

This summary of Arkansas appellate case law addresses three topics: availability of and standards for appellate review, standards and allowable ground for departure, constitutional requirements for proof of facts permitting upward departure under *Blakely v. Washington*, and equal protection challenges to sentencing standards.

## 1. Availability of and General Standards for Appellate Review

One recourse for review of the sentence is a petition for post-conviction relief. The defendant may file a petition if a sentence from a circuit court violates the Arkansas or U.S. constitution or laws, the court imposing the sentence was without jurisdiction, or the sentence exceeded the maximum sentence allowed by statute.<sup>1</sup> Post-conviction relief “is a narrow remedy designed to prevent wrongful incarceration under a sentence so flawed as to be void.”<sup>2</sup> If a petitioner is entitled to relief, the circuit court may set aside the original judgment, discharge or resentence the petitioner, grant a new trial, or otherwise correct the sentence, as may appear appropriate in the proceedings.<sup>3</sup> The defendant may appeal the denial of a petition for post-conviction relief;<sup>4</sup> however, an appeals court may reverse that decision only if it is clearly erroneous.<sup>5</sup> If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no post-conviction proceedings can be entertained by the circuit court while the appeal is pending.<sup>6</sup>

The claim that a sentence was imposed in an illegal manner may be raised for the first time on appeal.<sup>7</sup> However, as long as a sentence is within the statutory range, failure to object to it at sentencing generally precludes appellate review of the sentence.<sup>8</sup> Courts are required to file departure reports when departing from presumptive sentences,<sup>9</sup> but a judge failing to provide written justification does not make a sentence illegal.<sup>10</sup>

## 2. Standards and Allowable Grounds for Departure

The sentencing standards are purely advisory. As long as a sentence is within statutory limits, a court may depart to any extent from the sentencing guidelines. Sentencing orders departing from the guidelines should include information “on placement and sentence length, the number of months above or below the presumptive sentence, and the justification for the departure.”<sup>11</sup> However, the court can deviate from the presumptive sentence without providing written justification.<sup>12</sup> “[T]here is no appellate review of the use of departure criteria provided for in the sentencing standards structure.”<sup>13</sup>

## 3. Constitutional Requirements For Proof of Facts Permitting Upward Departure (*Blakely v. Washington* issues)

There are no *Blakely* issues present in the Utah sentencing scheme because the guidelines are advisory<sup>14</sup> and therefore judges merely exercise permissible discretion when choosing between alternative statutory minimums.<sup>15</sup> As the Court stated in *United States v. Booker*, “[w]e have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range,” and in such cases “the defendant has no right to jury determination of the facts that the judge deems relevant.”<sup>16</sup>

## 4. Equal Protection Challenges to Sentencing Standards

Because the Arkansas Sentencing Standards are not applicable when a jury is responsible for determining the sentence, the standards have been subject to challenge on the grounds that they violate the Equal Protection Clause of the Constitution. In *Pickett v. State*, the defendant asserted that the sentencing standards create two classes of people: “those who plead guilty and receive lesser sentences under the guidelines, and those who plead not guilty and are tried by a jury, and, when found guilty, receive a greater sentence.”<sup>17</sup> Defendant asserted that this two-tiered system burdened his ability to freely exercise his constitutional right to a jury trial. The Arkansas Supreme Court disagreed, noting first that the defendant had misunderstood the presumptive sentence he might be subject to under the sentencing standards and further elaborating that the court would have had to utilize the same sentencing range that the jury utilized.<sup>18</sup>

The defendant in *Hutcherson v. State*, brought a similar appeal asserting the sentencing standards “create[] two classes of defendants, one whose punishment is determined by a jury and one whose punishment is determined by the trial judge, and encourages defendants to waive their right to a jury trial.”<sup>19</sup> The appellate court disagreed, noting that the trial court judge is not required to impose the presumptive sentence.<sup>20</sup>

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## ENDNOTES

<sup>1</sup> Ark. R. Crim. P. 37.1 (2018).

<sup>2</sup> *Williams v. State*, 64 S.W.3d 709, 712 (Ark. 2002) (citing *Nooner v. State*, 4 S.W.3d 497 (Ark. 1999)).

<sup>3</sup> Ark. R. Crim. P. 37.4 (2018).

<sup>4</sup> *Howerton v. State*, 413 S.W.3d 861, 866 (Ark. Ct. App. 2012).

<sup>5</sup> *Atkins v. State*, 441 S.W.3d 19, 20 (Ark. 2014).

<sup>6</sup> Ark. R. Crim. P. 37.2 (2018). Only a defendant may appeal a district court conviction, and must appeal to the circuit court within 30 days of entry of judgment. Ark. R. Crim. P. 36. Both defendants and the state may appeal following a circuit court decision. Ark. Code Ann. §§ 16-91-101, 16-91-112 (2015). Note that appeals from a conviction and appeals under Rule 37 are distinct. See *Tisdale v. State*, 843 S.W.2d 803, 806 (Ark. 1992) (“Ordinarily we do not address Rule 37 issues in a direct appeal from judgment of conviction”).

<sup>7</sup> See, e.g., Ark. R. Crim. P. 37.2(b); *Atkins*, 441 S.W.3d at 20; *Richie v. State*, 357 S.W.3d 909, 912 (Ark. 2009).

<sup>8</sup> See, e.g., *Brown v. State*, 155 S.W.3d 22, 25 (Ark. Ct. App. 2004); *Reece v. State*, 928 S.W.2d 334, 335 (Ark. 1996); *Williams v. State*, 794 S.W.2d 618 (Ark. 1990) (“[A] defendant who makes no objection at the time the sentence is imposed has no standing to complain”).

<sup>9</sup> See *Woods v. State*, 323 Ark. 605, 612 (Ark. 1996).

<sup>10</sup> *Brown*, 155 S.W.3d at 25.

<sup>11</sup> See Ark. Code Ann. § 16-90-802(d)(11) (2018).

<sup>12</sup> Ark. Code Ann. § 16-90-804(a) (2018). Note that prior to 2005, the court was required to provide written justification for any departure that was more than 5% above or below the presumptive sentence. If the court failed to provide such written justification, the statutory remedy was that “the offender shall be considered for any discretionary release applicable under the law as if he had received the presumptive sentence, and the transfer or releasing authority may review, grant, or deny transfer or release based on any eligibility established by the presumptive sentence term.” See 2005 Ark. Laws, Act 186 § 1 (subtitled *An Act to Confirm That the Sentencing Guidelines of the State of Arkansas are Entirely Voluntary*); see also *Woods v. State*, 916 S.W.2d 728 (Ark. 1996) (assessing whether circling aggravating factors on a departure form met the requirement for the departure reasons to be in writing).

<sup>13</sup> *Duncan v. State*, No. CACR 98-233, 1998 WL 712746 at \*1 (Ark. Ct. App. Oct. 7, 1998).

<sup>14</sup> *Preece v. House*, 886 P.2d 508, 511 (Utah 1994) (citing *Labrum v. Utah State Bd. Of Pardons*, 870 P.2d 902 (Utah 1993)).

<sup>15</sup> *State v. Garner*, 177 P.3d 637, 643 (Utah Ct. App. 2008) (alternate holding, citing *United States v. Booker*, 543 U.S. 220, 233 (2005)).

<sup>16</sup> *United States v. Booker*, 543 U.S. 220, 233 (2005).

<sup>17</sup> *Pickett*, 902 S.W.2d at 208-09.

<sup>18</sup> *Id.*

<sup>19</sup> *Hutcherson v. State*, 47 S.W.3d 267, 272 (Ark. Ct. App. 2001).

<sup>20</sup> *Id.*