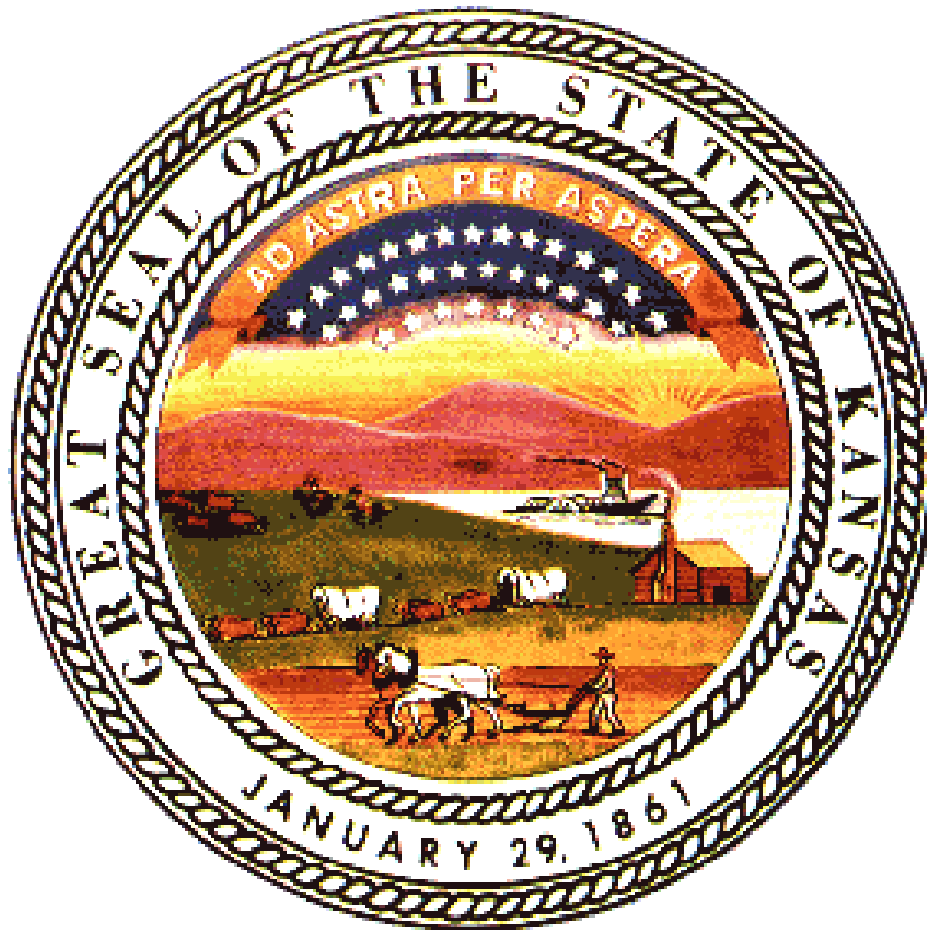


# **KANSAS**

## **SENTENCING GUIDELINES**



**DESK REFERENCE MANUAL**

**2010**



# KANSAS SENTENCING COMMISSION

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## INTRODUCTION

The Kansas Sentencing Commission Desk Reference Manual (“Manual”) provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21-4701 *et seq.* The Manual contains features that we hope will not only inform users of the latest developments in sentencing law 2010 but also help to facilitate more efficient understanding and application of the law.

In order to reduce the size of the Manual, the Time Line of KSGA Selected Events is posted, along with other Appendices, on the Kansas Sentencing Commission (KSC) website at [www.kansas.gov/ksc](http://www.kansas.gov/ksc). All of the 2010 legislative changes relative to the sentencing guidelines remain in the manual and are summarized in the first section. The case law updates have been reformatted and posted on the KSC website under the “Case Law Updates” link. These updates are now organized by topic area and posted with the most recent cases at the top of the page. Finally, the chart outlining non-statutory departure reasons that have been approved or disapproved by the Kansas appellate courts has been updated to reflect the most recent published decisions through June 30, 2010 and has been posted on our website. Posting these documents on our website rather than publishing them in the Manual allows us to easily update the material as new information becomes available.

The statutory listings of felonies and misdemeanors in Appendix B and C have also been modified to reflect the specific statutory violations based upon the 2010 Legislative Changes. Due to the costs of printing, only the alphabetical sort of the felonies and misdemeanor statutes has been included in the printed manual. The numerical, severity level and class sorts are now only available for download from the KSC website. The complete versions of both the felony and misdemeanor statute files are posted with the Desk Reference Manual under the “Agency Publications” link.

The Kansas Sentencing Commission encourages criminal justice professionals to contact our staff for further information and assistance regarding related questions concerning the Manual or the Kansas Sentencing Guidelines Act. Questions may be directed to our Staff at (785) 296-0923, or by the e-mail at [sentencing@sentencing.ks.gov](mailto:sentencing@sentencing.ks.gov).

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense(s) of conviction. Amendments to statutes are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

2010 changes to the penalties and/or statutory language, and newly enacted legislation listed within the Legislative Changes to the Kansas Sentencing Guidelines Act and Related Criminal Law are effective on the date listed below the change(s).

## ADDITIONAL COPIES

Requests for copies of the Manual may be obtained from the Kansas Sentencing Commission at a cost of fifteen dollars each for a bound hard copy document and five dollars each for a computer disk. This Manual may also be accessed and printed free of charge via the Kansas Sentencing Commission website at [www.kansas.gov/ksc](http://www.kansas.gov/ksc).

This Manual is not copyrighted. The entire text of this Manual, along with all of the grids, charts and forms, may be reproduced in part or in its entirety by any party wishing to do so. The Desk Reference Manual should always be used in consultation with the applicable Kansas statutes, the language of which control.

# 2010 LEGISLATIVE CHANGES TO THE KANSAS SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW

Changes affecting the Kansas Sentencing Guidelines Act (K.S.A. 21-4701 et seq.) and other related criminal statutes were made by the Kansas Legislature during the 2010 Legislative Session. These changes are summarized below under the headings of the Bills which the changes were included.

## -FELONY OFFENSES-

### House Substitute for Senate Bill 67 - Felony

House Substitute for Senate Bill 67 amends the crimes of mistreatment of a dependent adult, identity theft and identity fraud, and criminal possession of a firearm.

#### Mistreatment of a Dependent Adult

- K.S.A. 21-3437(a)(1) makes the knowing and intentional infliction of physical injury, unreasonable confinement, or unreasonable punishment upon a dependent adult a severity level 5, person felony;
- Deletes the requirement that taking unfair advantage of a dependent adult's physical or financial resources be committed by a caretaker or another person, and would make a violation of this subsection:
  - K.S.A. 21-3437(a)(2), severity level 2, person felony if the aggregate amount of the value of the resources is \$1,000,000 or more;
  - K.S.A. 21-3437(a)(2), severity level 3, person felony if the aggregate amount of the value of the resources is at least \$250,000 but less than \$1,000,000;
  - K.S.A. 21-3437(a)(2), severity level 4, person felony if the aggregate amount of the value of the resources is at least \$100,000 but less than \$250,000;
  - K.S.A. 21-3437(a)(2), severity level 5, person felony if the aggregate amount of the value of the resources is at least \$25,000 but less than \$100,000; and
  - K.S.A. 21-3437(a)(2), severity level 7, person felony if the aggregate amount of the value of the resources is at least \$1,000 but less than \$25,000.
- K.S.A. 21-3437(a)(3), makes the omission or deprivation of treatment, goods, or services that are necessary to maintain physical or mental health of a dependent adult a severity level 8, person felony and delete the requirement that the crime be committed by a caretaker or another person.

#### Identity Theft and Identity Fraud

The bill would:

- K.S.A. 21-4018(a) amends the crime of identity theft to clarify that the crime is committed by obtaining, possessing, transferring, using, selling, or purchasing any personal identifying information belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive a benefit. The penalty for the crime did not change;
- K.S.A. 21-4018(b) amends the crime of identity fraud to clarify that the crime is committed by either:
  - Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or

- Altering, amending, counterfeiting, making, manufacturing, or otherwise replicating any document containing personal identifying information with the intent to deceive;
- The penalty for the crime did not change;
- Clarify that it is not a defense that the person did not know the personal identifying information belonged to another person, living or deceased; and
- Provide a definition for personal identifying information.

Criminal Possession of a Firearm (formerly 2010 SB 411)

The bill amends K.S.A. 21-4204(a)(4), the crime of criminal possession of a firearm by a person who has been convicted within the previous ten years of certain violent crimes or certain felony drug crimes. The bill adds unlawful manufacture of controlled substances, unlawfully arranging a drug transaction using a communication device, and possession of chemicals with the intent to manufacture methamphetamine to the list of drug crimes covered by the crime of criminal possession of a firearm.

The bill also adds attempt, conspiracy, or solicitation to commit any of the specified felonies to the ten year prohibition from possessing firearms.

Criminal Possession of firearm is a severity level 8, nonperson felony.

The bill became effective April 15, 2010.

**Substitute for Senate Bill 353 - Felony**

Substitute for Senate Bill 353 renames the existing crimes of trafficking and aggravated trafficking to make it human trafficking and aggravated human trafficking, and makes corresponding changes in all statutes referencing these crimes. The bill does the following:

- Expands the crime of human trafficking to add coercing employment and peonage (involuntary servitude) as two additional ways to commit the crime;
- Clarifies that the use of the labor of any person incarcerated in a state or county correctional facility or city jail is not considered human trafficking;
- K.S.A. 21-3446, Human trafficking remains a severity level 2, person felony;
- K.S.A. 21-3447, Aggravated human trafficking remains a severity level 1, person felony; and
- K.S.A. 21-3447(a)(1)(A), Aggravated human trafficking when the offender is 18 years and the victim is less than 14 years of age aggravated trafficking is an off-grid person felony.

The bill amends K.S.A. 60-4104 by adding human trafficking and aggravated human trafficking to the list of crimes that are subject to forfeiture *i.e.*, seizure of the property and the proceeds of the illegal activity.

The bill shall be effective July 1, 2010.

**Senate Bill 434 – Felony**

Senate Bill 434 amends current law regarding unlawful sexual relations, trafficking contraband into a correctional institution or care and treatment facility, the Kansas Offender Registration Act, parole board hearings, and a special rule in sentencing regarding residential burglary.

### Unlawful Sexual Relations

The bill amends the penalty for K.S.A. 21-3520(a), unlawful sexual relations from a severity level 10, person felony to a severity level 5, person felony, except for subsection (a)(5), when the offender is an employee of the Juvenile Justice Authority or an employee of a contractor who provides services in a juvenile correctional facility and the person with whom the offender is engaging in the unlawful sexual relations is a person under 16 years of age or older who is confined by lawful custody to such facility. Such violation is a severity level 4, person felony.

The bill creates a special rule, K.S.A. 21-4704(r), establishing a presumptive imprisonment sentence for the crime of unlawful sexual relations. Such sentence shall not be considered a departure and is not subject to appeal.

### Special Rule Regarding Burglary (Formerly HB 2582)

The bill amends the special rule K.S.A. 21-4704(p), requiring presumptive imprisonment for an offender convicted of a residential burglary or an attempt or conspiracy to commit residential burglary, when such offender has a prior conviction for a residential or nonresidential building burglary, aggravated burglary, or an attempt or conspiracy to commit a residential or nonresidential building burglary or an aggravated burglary.

The special rule in sentencing regarding burglary becomes effective July 1, 2011.

### Traffic in Contraband in a Correctional Institution or Care and Treatment Facility

The bill amends K.S.A. 21-3826(b)(3), trafficking contraband into a correctional institution or care and treatment facility by increasing the level of severity of crime to a severity level 4, nonperson felony if the contraband are firearms, ammunition, or explosives introduced or attempted to be introduced by an employee of the correctional institution or care and treatment facility.

The bill clarifies K.S.A. 21-3826(b), trafficking in contraband in a correctional institution or care and treatment facility is a severity level 5, nonperson felony if such items are firearms, ammunition, explosives, controlled substances introduced by nonemployee.

All other violations of K.S.A. 21-3826, trafficking in contraband are a severity level 6, nonperson felony.

### Kansas Offender Registration Act

The bill amends K.S.A. 22-4902, Kansas Registration Act to add the crime of unlawful sexual relations to the list of crimes that require registration under the Act.

### Parole Board Hearings (Formerly HB 2508)

The bill requires the Kansas Parole Board to review inmates sentenced for a class A or class B felony who have not had a parole board hearing in the five years prior to July 1, 2010 if the review can be done within the agency's existing resources or with the funding subject to appropriation. The review by the Kansas Parole Board is required to be conducted on or before July 1, 2012.

The bill shall be effective July 1, 2010.

## **House Substitute for Senate Bill 458 – Felony**

House Substitute for Senate Bill 458 amends penalties under K.S.A. 17-12a508, Kansas Uniform Securities Act.

