddell's counsel made a different *in para materia* argument, suggesting the Legislature used the terms "offense" and "crime" to mean different things in the statute. He posited the Legislature used "offense" when it intended that a jury or a court could look at the facts of the offense but used "crime" when the Legislature intended a jury or a court to look only at the elements set forth in the statute defining the crime of conviction. We disagree.

Our review of K.S.A. 2022 Supp. 21-6815 reveals the Legislature used the terms synonymously. Perhaps the clearest example of this is in K.S.A. 2022 Supp. 21-6815(c)(1)(E), defining a mitigating factor as the "degree of harm or loss attributed to the

current *crime* of conviction was significantly less than typical for such an *offense*." (Emphases added.) Here, the phrase "such an offense" refers to the "current crime of conviction," showing the Legislature equates "offense" with "crime," at least for purposes of this statute. Other places in the statute also show equivalence between offense and crime in describing mitigating and aggravating factors. E.g., K.S.A. 2022 Supp. 21-6815(c)(1)(C)-(D), 21-6815(c)(2)(B)-(D), (G) (using offense); 21-6815(c)(1)(A)-(B), (F), 21-6815(c)(2)(F), (H), 21-6815(c)(3) (using crime). In short, the Legislature here uses "crime" and "offense" to mean the same thing in this statute.

We thus reject Newman-Caddell's statutory interpretation arguments and hold K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a) unambiguously allows consideration of the facts involved in the crime when determining whether the State has proven the extreme sexual crime aggravating factor.

We find no constraints against such an interpretation of the statute. While Newman-Caddell argues against considering the facts involved in the crime, he cites no authority in his petition for review suggesting any statutory or constitutional provision forbids such an approach. Below, he cited two cases, neither of which prohibits the approach we take today.

First, Newman-Caddell relied on this court's opinion in *State v. Spencer*, 291 Kan. 796, 825, 248 P.3d 256 (2011). There, we noted that crimes of extreme sexual violence include "rape, aggravated criminal sodomy, and aggravated indecent liberties perpetrated on children younger than 14." As the Court of Appeals panel noted in distinguishing the case, "the *Spencer* court did not find that the crimes covered by the statute were limited to the exclusive list highlighted by Newman-Caddell." *Newman-Caddell*, 2021 WL 4932035, at *5. The *Spencer* list merely highlights some crimes covered, and Newman-Caddell overreads that brief description to say it "emphasiz[ed] the nature of the crimes

themselves, meaning the elements of the crimes, as opposed to the acts committed during those crimes." The *Spencer* court did not decide the question now presented about whether we look to elements or facts when applying K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a). *Spencer* does not support Newman's preferred statutory interpretation. See *Spencer*, 291 Kan. at 819-29.

Second, Newman-Caddell cited *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to the Court of Appeals. But *Apprendi*'s protections do not apply to him because he voluntarily waived the right to a jury trial on the departure factors and stipulated "that sufficient facts exist to prove the existence of aggravating factors number 1 and number two in the State's Notice of Intent and Motion for Upward Durational Departure." He also stipulated that evidence proved beyond a reasonable doubt that substantial and compelling reasons support an upward durational departure and that these aggravating circumstances outweigh any mitigating circumstances. See *Horn*, 291 Kan. at 11 ("To summarize, if a defendant waives a trial jury by pleading guilty to the criminal offense and the district court has accepted the plea and the trial jury waiver, K.S.A. 21-4718[b][4] directs that an upward durational departure sentence proceeding is to be conducted by the court, not a jury."); see also *State v. Bello*, 289 Kan. 191, 199, 211 P.3d 139 (2009) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." [quoting *Blakely v. Washington*, 542 U.S. 296, 303-04, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004)]).

Newman-Caddell gives us no basis to conclude constitutional or statutory law precluded the judge from applying the departure factor for a crime of extreme sexual violence after finding that the factual basis for his plea established he had committed an aggravated kidnapping to facilitate rape and sodomy.

In sum, the district court judge did not err in applying the extreme sexual violence departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) because Newman-Caddell committed an aggravated kidnapping involving a nonconsensual act of sexual intercourse or sodomy. We hold the district court imposed a legal sentence when it granted the State's upward departure motion.

Unpreserved Due Process Challenge

Newman-Caddell also challenged his upward durational departure sentence as violating due process because the district court relied on a nonstatutory factor to support its decision—its determination he presented a risk of future dangerousness. He acknowledges he failed to raise the issue below, but he argues we may consider it a motion to correct an illegal sentence or under a preservation exception.

But a motion to correct an illegal sentence may not be used to litigate a constitutional due process claim. See *State v. Kingsley*, 306 Kan. 530, 536, 394 P.3d 1184 (2017) ("Kingsley's due process claim is not cognizable in a motion to correct an illegal sentence."); see also K.S.A. 2022 Supp. 22-3504(c)(1) (defining "illegal sentence"). Newman-Caddell thus may not raise his due process challenge as an illegal sentence claim under K.S.A. 2022 Supp. 22-3504.

That means we should consider Newman-Caddell's due process argument only if we, in our discretion, apply a preservation exception. *State v. Keys*, 315 Kan. 690, 696, 510 P.3d 706 (2022). We decline to exercise that discretion here. We have recognized that an appellate court may affirm a departure sentence as long as one or more of the factors relied on by the sentencing court was substantial and compelling. *State v. Ippert*, 268 Kan. 254, Syl. ¶ 2, 995 P.2d 858 (2000). And we have already affirmed the district court's upward departure sentence because Newman-Caddell's crime was a crime of extreme sexual violence and he is a sexual predator. Addressing this unpreserved

question would change nothing in this case. We would in essence be rendering an advisory opinion, something we do not do. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 898, 179 P.3d 366 (2008). We decline to exercise our discretion to consider Newman-Caddell's unpreserved constitutional due process challenge to the nonstatutory departure factor applied by the district court here.

Likewise, we need not consider the State's conditional cross-petition on this issue. The State asked us to address this issue only if we found the district court judge erred in finding Newman-Caddell committed a crime of extreme sexual violence. And we have affirmed that finding.

CONCLUSION

We hold Newman-Caddell's aggravated kidnapping committed to facilitate rape and aggravated sodomy constituted a crime of extreme sexual violence under K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). We affirm the district court's upward durational departure sentence on the aggravated kidnapping count.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

STANDRIDGE, J., not participating.