The bill makes an intentional securities violation pursuant to K.S.A. 17-12a501 (securities fraud) or 17-12a502 (investment adviser fraud) a felony, as follows:

- An intentional violation of \$1,000,000 or more is amended from severity level 4 to severity level 2, nonperson felony;
- An intentional violation of at least \$250,000 but less than \$1,000,000 is amended from severity level 4 to severity level 3, nonperson felony;
- An intentional violation of at least \$100,000 but less than \$250,000 is a severity level 4, nonperson felony;
- An intentional violation of at least \$25,000 but less than \$100,000 is a severity level 5, nonperson felony;
- An intentional violation of less than \$25,000 is amended from severity level 7 to severity level 6, nonperson felony;
- An intentional violation of cease and desist order is amended from severity level 8 to severity level 5, nonperson felony;
- An intentional violation of K.S.A. 17-12a401, 17-12a403, or 17-12a506 is amended from severity level 8 to severity level 6, nonperson felony; and
- An intentional violation of K.S.A. 17-12a402 or 17-12a403 is amended from severity level 8 to severity level 7, nonperson felony.

The bill shall be effective July 1, 2010.

## **Senate Bill 497 – Felony**

Senate Bill 497 amends K.S.A. 21-4201 by adding clarifying language to existing law by explicitly exempting the lawful selling, manufacturing, purchasing, possessing, or carrying of certain ordinary pocket knives from prosecution under the criminal weapons use statutes. The pocket knives covered under the change are those having a spring, detent, or other device which creates a bias toward closure of the blade. Additionally, the bill requires that the exempted knives use hand pressure applied to a button on the blade of the knife to overcome the bias towards closure to assist in the opening of the knife.

The bill shall be effective April 8, 2010.

## **House Bill 2435 – Felony**

House Bill 2435 amends several criminal and sentencing statutes.

### **Attempt, Conspiracy, or Criminal Solicitation (House Bill 2435, as introduced)**

- The bill increases the penalty from severity level 1, 2, or 3 to off-grid for an attempt (currently severity level 1, according to *State v. Horn*), conspiracy (currently severity level 2, according to *State v. Horn*), or solicitation (currently severity level 3, according to *State v. Horn*) of a sex crime when the offender is 18 or older and the victim is younger than 14 years of age, for the following crimes:

- K.S.A. 21-3447, Aggravated trafficking, if victim is less than 14, offender is 18 or older;
  - K.S.A. 21-3502(a)(2), Rape, if victim is less than 14, offender is 18 or older;
  - K.S.A. 21-3504(a)(3), Aggravated indecent liberties, if victim is less than 14, offender is 18 or older;
  - K.S.A. 21-3506(a)(1) or (a)(2), Aggravated criminal sodomy, if victim is less than 14, offender is 18 or older;
  - K.S.A. 21-3513, Promoting prostitution, if victim is less than 14, offender is 18 or older; and
  - K.S.A. 21-3516(a)(5) or (a)(6), Sexual exploitation of a child, if victim is less than 14, offender is 18 or older.
- The bill clarifies that a downward durational departure from a mandatory minimum sentence of 25 years for certain sex offenses be limited. A judge is not authorized to impose a downward durational departure for any crime of extreme sexual violence to less than 50 percent of the center of the range of the sentence for such crime.
  - The bill also amends K.S.A. 21-3449 on terrorism and K.S.A. 21-3450 illegal use of weapons of mass destruction to provide that an attempt, conspiracy, or criminal solicitation to commit the crime be an off-grid felony.

#### Aggravated Habitual Sex Offender (House Bill 2435 as introduced)

The bill amends K.S.A. 21-4642 by deleting the definition of “prior conviction event” the aggravated habitual sex offender statute to clarify that any person convicted of two or more sexually violent crimes, regardless of whether the convictions occur on the same day, is a habitual sex offender subject to a mandatory life sentence without the possibility of parole.

#### Aggravated Endangering a Child (Modified from Senate Bill 399)

The bill creates a special rule and amends current law K.S.A. 21-3608a to require the sentence for violation of aggravated endangering a child, a nondrug severity 9, person felony to be served consecutively to any other term or terms of imprisonment imposed by the court. The bill clarifies the sentence is not a departure and is not subject to appeal.

#### Sentence Enhancement of Certain Drug Crimes (Modified from SB 399)

- Amends K.S.A. 21-3608a, a definition of “minor” to mean a person under 18 years of age;
- Makes the crime of cultivation, distribution, or possession with intent to distribute certain drugs a drug severity level 2 felony, if the trier of fact finds that the offender is 18 years of age or more and the drug was distributed or possessed with the intent to distribute to a minor, or on or within 1,000 feet of any school property;
- Makes the knowing distribution or possession with the intent to distribute any drug paraphernalia used for a violation of K.S.A. 21-36a06(b) (certain depressant drugs, stimulant drugs, and hallucinogenic drugs; any material, compound, mixture, or preparation which contains any quantity of certain substances, their optical isomers, salts, or salts of isomers; and anabolic steroids) a severity level 9, nonperson felony if the trier of fact finds that the offender is 18 years of age or more and the drug paraphernalia was distributed or caused to be distributed to a minor or within 1,000 feet of any school property; and
- Makes the distribution, possession with the intent to distribute, or manufacture with the intent to distribute any stimulated controlled substances a severity level 7, nonperson felony if the trier of fact finds that the offender is 18 years of age or more and the violation occurred on or within 1,000 feet of any school property.

Sentence Enhancement for Ballistic Resistant Material (House Bill 2454 as introduced)

The bill creates a special rule in sentencing to add 30 months imprisonment to the sentence of any defendant convicted of a felony when the trier of fact finds beyond a reasonable doubt that the defendant wore or used ballistic resistant material during the commission of, attempt to commit, or flight from such felony. The sentence shall be presumptive prison and shall be served consecutively to any other sentence imposed.

The bill shall be effective April 29, 2010.

**-MISDEMEANOR OFFENSES-**

**House Substitute for Senate Bill 83 - Misdemeanor**

House Substitute for Senate Bill 83 creates the Naturopathic Doctors Licensure Act and amends K.S.A. 65-7211 by changing the regulatory status of naturopathic doctors and amending the Physical Therapy Practice Act by creating two new licensure categories, “exempt license” and “federally active license”.

Violation of the Naturopathic Doctors Licensure Act remains a class B misdemeanor.

The bill shall be effective July 1, 2010.

**Senate Bill 531 – Misdemeanor**

Senate Bill 531 amends K.S.A. 48-1625 and creates the Radon Certificate Law which requires certification of radon measurement technicians, radon mitigation technicians, and radon measurement laboratories by the Secretary of the Kansas Department of Health and Environment. The bill requires the Secretary to create rules and regulations for the establishment of a radon certification program by July 1, 2011.

Violation of the Radon Certificate Law or any rules and regulations is a class B misdemeanor.

The bill shall be effective July 1, 2010.

**House Bill 2577 - Misdemeanor**

House Bill 2577 creates the Addictions Counselor Licensure Act. The bill prohibits any person currently licensed as an addiction counselor, or substance abuse counselor from practicing without being licensed under this Act and meeting applicable requirements effective August 1, 2011. However, the act does provide for a grandfathering of anyone registered by the Board.

House Bill 2577 subsection (a) and of section three prohibits any person from engaging in the practice of addiction counseling or represent that such person is a licensed addiction counselor without having first obtained a license under the addiction counselor act. Violation of the Addictions Counselor Licensure Act is a class B misdemeanor.

House Bill 2577 subsection (b) of section three prohibits any person from engaging in the practice of addiction counseling as a clinical addiction counselor or represent that such person is a licensed



clinical addiction counselor without having first obtain a license. Violation of the Addictions Counselor act is a class B misdemeanor.

This bill shall be effective July 1, 2010.

**-OTHER OFFENSES-**

**House Substitute for Senate Bill 300 - Other**

House Substitute for Senate Bill 300 prohibits a person who is operating a vehicle on a public road or highway from “texting” using a wireless communications device to write, send or read a written communication. The bill defines “wireless communications device” to include voice-operated devices. The fine for unlawful text messaging is \$60.

The bill includes the following exceptions to the ban:

- Law enforcement officers or emergency services personnel acting within the course or scope of their employment;
- When the vehicle is stopped off the regular traveled portion of the roadway;
- Using the wireless communications device to make or receive a call; receive an emergency, traffic, or weather alert message related to the operation or navigation of the vehicle;
- To prevent imminent injury to a person or property; and
- To relay information between a transit or for-hire operator and the operator’s dispatcher, if the device is permanently affixed to the motor vehicle.

Law enforcement officers shall issue a warning citation for this violation until January 1, 2011.

The bill shall be effective July 1, 2010.

**Senate Bill 346 – Other**

Senate Bill 346 amends K.S.A. 75-5220, which grants the Secretary of Corrections four, rather than three, business days to notify the sheriff to immediately convey the offender in his or her custody to the Department of Corrections Reception and Diagnostic Unit. The bill would require the Secretary to be responsible for all medical care and treatment costs of the offender while in the actual physical custody of the Secretary.

The bill also grants the Secretary the discretion to discharge the offender from the prison portion of the sentence if the offender has ten days or less remaining to be served at the time the Secretary receives the notice of the Order for Commitment.

Finally, the bill requires the court to forward a copy of the complaints, affidavits, and the county and district attorney reports to the officer having custody of the offender for delivery when the offender is transferred to a correctional institution.

The bill shall be effective July 1, 2010.

### **Senate Bill 368 – Other**

Senate Bill 368 amends the effective date of the criminal penalty provisions regarding third and fourth or subsequent convictions for driving under the influence (DUI) that were enacted with the passage of 2009 House Bill 2096 from July 1, 2010 to July 1, 2011.

The bill also amends the administrative penalty provisions for a second alcohol or drug related conviction to require a one-year suspension of the offender's driving privileges, which may be modified after a 45-day hard suspension and application to the Kansas Division of Motor Vehicles. The offender's driving privileges shall be restricted the remainder of one year to driving only a vehicle equipped with an ignition interlock device, and restricted to driving to and from work, school, treatment, or to the ignition interlock provider. The person's driving privileges shall be further restricted for an additional year to driving only a vehicle equipped with an ignition interlock device.

Administrative penalties for a third, fourth or subsequent DUI, test failure or test refusal conviction shall be as provided under current law.

The bill shall be effective June 3, 2010.

### **House Substitute for Senate Bill 381 – Other**

House Substitute for Senate Bill 381 amends K.S.A. 21-3211 through K.S.A. 21-3218, Principal of Criminal Liability, justified threat or use of force. The bill does the following:

- Specifies that the bill is retroactive;
- Adds a new definitions section in which "use of force" is defined to include threats;
- Clarifies that a person who threatens deadly force, which is also defined in the new definitions section, is subject to the statutory provision governing "use of force" rather than use of deadly force;
- Adds "place of work" to the list of places where a person can use deadly force to prevent or terminate an unlawful entry or attack, if such person reasonably believes it is necessary to prevent imminent death or great bodily harm;
- Clarifies that a person would not be required to retreat when using force to protect a place of work; and
- Creates a presumption of reasonableness with regard to the use of deadly force in circumstances described in the bill. Summary

The bill shall be effective April 29, 2010.

### **Senate Bill 519 – Other**

Senate Bill 519 amends the following:

- Allows payment of traffic tickets, K.S.A. 8-2118 and K.S.A. 19-4716 fines for violations of county codes and resolutions by any means accepted by the court;
- K.S.A. 20-365 authorizes that the electronic signature of the Clerk of the District Court has the same legal effect as a manual signature on records and judicial proceedings;
- Authorizes the conveyance of a written statement, K.S.A. 22-2502 or K.S.A. 22-2504 affidavit for a search warrant by electronic communication;
- Amends K.S.A. 28-172 by eliminating the requirement that certain docket fees must be paid by mail or in person;

- Amends K.S.A. 38-2305, the Juvenile Code to authorize an adjudication court to use electronic means to send documents to sentencing court and
- Amends K.S.A. 59-2203, the Probate Code to require the district court to transmit the entire file to the proper county, once proper venue is determined.

The bill shall be effective July 1, 2010.

### **House Bill 2130 – Other**

House Bill 2130 amends K.S.A. 8-2503(a) to require every occupant of a passenger car manufactured with safety belts to wear a safety belt. The bill allows law enforcement to stop a passenger car for a violation of safety belt requirements by anyone in the front seat and by anyone under 18 years of age.

Before House Bill 2130 was enacted, the law did not require adults in the back seat to wear safety belts, and a law enforcement officer could have stopped a vehicle and issued a citation for failure to wear a safety belt only if another law had been violated. The bill continues to require that a citation be issued for failure to wear a safety belt by an adult passenger in the back seat only if another law has been violated. The bill does not change requirements for children under the age of 14 covered under the Child Passenger Safety Act (K.S.A. 8-1343 *et seq.*).

The bill sets the fine for violations of safety belt requirements by adults at \$5 from June 30, 2010, until July 1, 2011, and \$10 starting July 1, 2011; both amounts include court cost. The violation by someone ages 14 through 17, K.S.A. 8-2503(b), continues to be \$60, including court costs.

The bill shall be effective June 10, 2010.

### **Senate Substitute for House Bill 2226 – Other**

Senate Substitute for House Bill 2226 increases the fine assessed on traffic infractions listed on the uniform fine schedule by \$15. The increased funds shall be added to the KDOC Alcohol and Drug Abuse Treatment fund for fourth and subsequent DUI offenders and the Kansas Criminal Justice Information System line fund.

The bill shall be effective July 1, 2010.

### **House Bill 2411 – Other**

House Bill 2411 amends K.S.A. 65-4105, the Kansas Uniform Controlled Substance Act to expand the list of Schedule I controlled substances to include the chemical compounds HU-210, JWH-018, JWH-073, BZP, and TFMPP.

The bill shall be effective March 18, 2010.

### **House Bill 2412 – Other**

House Bill 2412 amends the law on functional incapacitation release and creates a new procedure for the release of a terminally ill inmate whose medical condition is likely to cause death within thirty days.

### Functional Incapacitation Release

The bill removes a person sentenced to imprisonment for an off-grid offense from the group of inmates who could be eligible for an early release pursuant to the functional incapacitation release procedure.

### Terminally Ill Early Release

The process is initiated with an application by the Secretary of Corrections to the Kansas Parole Board for the release of an inmate deemed by a physician to have a terminal medical condition likely to cause death within 30 days.

The bill shall be effective July 1, 2010.

### **House Bill 2468 - Other**

House Bill 2468 amends K.S.A. 22-4906, the Kansas Offender Registration Act to require a person convicted of K.S.A. 21-3301, 21-3302 or 21-3303, attempt, conspiracy or criminal solicitation of certain sex crimes to register for life rather than ten years. Such crimes include:

- K.S.A.. 21-3447, Aggravated human trafficking, if victim is less than 14, offender is 18 or older;
- K.S.A.. 21-3502(a)(2), Rape, if victim is less than 14, offender is 18 or older;
- K.S.A.. 21-3504(a)(3), Aggravated indecent liberties, if victim is less than 14, offender is 18 or older;
- K.S.A.. 21-3506(a)(1) or (a)(2), Aggravated criminal sodomy, if victim is less than 14, offender is 18 or older;
- K.S.A.. 21-3513 Promoting prostitution, if victim is less than 14, offender is 18 or older; and
- K.S.A.. 21-3516(a)(5) or (a)(6), Sexual exploitation of a child, if victim is less than 14, offender is 18 or older.

The bill shall be effective July 1, 2010.

### **House Bill 2469 – Other**

House Bill 2469 amends K.S.A. 21-4710(d)(11) to allow use of prior convictions as criminal history if the conviction(s) enhance a penalty, such as a 45-day jail sentence as a condition of probation in K.S.A. 21-3710(b)(4).

The bill shall be effective April 8, 2010.

### **Senate Substitute for House Bill 2476 - Other**

Senate Substitute for House Bill 2476 increases and extends to June 30, 2011, the Judicial surcharge the Legislature authorized in 2009 Senate Bill 66 to fund nonjudicial personnel. The surcharge is increased from \$10 to \$20 on most court docket fees. Expungement of conviction, expungement of arrest record, marriage license fee, general rule on court procedures, and expungement of juvenile adjudication surcharges are increased more than \$10. The bill also adds a \$100 docket fee for expungement of an adult conviction or a juvenile adjudication.

The bill shall be effective April 15, 2010.

## **Substitute for House Bill 2517 - Other**

Substitute for House Bill 2517 creates a new law to require on July 1, 2011, a domestic violence designation in a criminal case by the court if the trier of fact determines that a defendant committed a domestic violence offense. Only if the court finds, on the record, that the defendant has not previously committed a domestic violence offense or participated in a diversion agreement on a complaint alleging a domestic violence offense, and the domestic violence offense was not used to coerce, control, punish, intimidate, or take revenge against a person with whom the offender is involved or has been involved in a dating relationship or against a family or household member, would the court be authorized to not place a domestic violence designation on the criminal case or the defendant.

The bill allows, but does not require, a court to place a “DV” designation on the criminal case number uniquely identifying the case.

The Attorney General is required to promulgate rules and regulations, on or before July 1, 2011, to carry out the provision providing for disposition of a criminal case with a domestic violence designation.

The bill provides that the court, at disposition, for any criminal offense with a domestic violence designation, is:

- Required to order the defendant to undergo, and pay for, a domestic violence offender assessment and follow all recommendations, unless otherwise ordered by the court or the Department of Corrections;
- Authorized, but not required, to order a defendant to undergo, and pay for, a domestic violence offender assessment and any other evaluation prior to sentencing if the assessment or evaluation will assist the court in determining an appropriate sentence; and
- Required to provide the domestic violence assessment and any other evaluation to any entity responsible for supervising the defendant.

The bill also does the following:

- Defines domestic violence;
- Defines dating relationship;
- Defines family or household member to exclude siblings from the definition and to add persons who are presently residing together or have resided together in the past;
- Defines domestic violence offense to delete the crime of stalking and a violation of any order issued pursuant to the Protection from the Stalking Act;
- Amends the law requiring all law enforcement agencies to adopt written policies regarding domestic violence call to clarify that the law enforcement officer is required to arrest the person who the officer has probable cause to believe committed a crime or offense involving domestic violence;
- Amends the provision regarding written policies of law enforcement to require the law enforcement to require the law enforcement officer to consider defense of person or property when determining whether to arrest a person for a crime or offense involving domestic violence;
- Adds the appropriate statutory citations for defense of a person or property;
- Clarifies that a law enforcement officer will not be required to arrest any party if no probable cause exists to believe that a crime or offense involving domestic violence has been committed;

- Requires a statement in the written policies to direct a law enforcement officer to evaluate each complaint separately, when two or more parties are alleging domestic violence to determine if probable cause exists that a crime was committed and whether a defense of self defense of person or property exists;
- Amends the crime of domestic battery, on or after July 1, 2011, to prohibit a county or district attorney from entering into a diversion agreement if the complaint alleges a domestic violence offense, and the defendant has participated in two or more diversions on complaints alleging a domestic violence offense in the previous five year period;
- Clarifies that diversion agreements on a complaint alleging a domestic violence offense will require the agreement of the prosecutor, not the court, to relieve the defendant of the requirement to undergo a domestic violence offender assessment and follow all recommendations; or relieve the defendant of the requirement to pay for such assessment, for completion of all recommendations; and
- Requires the Kansas Bureau of Investigation to make available to the Governor’s Domestic Violence Fatality Review Board crime record information related to domestic violence. The information will be required to be transmitted in a manner that does not identify individual offenders or victims.

The bill shall be effective July 1, 2011.

### **House Bill 2581 – Other**

House Bill 2581 amends K.S.A. 21-2610a by increasing the misdemeanor probation supervision fee from \$25 to \$60 and felony probation supervision fee from \$50 to \$120. The reason for the fee increase is to provide funding for the state-wide implementation of and training for use of a risk needs assessment tool, the Level of Services Inventory – Revised (LSI-R) which will be implemented January 1, 2011.

The bill creates a new fund in the state treasury which is called the Correctional Supervision Fund. The additional funds collected from the payment by offenders of the increased correctional service fees are deposited in the Correctional Supervision Fund. Additionally, the bill amends K.S.A. 20-367, remittance of the docket fees, to clarify that the correctional supervision fees are deposited directly to either the Correctional Supervision Fund or the State General Fund, as specified in K.S.A. 21-4610a, and are not to be commingled with docket fees.

The bill shall be effective July 1, 2010.

### **House Bill 2604 – Other**

House Bill 2604 amends K.S.A. 21-4603 to authorize a sentencing court to assign defendants convicted of misdemeanors or felonies under provisions of K.S.A. 21-4704 that require imprisonment in the county jail rather than a state correctional facility, to a work release program provided that the defendant return to confinement in the county jail at the end of each day while in the work release program.

The bill clarifies that the authority of a sentencing court to order a defendant to a work release program does not include work release programs at state correctional facilities under control of the Secretary of Corrections as defined in K.S.A. 75-5202.

The bill shall be effective July 1, 2010.

### **House Bill 2605 - Other**

House Bill 2605 requires the court to order certain fees for forensic science of laboratory services or forensic computer examination services, or a DNA database fee.

#### Forensic Science or Laboratory Services or Forensic Computer Examination Services

The bill requires the court to order any adult convicted or diverted, or any juvenile adjudicated or diverted of a misdemeanor, felony, or a violation of a municipal ordinance prohibiting such acts to pay a separate court cost of \$400 for each offense if the forensic science laboratory services or forensic computer examination services are provided in an investigation.

#### DNA Database Fee

The bill requires persons convicted or adjudicated of certain offenses that require submission of a DNA sample to pay a separate court cost of \$200 to the KBI DNA database fee for each event of conviction even if the person's DNA sample is already on file.

The bill shall be effective July 1, 2010.

### **House Bill 2661 - Other**

House Bill 2661, Drug Code Recodification corrects inadvertent errors made in the recodification of the drug code in 2009 HB 2332. The bill:

- Adds a specific reference to subsection (b)(3) of K.S.A. 21-36a06 (possession of marijuana) regarding the law providing municipal court jurisdiction, or concurrent jurisdiction, to hear and determine cases;
- Adds the age 18 of the offender requirement back into the law regarding the crime of distribution of a controlled substance or controlled substance analog;
- Adds language to cover Schedule V controlled substances regarding the crime of possession of a controlled substance or controlled substance analog;
- Conforms the penalty provision regarding prescription-only drug violations;
- Uses terms defined in the recodified drug code and adds the age 18 of the offender requirement back into the law regarding precursor offenses;
- Adds references to the Uniform Controlled Substances Act provisions repealed in recodification and makes clear the old law violations and new law violations are treated the same; and
- Clarifies that only those individuals convicted of K.S.A. 21-36a05(a)(1) are required to register under the Kansas Offender Registration Act and makes the provision retroactive to remove the registration requirement for anyone convicted under the other subsections of K.S.A. 21-36a05.

The bill shall be effective April 15, 2010.

## **House Bill 2668 - Other**

House Bill 2668 recodifies the Kansas Criminal Code in order to do the following:

- Revise the statutory language to add clarity;
- Reorganize the statutes to place them in a more user-friendly order;
- Reorder statutes to reduce their number; and
- Repeal statutory language no longer in use.

This bill shall be effective July 1, 2011.



## **CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES**

### **Sentencing Considerations**

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in typical case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals will continue their efforts in reestablishing offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases. The sentencing court is free to choose an appropriate sentence, or combination of sentences, for each case. See K.S.A. 2010 Supp. 21-4603d.

### **Sentencing Guidelines**

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. Two grids, containing the sentencing range for drug crimes and nondrug crimes, were developed for use as a tool in sentencing. The sentencing guidelines grids provide practitioners in the criminal justice system with an overview of presumptive felony sentences. The presumptive sentence is determined by two factors: the severity level of the current crime of conviction and the offender's criminal history. The grid block where the severity level of the crime and the offender's criminal history score intersect is the presumed sentence, stated in months. See K.S.A. 2010 Supp. 21-4704.

### **Off-Grid Crimes**

The crimes of capital murder (K.S.A. 21-3439), murder in the first degree (K.S.A. 21-3401), treason (K.S.A. 21-3801) and several specific sex offenses involving victims less than 14 years of age and offenders 18 years of age or older are designated as off-grid person crimes and for such crimes, the term of imprisonment shall be imprisonment for life. K.S.A. 21-4706. However, in most cases, such sentences do not actually mean that the offender will remain imprisoned for the remainder of the offender's life. Generally, an offender will become eligible for parole after serving a mandatory term of years in confinement. The exceptions are for convictions of capital murder wherein the death penalty is not imposed and for convictions as an aggravated habitual sex offender.

A person convicted of premeditated first-degree murder will be eligible for parole after serving 25 years in confinement unless the court finds that aggravating circumstances exist and such aggravating circumstances are not outweighed by any mitigating circumstances. In that case, the person shall serve 40 or 50 years pursuant to K.S.A. 21-4638 before becoming eligible for parole. See K.S.A. 2010 Supp. 22-3717(b)(1), K.S.A. 21-4635(b), (d), and K.S.A. 21-4638 (hard 40 for crimes committed prior to July 1, 1999, hard 50 for crimes committed on or after July 1, 1999). For crimes committed on or after July 1, 2006 where a hard 50 sentence could be imposed, such sentence will not be imposed if the offender's criminal history would result in a guidelines sentence in excess of 600 months. In that case, the mandatory minimum will be the 600+ months as provided by the guidelines grid. K.S.A. 21-4638

Felony murder and treason carry terms of life imprisonment with eligibility for parole after serving 15 years for crimes committed after July 1, 1993 but prior to July 1, 1999, and 20 years for crimes committed on or after July 1, 1999. See K.S.A. 2010 Supp. 22-3717(b)(2).

In 2006, Senate Substitute for House Bill 2576 was passed and designated certain sex offenses involving victims less than 14 years of age and offenders 18 years of age or older as off-grid felonies. If an offender is convicted of one of these off-grid sex offenses, the sentence shall be imprisonment for life pursuant to K.S.A. 2010 Supp. 21-4643 unless the offender is determined to be an aggravated habitual sex offender. K.S.A. 21-4706(d). If the offender is determined to be an aggravated habitual sex offender, the sentence would be imprisonment for life without the possibility of parole. K.S.A. 2010 Supp. 21-4642

As with the aggravated habitual sex offender, statute K.S.A. 21-4635 provides that if a person is convicted of capital murder where the crime was committed on or after July 1, 2004, and a sentence of death is not imposed pursuant to K.S.A. 21-4624, such person shall be sentenced to life imprisonment without the possibility of parole. If the crime of capital murder was committed prior to July 1, 2004, and the death penalty was not imposed, the mandatory minimum term of imprisonment would be 25 years unless aggravating factors were found to outweigh any mitigating ones. In that case, the term would be either 40 or 50 years as with premeditated first degree murder. K.S.A. 21-4635. The death penalty and the sentence of life imprisonment without parole do not apply to juveniles or persons determined to be mentally retarded.

### **Drug Grid and Nondrug Grid**

There are two grids used for sentencing on felony convictions. The drug grid is used for sentencing of drug crimes recently recodified in K.S.A. Chapter 21, Article 36. The nondrug grid is used for sentencing of all other felony crimes. Both grids are similar in appearance. The criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis. Each grid contains nine criminal history categories. The drug grid contains four severity levels while the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line are grid blocks, which are designated as presumptive prison sentences. Below the dispositional line are shaded grid blocks, which are designated as presumptive probation sentences.

The grids also contain blocks that have lines passing through them, which are referred to as "border boxes." A border box has a presumptive prison sentence but the sentencing court may choose to impose an optional nonprison sentence, which will not constitute a departure. The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains five border boxes, in levels 3-E, 3-F, 3-G, 3-H and 3-I. See K.S.A. 2010 Supp. 21-4704 and 21-4705.

### **Grid Blocks**

Within each grid block are three numbers, representing months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence at any place within the range. The middle number in the grid block is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors insufficient to warrant a departure. See K.S.A. 2010 Supp. 21-4704 and 21-4705.

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid block. The court may also depart downward to lower the duration of a presumptive sentence to any extent. See K.S.A. 2010 Supp. 21-4717, K.S.A. 21-4716, and K.S.A. 21-4718. The court may also impose a dispositional departure when aggravating or mitigating circumstances exist that are substantial and compelling. See K.S.A. 2010 Supp. 21-4719(c)(2).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. In the 2002 Legislative Session, both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* and this change became effective on June 6, 2002. The jury now determines all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. The trial court determines if the presentation of evidence regarding the aggravating factors will be presented during the trial of the matter, or in a bifurcated jury proceeding following the trial. See K.S.A. 21-4718.

## **CHAPTER II: PROCEDURE PRIOR TO SENTENCING**

### **Determination of the Date of Offense; Application to the Sentencing Guidelines**

The Kansas Sentencing Guidelines Act (KSGA) applies to all felony crimes committed on or after July 1, 1993. All felony crimes committed prior to that date should be prosecuted under the laws existing prior to that date. A crime is committed prior to July 1, 1993, if any essential elements of the crime as then defined occurred before July 1, 1993. If it cannot be determined that the crime was committed prior to or after July 1, 1993, the offender should be prosecuted under laws existing prior to the KSGA. See K.S.A. 21-4723.

The date of offense controls selection of the appropriate Journal Entry form. Each year the Journal Entry forms are updated to reflect the laws and special sentencing rules in effect beginning July 1 of that year. Therefore, when completing a journal entry form make sure that the year of the form corresponds with the laws in effect for the date of offense. Examples: For an offense committed on May 1, 2001, complete the 2000 Journal entry form. For an offense committed October 7, 1996, the 1996 Journal entry form should be completed. Forms from prior years may be found at the Kansas Sentencing Commission website: [www.kansas.gov/ksc](http://www.kansas.gov/ksc) .

### **Accusatory Instruments**

All accusatory instruments filed for crimes to be sentenced under the KSGA system should allege facts sufficient to classify the crime severity level of the offense on the guidelines grid. If a particular felony crime is sub-classified into different versions of the same offense that have been assigned different severity levels, the accusatory instrument should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the accusatory instrument. See K.S.A. 2010 Supp. 22-3201.

### **Fingerprinting; Sentencing Guidelines Implications**

**Municipal Court Duties** The court is required to ensure that fingerprints are taken upon conviction for a city ordinance violation comparable to a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 21-3408. See K.S.A. 2010 Supp. 12-4517(a).

**Law Enforcement Duties** Every sheriff, police department, or countywide law enforcement agency in the state is required to make two sets of fingerprint impressions of a person who is arrested if the person is:

- wanted for the commission of a felony. On or after July 1, 1993, fingerprints shall also be taken if the person is wanted for the commission of a class A or B misdemeanor or a violation of a county resolution which would be the equivalent of a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 21-3408.
- is believed to be a fugitive from justice;
- may be in the possession at the time of arrest of any goods or property reasonably believed to have been stolen by the person;

- is in possession of firearms or other concealed weapons, burglary tools, high explosives or other appliances believed to be used solely for criminal purposes;
- is wanted for any offense which involves sexual conduct prohibited by law or for violation of the uniform controlled substances act; or
- is suspected of being or known to be a habitual criminal or violator of the intoxicating liquor law.

See K.S.A. 2010 Supp. 21-2501(a).

**County/District Court Duties** The court shall ensure, upon the accused person's first appearance, or in any event, before final disposition of a felony or a class A or B misdemeanor or a violation of a county resolution which prohibits an act which is prohibited by a class A or B misdemeanor, the offender has been processed and fingerprinted. See K.S.A. 2010 Supp. 21-2501(b).

**Juvenile Court Duties** Fingerprints shall not be taken of any juvenile who is taken into custody for any purpose, with the following exceptions:

- Fingerprints of a juvenile may be taken if authorized by the court having jurisdiction;
- After adjudication, fingerprints shall be taken of all juvenile offenders adjudicated due to commission of an offense which if committed by an adult would constitute the commission of a felony or any of the following misdemeanor violations:
  - K.S.A. 21-3424, criminal restraint, when the victim is less than 18 years of age,
  - Subsection (a)(1) of K.S.A. 21-3503, indecent liberties with a child,
  - K.S.A. 21-3507, adultery, when one of the parties involved is less than 18 years of age,
  - K.S.A. 21-3508, lewd and lascivious behavior,
  - Subsection (b)(1) of K.S.A. 21-3513, promoting prostitution, when one of the parties involved is less than 18 years of age,
  - K.S.A. 21-3517, sexual battery, and
  - an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 2010 Supp. 21-3301, 21-3302 or 21-3303, to commit a violation of any of the offenses specified in this subsection;
- Fingerprints of a juvenile may be taken under K.S.A. 2010 Supp. 21-2501, if the juvenile has been prosecuted as an adult pursuant to K.S.A. 2010 Supp. 38-2347; and
- Fingerprints may be taken of any juvenile admitted to a juvenile correctional facility.

See K.S.A. 2010 Supp. 38-2313.

### **Official Records**

All Kansas law enforcement agencies shall maintain a permanent record, on forms approved by the Attorney General, of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions. K.S.A. 21-2501a(a). All law enforcement agencies must file a report of such offenses, on a form approved by the Attorney General, with the Kansas Bureau of Investigation (KBI) within 72 hours after such offense is reported, or known to have been committed. K.S.A. 21-2501a(b). Effective April 21, 2005, all law enforcement agencies must report within 30 days and on forms approved by the Attorney General, any methamphetamine laboratory seizures or dump sites and any theft or attempted theft of anhydrous ammonia that occurs in such agency's jurisdiction. K.S.A. 21-2501a(c)

## **Plea Agreement Rules**

The parties may move to dismiss any charge or counts pursuant to a plea bargain. The parties may stipulate to a particular sentence within the grid block classification appropriate for an offender given his or her crime of conviction and complete criminal history score. The parties may agree to recommend a sentence outside the presumptive range on the grid when departure factors exist. These factors must be stated on the record. The State may agree to file or not to file specific charges or counts. See K.S.A. 2010 Supp. 21-4713.

A plea agreement involving the deliberate deletion of an offender's prior convictions from criminal history or an agreement by the prosecution to disregard any prior convictions of the offender which will elevate the severity level of the offense or count in the offender's criminal history is impermissible. See K.S.A. 2010 Supp. 21-4713(f) and 21-4708(b)(2).

The sentencing court is free to accept or reject any plea agreement entered into by the parties. At the time of acceptance of a plea of guilty or *nolo contendere*, the sentencing court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. See K.S.A. 2010 Supp. 22-3210.

Once the guilty or *nolo contendere* plea has been accepted by the court, the severity level of the crime cannot be elevated for sentencing purposes due to the subsequent discovery of prior convictions which would have raised the severity level of the crime; instead the prior convictions will be used in the determination of the criminal history category. See K.S.A. 21-4707(b)(4).

For a charge of Driving Under the Influence, (DUI) no plea bargaining agreement shall be entered into nor approved, for the purpose of permitting the person charged to avoid the mandatory penalties established by the DUI statute or a similar ordinance. A diversion agreement shall not constitute plea bargaining. See K.S.A. 2010 Supp. 8-1567(q).

## **Diversions**

A diversion agreement cannot be entered into for a DUI violation if; the defendant has previously participated in a diversion for DUI, has previously been convicted of or pleaded *nolo contendere* to a DUI or, during the time of the DUI the defendant was involved in a motor vehicle accident or collision resulting in personal injury or death. K.S.A. 22-2908(b)(1)

A diversion agreement cannot be entered into for a class A or B felony or for crimes committed on or after July 1, 1993, an off-grid crime, a nondrug severity level 1, 2 or 3 felony, or a drug severity level 1 or 2 felony. K.S.A. 22-2908(b)(2)

A county or district attorney may enter into a diversion agreement in lieu of criminal proceedings on a complaint for violation of Wildlife and Parks laws (Article 10 of Chapter 32) if the diversion carries the same penalties as the conviction for the corresponding violation. If the defendant has previously participated in one or more diversions then each subsequent diversion would carry the same penalties as the conviction for the corresponding violation. See K.S.A. 22-2908(c).

## **Deferring Sentence Pending Mental Examination**

A mental health examination may be completed on the offender as part of the presentence investigation report. The sentencing court may commit the offender to a state security hospital or suitable local mental health facility for such examination. The maximum duration of commitment that can be imposed for the examination is 120 days. See K.S.A. 22-3429.

## **Drug Abuse Assessment**

As part of the presentence investigation, offenders who meet the requirements of K.S.A. 2010 Supp. 21-4729(a) (2003 Senate Bill 123) shall be subject to a drug abuse assessment which shall include a clinical interview with a mental health professional (as defined in subsection (g) of K.S.A. 2010 Supp. 21-4729) and a recommendation concerning drug abuse treatment for the offender, and a criminal risk-need assessment, unless otherwise specifically ordered by the court. The criminal risk-need assessment shall assign a high or low risk status to the offender. K.S.A. 2010 Supp. 21-4729(b)

The presentence criminal risk-need assessment shall be conducted by a court services officer or a community corrections officer. The presentence drug abuse treatment program placement assessment shall be conducted by a drug abuse treatment program certified by the secretary of corrections to provide assessment and treatment services. See K.S.A. 2010 Supp. 75-52,144(b).

The drug abuse assessment is only available to the parties, the sentencing judge, the department of corrections and if requested, the Kansas Sentencing Commission. See K.S.A. 2010 Supp. 21-4714(c).

## CHAPTER III: CRIME SEVERITY LEVELS

### General Rules for Determining Severity Levels

The severity levels range from severity level 1 to severity level 10 on the nondrug grid. Level 1 is used to categorize the most severe crimes and level 10 is used to categorize the least severe crimes. Crimes listed within each level are considered relatively equal in severity. K.S.A. 21-4707(a)

The crime severity scale contained in the sentencing guidelines grid for drug crimes consist of four levels of crimes. Crimes listed within each level are also considered relatively equal in severity. Level 1 is used to categorize the most severe crimes and level 4 is used to categorize the least severe crimes. K.S.A. 2010 Supp. 21-4708(a)

The following provisions shall be applicable with regard to ranking offenses according to the crime severity scale:

- (1) The sentencing court will designate the appropriate severity level if it is not provided by statute. When considering an unranked offense in relation to the crime severity scale, the sentencing court should refer to comparable offenses on the crime severity scale. K.S.A. 21-4707(c)(1)
- (2) Except for off-grid felony crimes, which are classified as person felonies, any felony crimes omitted from the crime severity scale shall be considered nonperson felonies. K.S.A. 21-4707(c)(2)
- (3) All unclassified felonies shall be scored as level 10 nonperson crimes. K.S.A. 21-4707(c)(3)

All felony crimes, with the exception of off-grid crimes, felony driving under the influence (K.S.A. 2010 Supp 8-1567), felony domestic battery (K.S.A. 2010 Supp 21-3412a), and animal cruelty (K.S.A. 2010 Supp 21-4310 and K.S.A. 21-4318) should be categorized in one or more of the crime severity levels. The severity level designation of each felony crime is included in the statutory definition of the crime. Some crimes include a broad range of conduct. In such circumstances, there may be a different severity level designated for violations of different subsections of the statute. All felonies are listed in Appendix B of this Manual alphabetically by description. Listings on-line at [www.Kansas.gov/ksc](http://www.Kansas.gov/ksc) are also in statute and severity level order.

### Anticipatory Crimes

Anticipatory crimes, including attempt, conspiracy, and solicitation, are treated differently for off-grid felonies, offenses on the nondrug grid and drug grid, and misdemeanor offenses.



### **Attempt (K.S.A. 2010 Supp. 21-3301)**

- An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1, except terrorism and illegal use of weapons of mass destruction, which are off-grid.
  - This reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender, or for child sex offenses involving a victim less than 14 years of age and an offender 18 or older. See K.S.A. 2010 Supp. 21-4642 and K.S.A. 2010 Supp. 21-4643.
  - However, see *State v. Horn*, 288 Kan. 690 (2009). Kansas Supreme Court attempted aggravated sodomy is ranked at nondrug severity level 1 felony pursuant to K.S.A. 2010 Supp. 21-3301(c).
  - 2010 House Bill 2435 amended attempt to commit any of these crimes to off-grid.
- An attempt to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for an attempt to commit a nondrug felony shall be a severity level 10.
- An attempt to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.
  - The provision for the reduction of a sentence on the drug grid by six months for an attempted crime does not apply in cases involving an attempt to manufacture a controlled substance under K.S.A. 2010 Supp. 21-36a03 [formerly K.S.A. 65-4159(d)].
- An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor.

### **Conspiracy (K.S.A. 2010 Supp. 21-3302)**

- Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2, except terrorism and illegal use of weapons of mass destruction, which are off-grid.
  - This reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender, or for child sex offenses involving a victim less than 14 years of age and an offender 18 or older. See K.S.A. 2010 Supp. 21-4642 and K.S.A. 2010 Supp. 21-4643.
  - However, see *State v. Horn*, 288 Kan. 690 (2009). Kansas Supreme Court attempted aggravated sodomy is ranked at nondrug severity level 1 felony pursuant to K.S.A. 2010 Supp. 21-3301(c). Under this analysis, a conspiracy to commit such crime is ranked at nondrug severity level 2.
  - 2010 House Bill 2435 amended conspiracy to commit any of these crimes to off-grid.
- Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10.

- Conspiracy to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.
- Conspiracy to commit a misdemeanor is a class C misdemeanor.

**Solicitation (K.S.A. 2010 Supp. 21-3303)**

- Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3, except terrorism and illegal use of weapons of mass destruction, which are off-grid.
  - This reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender, or for child sex offenses involving a victim less than 14 years of age and an offender 18 or older. See K.S.A. 2010 Supp. 21-4642 and K.S.A. 2010 Supp. 21-4643.
  - However, see *State v. Horn*, 288 Kan. 690 (2009). Kansas Supreme Court attempted aggravated sodomy is ranked at nondrug severity level 1 felony pursuant to K.S.A. 2010 Supp. 21-3301(c). Under this analysis, criminal solicitation to commit such crime is ranked at nondrug severity level 3.
  - 2010 House Bill 2435 amended conspiracy to commit any of these crimes to off-grid.
- Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three (3) severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for solicitation to commit a nondrug felony shall be a severity level 10.
- Criminal solicitation to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.

## CHAPTER IV: CRIMINAL HISTORY

### Criminal History Rules

The horizontal axis or top of the grid represents the criminal history categories. Nine categories are used to designate prior criminal history. Category A is used to categorize offenders having three (3) or more prior felony convictions designated as person crimes. Category I is used to categorize offenders having either no criminal record or a single conviction or juvenile adjudication for a misdemeanor. The criminal history categories classify an offender's criminal history in a quantitative as well as a qualitative manner. The categories between A and I reflect cumulative criminal history with an emphasis on whether prior convictions were for person crimes or nonperson crimes. Generally, person crimes are weighted more heavily than nonperson crimes. Within limits, prior convictions for person crimes will result in a harsher sentence for the current crime of conviction. See K.S.A. 21-4709.

The criminal history scale is represented in an abbreviated form on the horizontal axis of the nondrug grid and the drug grid. The relative severity of each criminal history category decreases from left to right on the grids, with Criminal History Category A being the most serious classification and Criminal History Category I being the least serious classification.

<b>Criminal History Category</b>	<b>Descriptive Criminal History</b>
A	The offender's criminal history includes three or more adult convictions or juvenile adjudications, in any combination, for person felonies.
B	The offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies.
C	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult convictions or juvenile adjudications for nonperson felonies.
D	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudication for a nonperson felony.
E	The offender's criminal history includes three or more adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
F	The offender's criminal history includes two adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
G	The offender's criminal history includes one adult conviction or juvenile adjudication for a nonperson felony, but no adult conviction or juvenile adjudication for a person felony.
H	The offender's criminal history includes two or more adult convictions or juvenile adjudications for nonperson and/or select misdemeanors, and no more than two adult convictions or juvenile adjudications for person misdemeanors, but no adult conviction or juvenile adjudication for either a person or nonperson felony.
I	The offender's criminal history includes no prior record, or one adult conviction or juvenile adjudication for a person, nonperson, or a select misdemeanor, but no adult conviction or juvenile adjudication for either a person or a nonperson felony.

**Criminal History Categories** are based upon the following types of prior convictions and/or adjudications:

- person felonies;
- nonperson felonies;
- person misdemeanors and comparable municipal ordinance and county resolution violations;
- class A nonperson misdemeanors and comparable municipal ordinance and county resolution violations; and
- class B nonperson select misdemeanors and comparable municipal ordinance and county resolution violations.

The “person” designation refers to crimes that inflict, or could inflict, physical or emotional harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery. The “nonperson” designation refers generally to crimes committed that inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver’s license, perjury, etc. The “select” designation refers to convictions for weapons violations.

All convictions and adjudications, except as otherwise provided, should be included in the offender’s criminal history. Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction. An offender’s **criminal history classification** is determined using the following rules pursuant to K.S.A. 2010 Supp. 21-4710:

- 1) Only verified prior convictions will be considered and scored. K.S.A. 2010 Supp. 21-4710(d)(1)
  - **A prior conviction is** any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, which occurred prior to imposition of sentence in the current case regardless of whether the crime that was the subject of the prior conviction was committed before or after the commission of the current crime of conviction. K.S.A. 2010 Supp. 21-4710(a)
  - The classification of a prior conviction will be made in accordance with the law applicable at the time of the conviction. See K.S.A. 2010 Supp. 21-4710(d)(9) and 21-4723.
  - Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately. K.S.A. 2010 Supp. 21-4710(c)
- 2) All prior adult felony convictions, including expungements, will be considered and scored. K.S.A. 2010 Supp. 21-4710(d)(2)
- 3) There will be no decay factor applicable to adult convictions. K.S.A. 2010 Supp. 21-4710(d)(3)
- 4) All person misdemeanor convictions, class A nonperson misdemeanor convictions, class B select nonperson misdemeanors, and comparable municipal ordinance and county resolution violations shall be considered and scored. K.S.A. 2010 Supp. 21-4710(d)(7)

- Convictions for “comparable municipal ordinance and county resolution violations” may only be scored for criminal history purposes for crimes committed on or after July 1, 1994, when K.S.A. 1993 Supp. 21-4710(d)(7) was amended to specifically allow for those convictions to be counted for criminal history purposes. See *State v. Dunn*, 21 Kan. App. 2d 359, 900 P.2d 245 (1995).
- 5) Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2010 Supp. 21-4710(d)(8)
  - 6) Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction. K.S.A. 2010 Supp. 21-4710(d)(9)
  - 7) Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2010 Supp. 21-4710(d)(10)
  - 8) If prior convictions of any crime operate to enhance the severity level for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, those prior convictions may not be counted in the offender’s criminal history. Unless otherwise provided, all other prior convictions will be considered and scored. Penalty enhancements, as identified in *State v. Gilley*, 290 Kan 31 (2010) may be counted in an offender’s criminal history for crimes committed on or after April 18, 2010. See K.S.A. 2010 Supp. 21-4710(d)(11). A conviction that creates need for registration as a sex offender cannot be counted in determining criminal history score. *State v. Potteroff*, 32 Kan. App. 2d 1161 (2004).

### **Juvenile Adjudications**

Except as otherwise provided, a juvenile adjudication which would have been a nonperson class D or class E felony if committed before July 1, 1993, or a nondrug level 6, 7, 8, 9 or 10, or drug level 4, nonperson felony if committed on or after July 1, 1993, or a misdemeanor if committed by an adult, will decay if the current crime of conviction is committed after the offender reaches the age of 25. K.S.A. 2010 Supp. 21-4710(d)(4)

For convictions of crimes committed before July 1, 1993, a juvenile adjudication that would constitute a class A, B, or C felony, if committed by an adult, will not decay. For convictions of crimes committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1, 2, 3, 4, or 5 felony, or a drug severity level 1, 2, or 3 felony, if committed by an adult, will not decay. K.S.A. 2010 Supp. 21-4710(d)(5). All juvenile adjudications that would constitute a person felony will not decay. K.S.A. 2010 Supp. 21-4710(d)(6)

### **Diversions**

Diversions are not “convictions” and are therefore not included in criminal history, with the exception of the felony DUI and the Involuntary Manslaughter provisions.

- The felony DUI exception provides that, for the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under the DUI provisions, a “conviction” includes entering into a diversion agreement in lieu of further criminal proceedings on a DUI violation. See K.S.A. 2010 Supp 8-1567(m).
- On or after July 1, 1996, if the current crime of conviction is for a violation of K.S.A. 21-3442, Involuntary Manslaughter while driving under the influence of drugs or alcohol, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a DUI violation shall count as one person felony for criminal history purposes. K.S.A. 2005 Supp. 21-4711(c)(2)

### **Information Not Relevant to Criminal History**

The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do **not** include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.
- **Adults:** Do **not** include traffic infractions, diversions, contacts with law enforcement, or arrests not resulting in conviction.

### **Special Applications in Determining Criminal History K.S.A. 21-4711**

The following special rules are applicable to the determination of the offender's criminal history category.

#### **Person Misdemeanors**

Every three prior adult convictions or juvenile adjudications of class A and class B person misdemeanors in the offender’s criminal history, or any combination thereof, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 21-4711(a). Convictions or adjudications for misdemeanor person crimes may place an offender in a higher criminal history category classification. For example, an offender who has five misdemeanor batteries will fall into criminal history category D, which reflects one prior person felony conviction, rather than criminal history category H, which reflects multiple misdemeanor convictions.

In addition, every three prior adult convictions or adjudications of misdemeanor assault, as defined in K.S.A. 21-3408, that occurred within a period of three years commencing immediately prior to the date of conviction for the current crime, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 21-4711(a)

#### **Select Class B Nonperson Misdemeanors**

A prior conviction for a violation of: subsection (a)(1) of K.S.A. 2010 Supp. 21-4204, criminal possession of firearms by a person who is both addicted to and an unlawful user of a controlled substance; subsection (a)(5) of K.S.A. 2010 Supp. 21-4204, possession of a firearm on school

grounds; or K.S.A. 2010 Supp. 21-4218, possession of a firearm on the grounds of or in the state capitol building, shall be scored as a select class B nonperson misdemeanor conviction or adjudication and shall not be scored as a person misdemeanor for criminal history purposes. K.S.A. 21-4711(b)

### **Involuntary Manslaughter and DUI**

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a violation of K.S.A. 2010 Supp. 8-1567, or a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits acts described in K.S.A. 2010 Supp. 8-1567, shall count as one person felony for criminal history purposes. K.S.A. 21-3442 and 21-4711(c)(2)

### **Burglary**

Prior adult convictions and juvenile adjudications for burglary will be scored for criminal history purposes as follows:

- As a prior person felony if the prior conviction or adjudication was classified as a burglary to a dwelling, as described in subsection (a) of K.S.A. 21-3715. K.S.A. 21-4711(d)(1)
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a building other than a dwelling, as described in subsection (b) of K.S.A. 21-3715. K.S.A. 21-4711(d)(2)
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a motor vehicle or other means of conveyance of persons or property, as described in subsection (c) of K.S.A. 21-3715. K.S.A. 21-4711(d)(2)

The facts required to classify prior adult convictions or juvenile adjudications for burglary, must be established by the State by a preponderance of the evidence. See K.S.A. 21-4711(d)

### **Out-of-State Convictions**

Prior out-of-state convictions and juvenile adjudications will also be used to determine the appropriate criminal history category classification. Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 21-4711(e). For example, if a crime is a felony in another state, it will be counted as a felony for criminal history purposes regardless of the classification of the crime under Kansas law.

However, the plain language of K.S.A. 21-4711(e) requires the sentencing court to consider whether Kansas has an offense comparable to the out-of-state crime when determining whether an out-of-state conviction should be classified as a person felony. See *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003); *State v. Hernandez*, 24 Kan. App. 2d 285, 287, 944 P.2d 188, rev. denied 263 Kan. 888 (1997). A comparable offense need not contain elements identical to those of the out-of-state crime, *Vandervort*, 276 Kan. at 179, but must be similar in nature and cover a similar type of criminal conduct. *State v. Schultz*, 22 Kan. App. 2d 60, 62, 911 P.2d 1119 (1996). If Kansas has no comparable offense, the sentencing court must classify the out-of-state conviction as a nonperson felony. K.S.A. 21-4711(e). Convictions or adjudications occurring within the federal system, other

state systems, the District of Columbia, foreign, tribal, or military courts are considered out-of-state convictions or adjudications. K.S.A. 21-4711(e)

While both California's offense of DUI causing bodily injury, Cal. Vehicle Code § 23153(b) (West 2000), and Kansas' aggravated battery statute, K.S.A. 21-3414, contain 2 provisions regarding bodily injury, the offenses do not cover similar types of conduct and are not comparable offenses. California's offense of DUI causing bodily injury, unlike Kansas' aggravated battery statute, includes a specific causation requirement, *i.e.*, that the defendant drive while legally intoxicated and concurrently neglect to perform a duty required by law, which failure results in injury to another person. Further, the Kansas aggravated battery statute, unlike California's offense of DUI causing bodily injury, requires reckless or intentional conduct. *State v. Barajas*, 43 Kan. App. 2d No. 3 639 (2010).

The facts required to classify out-of-state adult convictions and juvenile adjudications such that they are considered in the determination of the offender's criminal history score must be established by the State by a preponderance of the evidence. K.S.A. 21-4711(e)

When military convictions are at issue, "a specification is the allegation of a distinct offense in support of the general charge, and is comparable to a count in a civilian indictment." *Hunsaker v. Ridgely*, 85 F. Supp. 757,758 (S.D.Me. 1949). Cited in *State v. Swilley*, 25 Kan. App. 2d 492 (1998).

The Legislature intended the sentencing court to compare a prior conviction to the most comparable Kansas offense to make a felony or misdemeanor determination when such conviction occurred in a jurisdiction that does not distinguish between felonies and misdemeanors, such as a military proceeding. *State v Hernandez* 24 Kan. App. 2d 285, 286-289, 944 P.2d 188, 192-193 (Kan. App.,1997)

### **Juvenile Records**

Subject to the decay rules in K.S.A. 2010 Supp. 21-4710(d)(4), (d)(5), and (d)(6), prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history classification. Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. K.S.A. 21-4711(f)

The parties are entitled access to the juvenile files and records of the offender in order to discover or verify criminal history. K.S.A. 22-3212(i)

### **Anticipatory Crimes**

A prior conviction for an attempt, conspiracy, or solicitation to commit a crime will be treated as a person or nonperson crime in accordance with the designation of the underlying crime. K.S.A. 21-4711(g)

### **Drug Crimes**

Drug crimes are designated as nonperson crimes for criminal history scoring. K.S.A. 21-4711(h)



## **Proof of Criminal History**

Unless disputed by the offender, the criminal history worksheet serves as adequate verification of the offender's criminal history. If the offender disputes any aspect of the criminal history worksheet portion of the presentence investigation report as prepared by the field services officer, the offender shall immediately notify the district attorney and the court with a written notice specifying the exact nature of the alleged error. The State will then have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part, or parts, of the criminal history. The sentencing judge must allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence. If the offender later challenges such offender's criminal history, which has been previously established, the burden of proof shall shift to the offender to prove such offender's criminal history by a preponderance of evidence. K.S.A. 2010 Supp. 21-4715

## CHAPTER V: PRESENTENCE INVESTIGATION REPORTS

### Requirements

The sentencing court is required to order a Presentence Investigation Report (PSI) to be prepared by a court services officer as soon as possible after every felony conviction involving crimes committed on or after July 1, 1993, including all unclassified felonies. K.S.A. 2010 Supp. 21-4714(a). The KSGA establishes a uniform format for the PSI in all felony cases. This format must be used to provide consistency statewide. The PSI includes a face sheet, a Criminal History Worksheet, and limited topic sections covering the current offense: official version, defendant's version, victim(s) statement(s), drug, alcohol, and psychological evaluations of the defendant, restitution amounts, and the field services officer's recommendations regarding conditions of probation where appropriate. See K.S.A. 2010 Supp. 21-4714. A copy of the PSI, including the Criminal History Worksheet, and the Journal Entry of Judgment, all attached together, must be sent to the Kansas Sentencing Commission for each felony case within thirty days after sentencing. K.S.A. 22-3439(a)

Each PSI prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1993 **shall be limited to** the following information:

1. A summary of the factual circumstances of the crime or crimes of conviction.
2. If the defendant desires to provide one, a summary of the defendant's version of the crime.
3. When there is an identifiable victim, a victim report. To the extent possible, the report shall include a complete listing of restitution for damages suffered by the victim.
4. An appropriate classification of each crime of conviction on the crime severity scale.
5. A listing of prior adult convictions or juvenile adjudications for felony or misdemeanor crimes or violations of county resolutions or city ordinances comparable to any misdemeanor defined by state law. Such listing shall include an assessment of the appropriate classification of the criminal history on the criminal history scale, the source of information regarding each listed prior conviction and copies of any available source of journal entries or other documents through which the listed convictions may be verified, including any prior criminal history worksheets.
  - The following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.
    - **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.
    - **Adults:** Do not include traffic infractions, diversions contacts with law enforcement, or arrests not resulting in conviction.
6. A proposed grid block classification for each crime, or crimes of conviction and the presumptive sentence for each crime, or crimes of conviction.

7. If the proposed grid block classification is a grid block that presumes imprisonment, the presumptive prison term range and the presumptive duration of postrelease supervision as it relates to the crime severity.
8. If the proposed grid block classification does not presume prison, the presumptive prison term range and the presumptive duration of the nonprison sanction as it relates to the crime severity scale and the court services officer's professional assessment as to recommendations for conditions to be included as part of the nonprison sanction.
9. For defendants who are being sentenced for a conviction of a felony violation of K.S.A. 2010 Supp. 21-36a06(a) or (b) (formerly K.S.A. 65-4160 or 65-4162), and meet the requirements of K.S.A. 2010 Supp. 21-4729 (2003 Senate Bill 123), the drug abuse assessment package as provided in K.S.A. 2010 Supp. 21-4729.

The presentence investigation report will become part of the court record and is accessible to the public, except that the official version, defendant's version, victim's statement, any psychological reports, drug and alcohol reports and assessments shall be accessible only to the parties, the sentencing judge, the department of corrections, and if requested, the Kansas Sentencing Commission. If the offender is committed to the custody of the secretary of corrections, the report shall be sent to the secretary and the warden of the state correctional institution to which the defendant is conveyed in accordance with K.S.A. 2010 Supp. 75-5220. K.S.A. 2010 Supp. 21-4714(c)

The criminal history worksheet will not substitute as a presentence investigation report. K.S.A. 2010 Supp. 21-4714(d)

The presentence investigation report will not include optional report components, which would be subject to the discretion of the sentencing court in each district except for psychological reports and drug and alcohol reports. K.S.A. 2010 Supp. 21-4714(e)

The sentencing court may take judicial notice in a subsequent felony proceeding of an earlier criminal history worksheet included in a presentence investigation report prepared for a prior sentencing of the defendant for a felony committed on or after July 1, 1993, as verification of the criminal history reflected on the worksheet. K.S.A. 2010 Supp. 21-4714(f). See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

All presentence investigation reports in any case in which the defendant has been convicted of a felony shall be on a form approved by the Kansas Sentencing Commission. K.S.A. 2010 Supp. 21-4714(g)

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form along with the instructions for completing the form are contained in Appendix A of this Manual.

## CHAPTER VI: SENTENCING

### Sentencing Range

Each grid block states the presumptive sentencing range, in months, for an offender whose crime of conviction and criminal history place such offender in that grid block. The middle number in the grid block is the “standard” number of months, the upper number in the grid block is the “aggravated” number of months, and the lower number in the grid block is the “mitigated” number of months. If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. See K.S.A. 2010 Supp. 21-4704

### Sentencing Options

The sentencing court may impose any sentence within the presumptive sentencing range. The sentencing court should select the midpoint or standard term of months in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure.

A sentence to any term, including an aggravated term, within the range in a Kansas sentencing guideline presumptive grid box is constitutional. Because a sentence that falls within a grid box is a presumptive sentence, appellate courts lack jurisdiction to consider a challenge to such sentence under K.S.A. 21-4721(c). Appellate courts lack jurisdiction even if the sentence is to the longest term in the presumptive grid box for a defendant’s convictions. *State v. Johnson*, 286 Kan. 824 (2008).

While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may depart from the presumptive sentence based upon substantial and compelling reasons. See K.S.A. 2010 Supp. 21-4704 and K.S.A. 21-4716. The sentencing court may increase the sentence up to double the duration within the grid block, lower the duration with some limitations (crimes of extreme sexual violence), or impose a dispositional departure when aggravating or mitigating circumstances exist which are substantial and compelling. See K.S.A. 2010 Supp. 21-4717(a), 21-4719(a) and (c)(2), and K.S.A. 21-4716(a).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. However, K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were both amended to correct the upward durational departure problem arising from *Gould*, effective June 6, 2002. A bifurcated jury procedure is now provided to allow the jury to determine any aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. K.S.A. 21-4716(b)

### Authorized Dispositions (K.S.A. 2010 Supp. 21-4603d)

Whenever a person has been convicted of a crime, the sentencing court has several sentencing options available that may be imposed either alone or in combination. The court may:

- Commit the defendant to the custody of the Secretary of Corrections if the current crime is a felony and the sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment;
- Commit the defendant to jail for the term provided by law if confinement is for a misdemeanor or a nongrid felony;
- Impose fines applicable to the offense that may be paid in installments if authorized by the court;
- Release the defendant on probation, under the supervision of a court services officer, if the defendant's crime and criminal history place such defendant in a presumptive nonprison category or, through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include the imposition of a jail term of not more than 60 days;
- Assign the defendant to a community correctional services program pursuant to K.S.A. 2010 Supp. 75-5291, or through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include full or partial restitution;
- \*Assign to a conservation camp for a period not to exceed 6 months as a condition of the probation followed by a 6 month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program;
- Assign the defendant to house arrest pursuant to K.S.A. 2010 Supp. 21-4603b;
- Order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (3) of K.S.A. 2010 Supp. 21-4502;
- Order the defendant to repay the amount of any reward paid to aid in defendant's apprehension, any costs and expenses incurred by law enforcement to recapture defendant due to defendant's crime of escape, expenses incurred by firefighting agencies due to defendant's crime of arson, any public funds used by law enforcement to purchase controlled substances from the defendant during the investigation, any medical costs and expenses incurred by law enforcement;
- Order the defendant to pay the administrative fee authorized by K.S.A. 22-4529 unless waived by the court;
- Order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20-369;
- Order the defendant to a work release program, outside the control of the Department of Corrections, if the defendant is convicted of a felony, under K.S.A. 2010 Supp. 21-4704(i), or a misdemeanor;

- Order the defendant to pay restitution, including but not limited to, damages or loss caused by the defendant’s crime unless the court finds a restitution plan unworkable due to compelling circumstances and states such on the record;
- Order the defendant to submit to and complete an alcohol and drug evaluation and pay a fee for such evaluation when required by subsection (4) of K.S.A. 2010 Supp. 21-4502;
- Order the defendant to reimburse the county general fund for expenditures by the county to provide counsel and other defense services to the defendant, after any order for restitution has been paid in full;
- Order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigent’s defense services to provide counsel and other defense services to the defendant.
- Decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty pursuant to any other Kansas statute.

\*This option is included in statute, but is unavailable.

### **Fines**

Felony and misdemeanor fines are as follows (K.S.A. 21-4503a):

Off-grid and drug severity level 1	≤ \$500,000
Nondrug severity level 1 through 5 and drug severity level 2 and 3	≤ \$300,000
Nondrug severity level 6 through 10 and drug severity level 4	≤ \$100,000
Class A misdemeanor	≤ \$2,500
Class B misdemeanor	≤ \$1,000
Class C misdemeanor	≤ \$500
Traffic infraction	≤ \$500
Cigarette or Tobacco infraction	\$25

As an alternative to any of the above fines, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender. K.S.A. 21-4503a(c)

A civil penalty of up to \$25,000 may be imposed for each violation of the Kansas Securities Act. If the violation is committed against an elderly or disabled person, in addition to any civil penalty otherwise provided by law, the administrator may impose a penalty not to exceed \$15,000 for each violation. The total penalty against a person shall not exceed \$1,000,000. See K.S.A. 17-12a412(c)(3), 17-12a603(b)(2)(C) and 17-12a604(b)(1).

### **Presumptive Nonprison**

In a presumptive nonprison case, the sentencing court must pronounce the duration of the nonprison sanction and must pronounce the underlying prison sentence. See K.S.A. 2010 Supp. 21-4704(e)(3), 21-4705(c)(3) and K.S.A. 21-4706(b).

## Duration of Probation (Court Services or Community Corrections)

For all crimes committed on or after July 1, 1993, the duration of probation in felony cases sentenced for the following severity levels is as follows (K.S.A. 2010 Supp. 21-4611(c)):

Severity Level	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	36	24	24	≤18	≤12	≤12
Drug	36	36	≤18	* ≤12	N/A	N/A	N/A	N/A	N/A	N/A

\* Except for SB 123 sentences, where the standard probation term is 18 months. K.S.A. 2010 21-4611(c)(4)

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7 and on the drug grid for severity levels 1 and 2. With three exceptions, the total period in all cases shall not exceed 60 months or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2010 Supp. 21-4611(c)(6). The first exception is that the sentencing court may modify or extend the period of supervision, pursuant to a modification hearing and a judicial finding of necessity, up to a maximum of five (5) years or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2010 Supp. 21-4611(c)(8). Second, if the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. K.S.A. 2010 Supp. 21-4611(a) and (c)(7). Third, if the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid. K.S.A. 2010 Supp. 21-4611(c)(7)

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid and severity levels 3 and 4 on the drug grid. For crimes at these severity levels, the sentencing court may impose a longer period of probation if the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4) of K.S.A. 2010 Supp. 21-4611. K.S.A. 2010 Supp. 21-4611(c)(5)

## Conditions of Probation

Court services and community corrections officers may recommend conditions of probation for offenders ordered to community placement. The maximum amount of time an offender can be incarcerated in a county jail as a condition of probation in a felony case is 60 days (with an additional maximum of 60 days in jail as a condition of a probation revocation), except for convictions for felony driving under the influence. K.S.A. 2010 Supp. 21-4603d(a)(3)

## Target Population for Community Corrections (2000 Senate Bill 323)

K.S.A. 2010 Supp. 75-5291(a)(2) defines the target population of offenders for placement in Community Corrections programs. This target population consists of adult offenders convicted of felony offenses who meet one of the following criteria:

1. Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;

2. Offenders whose sentence falls within nondrug grid blocks 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;
3. Offenders whose severity level and criminal history classification designate a presumptive prison sentence on either grid but receive a nonprison sentence as the result of a dispositional departure;
4. Offenders convicted of a sex offense as defined in K.S.A. 2010 Supp. 22-4902, classified as a severity level 7 or higher, and who receive a nonprison sentence, regardless of the manner in which the sentence is imposed;
5. Offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established as provided in K.S.A. 2010 Supp. 22-3716 prior to revocation to a state correctional facility;
6. Offenders who are determined to be “high risk or needs, or both” by the use of a statewide, mandatory, standardized risk assessment tool or instrument approved by KSC (effective January 1, 2011);
7. Offenders who are placed in community correctional services programs as a condition of supervision following the successful completion of a conservation camp program;
8. Offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 2010 Supp. 21-4729 (2003 Senate Bill 123).

Juvenile offenders may be placed in community corrections programs if the local community corrections advisory board approves. However, grants from the community corrections fund administered by the Secretary of Corrections cannot be used for this service. K.S.A. 2010 Supp. 75-5291(a)(4). A public safety provision also allows direct placement to prison of offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established, as provided in K.S.A. 2010 Supp. 22-3716, if the sentencing court sets forth with particularity why placement in community corrections would jeopardize public safety or would not be in the best interest of the offender. K.S.A. 2010 Supp. 75-5291(a)(5)

### **Target Population for Treatment (2003 Senate Bill 123)**

K.S.A. 2010 Supp. 21-4603d(n) provides a nonprison sanction of certified drug abuse treatment under community corrections supervision for a defined target population of offenders. This target population is defined in K.S.A. 2010 Supp. 21-4729 and consists of **adult** offenders convicted of K.S.A. 2010 Supp. 21-36a06(a) or (b) (formerly K.S.A. 65-4160 or 65-4162), who meet one of the following criteria:

1. Offenders whose offense is in the 4-E, 4-F, 4-G, 4-H or 4-I grids blocks of the drug grid and who have no prior conviction(s) of:
  - a. K.S.A. 2010 Supp. 21-36a16 (formerly K.S.A. 65-4142). (Conducting financial transaction involving proceeds derived from the commission of a Chapter 21 drug crime);
  - b. K.S.A. 2010 Supp. 21-36a03 (formerly K.S.A. 65-4159). (Manufacturing of any controlled substance or controlled substance analog);



- c. K.S.A. 2010 Supp. 21-36a05(a)(1) (formerly K.S.A. 65-4161, 65-4163, 65-4164). (Cultivation, distribution or possession with intent to distribute controlled substances or analogs);
  - d. or any similar offense from another jurisdiction; or
2. Offenders whose offense is in the 4-A, 4-B, 4-C, or 4-D grids blocks of the drug grid and who have no prior conviction(s) of the crimes listed in items 1 above, **if** the offender's prior person felony conviction(s) were severity level 8, 9, or 10 or nongrid offenses and the sentencing court finds and sets forth with particularity the reasons for finding that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program. K.S.A. 2010 Supp. 21-4729

Offenders whose offense is classified in the 4-E or 4-F drug grid blocks but do not qualify for the certified drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. This must also be done prior to the revocation of a nonprison sanction for an offender whose offense is classified in the 4-E or 4-F drug grid blocks but does not qualify for the certified drug treatment program. K.S.A. 2010 Supp. 21-4603d(g)

The Secretary of Corrections may also make direct placement to Labette Correctional Conservation Camp for offenders whose offense is classified in the 4-E or 4-F drug grid blocks if those offenders do not otherwise meet the requirements of K.S.A. 2010 Supp. 21-4729. K.S.A. 2010 Supp. 21-4603d(l)

**However, the Kansas Court of Appeals, in *State v. Johnson*, 42 Kan. App. 2d 356 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2010 Supp. 21-4603d(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections. In practice, all the nonprison alternatives provided in K.S.A. 2010 Supp. 21-4603d(g) either never was created or currently no longer exist as viable placement alternatives.**

On or after July 1, 2006, offenders, who are residents of another state and are returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision, or who are not lawfully present in the United States and being detained for deportation, are not eligible for treatment under SB 123 and shall be sentenced as otherwise provided by law. K.S.A. 2010 Supp. 21-4729(h)

If an offender is revoked from the SB 123 program, and sentenced to the underlying prison sentence, the offender shall not be subject to a period of postrelease supervision. The amount of time spent participating in the SB 123 program shall not be credited as service on the underlying prison sentence. K.S.A. 2010 Supp. 21-4603d(n)

## **Presumptive Imprisonment**

In presumptive imprisonment cases, the sentencing court must pronounce the prison sentence, the maximum potential good time reduction to such sentence and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision will not negate the period of postrelease supervision. K.S.A. 2010 Supp. 21-4704(e)(2) and 2010 Supp. 21-4705(c)(2)

### **Good Time**

The prison sentence represents the time an offender actually serves, subject to a maximum reduction of:

- 20% good time for crimes committed on or after July 1, 1993 and prior to April 20, 1995;
- 15% good time for crimes committed on or after April 20, 1995; or,
- 20% good time for crimes of drug severity level 3 or 4 or nondrug severity level 7-10 committed on or after January 1, 2008. K.S.A. 21-4706(a) and 21-4722(a)(2).

Any reduction in the prison sentence due to good time must be added to the postrelease supervision period to be served after the prison sentence is completed. K.S.A. 21-4722(b)

In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision shall not negate the existence of such period of postrelease supervision. K.S.A. 2010 Supp. 21-4704(e)(2)

### **Border Boxes**

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the drug grid, the sentence is presumed imprisonment, but the court may impose an optional nonprison sentence upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and
  - the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or
  - the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2010 Supp. 21-4704(f) and 21-4705(d)

### **Aggravated Habitual Sex Offender**

K.S.A. 2010 Supp. 21-4642(a) provides that the sentence for an aggravated habitual sex offender shall be imprisonment for life without the possibility of parole in the custody of the secretary of corrections. An offender who is sentenced pursuant to this section shall not be eligible for parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence.

An “aggravated habitual sex offender” is defined as a person who, on and after July 1, 2006: (A) has been convicted in this state of a sexually violent crime; and (B) prior to the current conviction, has been convicted on at least two prior conviction events of any sexually violent crime. A “prior conviction event” is defined as one or more felony convictions of a sexually violent crime, occurring on the same day and within a single court. These convictions may result from multiple counts within an information or from more than one information. If a person crosses a county line and commits a felony as part of the same criminal act or acts, such felony, if such person is convicted, shall be considered part of the prior conviction event. K.S.A. 2010 Supp. 21-4642(c). *State v. Trautloff*, 289 Kan. 793 (2009)

However, 2010 House Bill 2435, Sec. 17 amends the definition to a person who, on or after July 1, 2006: (A) has been convicted in this state of a sexually violent crime; and (B) prior to the current conviction of two or more sexually violent crimes.

Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of corrections and the court shall state in the sentencing order of judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole. K.S.A. 2010 Supp. 21-4642(b)

## **Special Sentencing Rules**

### **Public Safety Offenses / Firearms Finding:**

#### **1. Person Felony Committed With a Firearm**

When a firearm is used to commit any person felony, the offender’s sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2010 Supp. 21-4704(h)

#### **2. Aggravated Battery Against a Law Enforcement Officer**

The sentence for the violation of K.S.A. 21-3415 (aggravated battery against a law enforcement officer), if committed prior to July 1, 2006, which places the defendant’s sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2010 Supp. 21-4704(g)

The sentence for an intentional or reckless violation of battery against a law enforcement officer shall be presumptive imprisonment and shall be served consecutively to any other terms imposed.

A law enforcement officer shall include a uniformed or properly identified university campus police, or state, county, or city law enforcement officer, other than a juvenile or adult correctional officer. K.S.A. 2010 Supp. 21-4704(q)

### **3. Aggravated Assault Against a Law Enforcement Officer**

The sentence for the violation of K.S.A. 21-3411 (aggravated assault of a law enforcement officer), which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2010 Supp. 21-4704(g)

### **34. Battery on a Law Enforcement Officer**

A special sentencing rule exists for a violation of K.S.A. 21-3413(a)(2), battery on a law enforcement officer where **bodily injury occurs**. Additionally, the sentence shall be consecutive to any other term or terms of imprisonment imposed. K.S.A. 2010 Supp. 21-4704(q)

### **32/33. Drug Felony Committed with a Firearm**

Special rules were created to enhance the sentence on a drug felony if the trier of fact makes a finding that the offender carried or discharged a firearm during the commission or furtherance of the drug felony. The special rule DOES NOT apply to K.S.A. 2010 Supp. 21-36a06, possession, or 21-36a13, possession or distribution of a simulated controlled substance. The offender's sentence shall be presumptive imprisonment and:

#### **32. Possessing a Firearm**

Results in an additional 6 months imprisonment. K.S.A. 2010 Supp. 21-4705(g)

#### **33. Discharging a Firearm**

Results in an additional 18 months imprisonment. K.S.A. 2010 Supp. 21-4705(g)

### **4. Crime Committed for the Benefit of a Criminal Street Gang**

If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence and such nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2010 Supp. 21-4704(k)

### **11. Extended Jurisdiction Juvenile Imposed**

If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall; (1) impose one or more juvenile sentences under K.S.A. 2010 Supp. 38-2361 and, (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new

offense. *An adult felony Journal Entry of Judgment must be completed for these cases.* K.S.A.2010 Supp. 38-2364(a)

### **35. Aggravated Endangering a Child**

This special rule amends K.S.A. 21-3608a to require the sentence for violation of aggravated endangering of a child, a nondrug severity 9, person felony, to be served consecutively to any other term or terms of imprisonment imposed by the court. The bill clarifies the sentence is not a departure and is not subject to appeal. 2010 House Bill 2435, Sec. 12, amending K.S.A. 2009 Supp. 21-3608a, effective April 29, 2010.

### **36. Ballistic Resistant Material**

This special rule adds 30 months imprisonment to the sentence of any defendant convicted of a felony when the trier of fact finds beyond a reasonable doubt that the defendant wore or used ballistic resistant material during the commission of, attempt to commit, or flight from such felony. The sentence shall be presumptive prison and shall be served consecutively to any other sentence imposed. 2010 House Bill 2435, Sec. 12, amending K.S.A. 2009 Supp. 21-3608a, effective April 29, 2010.

## **Habitual or Repeat Offenses:**

### **5. Persistent Sex Offender**

The sentence for any persistent sex offender (as defined in K.S.A. 2010 Supp. 21-4704(j)) whose current crime of conviction carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. However, the provisions of this subsection shall not apply to any person whose current crime of conviction is a severity level 1 or 2 nondrug felony, unless such current conviction is for the crime of rape (K.S.A. 21-3502) and the offender has at least one prior conviction for rape in this state or a comparable felony from another jurisdiction. K.S.A. 2010 Supp. 21-4704(j)

A prior conviction used to classify a defendant as a persistent sex offender may not again be used to calculate the defendant's criminal history category. K.S.A. 21-4710(d)(11), see also *State v. Taylor*, 27 Kan. App. 2d 62, 998 P.2d 123 (2000), affirmed *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

### **Example**

- An offender's current crime of conviction is sexual exploitation of a child, a severity level 5 person felony. (K.S.A. 21-3516) The offender has one prior conviction of indecent solicitation of a child (K.S.A. 21-3510). The offender's prior conviction will be used to determine the offender's status as a "persistent sex offender" and will not be used in calculating the offender's criminal history category. Therefore, the offender will have a criminal history score of 5-I (sentence doubled) if the offender has no other criminal convictions.
- An offender's current conviction is indecent solicitation of a child, a severity level 6 person felony. (K.S.A. 21-3510). The offender has two prior convictions of indecent solicitation of a child. One prior conviction of indecent solicitation of a child will be used to determine the

offender's status as a "persistent sex offender" and the other conviction will be used in calculating the offender's criminal history score. Therefore, the offender will have a criminal history score of 6-D (sentence doubled) if the offender has no other person/nonperson felony convictions.

## **12. Second or Subsequent Conviction for Manufacture of a Controlled Substance**

The sentence for a second or subsequent conviction for the manufacture of a controlled substance under K.S.A. 2010 Supp. 21-36a03 (formerly K.S.A. 65-4159), is a severity level 1 drug felony and the sentencing court is required to double the presumptive sentence length. However, the sentencing court may reduce the sentence in an amount not to exceed 50 percent of the special sentence length increase if mitigating circumstances exist. Any decision made by the sentencing court regarding the reduction is not considered a departure and is not subject to appeal. K.S.A. 2010 Supp. 21-4705(e)

## **26. Third or Subsequent Conviction for Drug Possession**

The sentence for a third or subsequent felony conviction of K.S.A. 2010 Supp. 21-36a06 (formerly K.S.A. 65-4160 or 65-4162), shall be presumed imprisonment if the third or subsequent felony occurred on or after July 1, 2008. If the conviction occurred prior to July 1, 2008, then the sentence shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section, **if**:

- the defendant has previously completed a certified drug abuse program;
- the defendant has previously been discharged from a certified drug abuse program; or
- the defendant has previously refused to participate in a certified drug abuse program, as provided in K.S.A. 2010 Supp. 75-52,144.

Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2010 Supp. 21-4705(f)

## **13. Residential Burglary with a Prior Residential, Non-Residence, Aggravated Burglary Conviction**

The sentence for the violation of subsection (a) of K.S.A. 21-3715, burglary of a residence, when the offender has a prior conviction for the burglary of a residence or non-residence building (automobile burglary is not included), or an aggravated burglary (K.S.A. 21-3716), shall be presumed imprisonment. K.S.A. 2010 Supp. 21-4704(l)

## **27. Burglary with Two or More Prior Convictions for a Felony Violation of Theft, Burglary or Aggravated Burglary**

The sentence for a violation of K.S.A. 21-3715, burglary, when the offender has any combination of two or more prior convictions of theft, (K.S.A. 21-3701), burglary or aggravated burglary (K.S.A. 21-3716) shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2010 Supp. 21-4704(p)

### **29. Felony Theft with Three or More Prior Convictions for a Felony Violation of Theft, Burglary, or Aggravated Burglary**

The sentence for a violation of K.S.A. 21-3701, theft, when the offender has three or more prior convictions for a felony violation of theft, burglary (K.S.A. 21-3715), or aggravated burglary (K.S.A. 21-3716) shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. K.S.A. 2010 Supp 21-4704(p)

### **30. Substance Abuse Underlying Factor**

The court may make findings that substance abuse is the underlying factor in the commission of crimes under #27 and #29 above and place the offender in an intensive treatment program for at least 4 months if the state substance abuse facility is likely to be more effective than prison in reducing the risk of offender recidivism, serve community safety interests and promote offender reformation; return to court upon successful completion. K.S.A. 2010 Supp. 21-4704(p). While this option is authorized by statute, it has never been funded and is not, therefore, an available option.

### **31. Third or Subsequent Criminal Deprivation of a Motor Vehicle**

The sentence for a third or subsequent violation of criminal deprivation of property that is a motor vehicle pursuant to K.S.A. 2010 Supp. 21-3705(b) shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2010 Supp. 21-4704(n)

### **16. Second Forgery**

The crime of forgery is a severity level 8, nonperson felony on the nondrug grid. The sentence for a felony violation of K.S.A. 21-3710(b)(3) shall be as provided by the specific mandatory sentencing requirements of that statute unless the new conviction places the offender in the criminal history category A or B. In such case, the sentence shall be as for a severity level 8, nonperson felony. K.S.A. 2010 Supp. 21-4704(i)

The specific mandatory sentencing provisions of K.S.A. 21-3710 provide that upon a first conviction for forgery, the offender is to be fined the lesser of the amount of the forged instrument or \$500. For a second conviction of forgery the offender is required to serve at least 30 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$1,000. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 30 or 45 day sentences as provided herein. K.S.A. 21-3710(b)(3)

*State v. Luttig*, 40 Kan. App. 2d 1095 (2009) identified this jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty may not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31 (2010) However, 2010 House Bill 2469, effective April 8, 2010, allows penalty enhancements to be counted in the offender's criminal history score.

## **17. Third or Subsequent Conviction for Forgery**

Upon a third or subsequent conviction of forgery the offender is required to serve at least 45 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$2,500. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 30 or 45 day sentences as provided herein. K.S.A. 21-3710(b)(4) and K.S.A. 2010 Supp. 21-4704(i)

*State v. Luttig*, 40 Kan. App. 2d 1095 (2009) identified this jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty may not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31 (2010). However, 2010 House Bill 2469, effective April 8, 2010, allows penalty enhancements to be counted in the offender's criminal history score.

## **9. Crime Committed While Incarcerated and Serving a Felony Sentence, or While on Probation, Parole, Conditional Release, or Postrelease Supervision for a Felony**

Under any of these conditions, a new sentence shall be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2010 Supp. 21-4608 and the sentencing court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. K.S.A. 2010 Supp. 21-4603d(f)(1) and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001). See also K.S.A. 2010 Supp. 21-4608(e)(2) (serving indeterminate sentence)

## **28. Crime Committed While Incarcerated in a Juvenile Correctional Facility for an Offense Which if Committed by an Adult Would be a Felony**

A special rule pertains to juveniles who commit a new felony while incarcerated in a juvenile correctional facility for a crime which if committed by an adult would be a felony. In such instances, the court shall sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. The conviction shall operate as a full and complete discharge from any obligations, except for an order of restitution, imposed on the offender arising from the offense for which the offender was committed to a juvenile correctional facility. K.S.A. 2010 Supp. 21-4603d(f)(2)

## **10. Crime Committed While the Offender is on Release for a Felony Bond**

When a new felony is committed while the offender is on release pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated, or similar provisions of the laws of another jurisdiction, a new sentence may be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2010 Supp. 21-4608 and the sentencing court may sentence an offender to imprisonment for the new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. K.S.A. 2010 Supp. 21-4603d(f)(3). However, K.S.A. 21-4608(d) indicates that any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released. Because of this conflict, a court imposing a



consecutive sentence should clarify that consecutive sentencing was done in the exercise of discretion, not because it was mandated.

## **Nongrid Offenses:**

### **6. Felony DUI**

Felony driving under the influence as defined in K.S.A. 2010 Supp. 8-1567 is a nongrid crime with no guidelines severity level or other connection to the KSGA. Instead, the specific sentencing provisions of the DUI statute determine the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2010 Supp. 21-4704(i). However, for a fourth or subsequent DUI, an offender is required to serve a mandatory period of one year postrelease supervision under the custody of the secretary of corrections. Therefore, it is possible that an offender may serve time in a state correctional facility if the offender violates conditions of this postrelease supervision. K.S.A. 2010 Supp. 8-1567(g)

### **8. Felony Domestic Battery**

Felony domestic battery, as defined in K.S.A. 2010 Supp. 21-3412a, is a nongrid person felony with no guidelines severity level or other connection to the KSGA. The specific sentencing provision of the domestic battery statute determines the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2010 Supp. 21-4704(i)

### **21. Animal Cruelty**

Felony animal cruelty, as defined in K.S.A. 2010 Supp. 21-4310(a)(1) and (d)(2) (second or subsequent conviction of a violation of (a)(2), (a)(3), (a)(4), or (a)(5)), is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2010 Supp. 21-4310(d)(1) or (d)(2). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2010 Supp. 21-4310 and 21-4704(i)

Felony animal cruelty involving a working or assistance dog, as defined in K.S.A. 21-4318(a), is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty of a working or assistance dog shall be as provided by the specific mandatory sentencing requirements of K.S.A. 21-4318(c). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2010 Supp. 21-4704(i)

## **Finance Offenses:**

### **25. Fraudulent Insurance Act**

A fraudulent insurance act shall constitute a severity level 6, nonperson felony if the amount involved is \$25,000 or more; a severity level 7, nonperson felony if the amount involved is at least \$5,000 but less than \$25,000; a severity level 8, nonperson felony if the amount involved is at least \$1,000 but less than \$5,000; and a class C nonperson misdemeanor if the amount is less than \$1,000. Any combination of fraudulent acts as defined in subsection (a) occurring within a period of six consecutive months which involves \$25,000 or more shall have a presumptive prison sentence of

imprisonment regardless of its location on the sentencing grid block. K.S.A. 2010 Supp. 40-2,118(e)

### **15. Kansas Securities Act**

Any violation of the Kansas Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of \$25,000 or more, shall have a presumptive sentence of imprisonment regardless of the offender's presumptive sentence as located on the nondrug grid. K.S.A 2010 Supp. 17-12a508(a)(5)

### **19. Mortgage Business Act**

Any person who willfully or knowingly violates any of the provisions of this act, any rule, and regulation adopted or order issued under this act commits a severity level 7 nonperson felony. A second or subsequent conviction of this act, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2010 Supp. 9-2203(d)

### **20. Loan Brokers Act**

Any person who willfully violates any provision of this act or knowingly violates any cease and desist order issued under this act commits a severity level 7, nonperson felony. Any violation of this act committed on or after July 1, 1993 and resulting in a loss of \$25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 50-1013(a)

## **Special Sentencing Considerations**

### **Correctional Conservation Camps**

The sentencing court shall consider placement of an offender in the Labette Correctional Conservation Camp, conservation camps established by the Secretary of Corrections pursuant to K.S.A. 2010 Supp. 75-52,127, or a community intermediate sanction center in the following instances:

- Prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guidelines grid;
- Prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, or in grid blocks 3-E, 3-F, 3-G, 3-H, or 3-I of the sentencing guidelines grid for drug crimes;
- Prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2010 Supp. 21-4729;
- Prior to revocation of a nonprison sanction of a defendant whose offense is classified grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2010 Supp. 21-4729; or

- Prior to revocation of a nonprison sanction of a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-E, 3-F, 3-G, 3-H, or 3-I, of the sentencing guidelines grid for drug crimes.

A defendant shall not be sentenced to imprisonment if space is available in a conservation camp or a community intermediate sanction center and the defendant meets all the conservation camp's or a community intermediate sanction center's placement criteria, unless the sentencing court states on the record the reasons for not placing the offender in a conservation camp or a community intermediate sanction center. K.S.A. 2010 Supp. 21-4603d(g)

**However, the Kansas Court of Appeals, in *State v. Johnson*, 42 Kan. App. 2d 356 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2010 Supp. 21-4603d(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections. In practice, all the nonprison alternatives provided in K.S.A. 2010 Supp. 21-4603d(g) either never was created or currently no longer exist as viable placement alternatives.**

#### **Revocation of Nonprison Sanction of Certified Drug Abuse Treatment** **(K.S.A. 2010 Supp. 21-4729)**

If the offender fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding or is convicted of a new felony, the offender shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 2010 Supp. 21-4705. K.S.A. 2010 Supp. 21-4603d(n) and 21-4729(f). In addition, K.S.A. 21-4610 grants the district court broad discretion concerning the conditions and revocation of probation. Therefore, condition violations may also result in discharge from the mandatory drug abuse treatment. See *State v. Gumfory*, 281 Kan. 1168, (2006) (holding that K.S.A. 21-4729(f)(1)(A) and (B) do not set forth exclusive grounds for revocation of an SB 123 sentence.) If the offender is revoked, upon completion of the underlying prison sentence, the offender shall not be subject to a period of postrelease supervision and the amount of time spent participating in such program shall not be credited as time against the underlying prison sentence. K.S.A. 2010 Supp. 21-4603d(n) and 21-4705

#### **Multiple Convictions; Sentences on Same Date**

When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively at the discretion of the sentencing court. If the sentencing court is silent as to whether multiple sentences are to run consecutively or concurrently, the sentences shall run concurrently except as provided by K.S.A. 2010 Supp. 21-4608(c), (d) and (e). *The sentencing court must state on the record whether the sentence is to be served concurrently or consecutively.* K.S.A. 2010 Supp. 21-4608 and K.S.A. 21-4720(b)

## **Limitations on Concurrent and Consecutive Sentences for Multiple Convictions**

Consecutive sentencing is mandatory in certain circumstances if it will not result in a manifest injustice. K.S.A. 21-4720(a). Consecutive sentencing is generally required when imposing:

- A sentence for a felony committed while the offender was on probation, assigned to a community corrections services program, on parole, conditional release, postrelease supervision, or serving time for a felony K.S.A. 2010 Supp. 21-4608;
- A sentence for a felony committed while the offender was on felony bond K.S.A. 2010 Supp. 21-4608;
- A sentence for an intentional or reckless violation of battery against a law enforcement officer K.S.A. 2010 Supp. 21-4704(q);
- A sentence for a felony committed while the offender was incarcerated and serving a sentence for a felony in any place of incarceration. K.S.A. 2010 Supp. 21-4608(c), (d) and (e).
  - If an offender is sentenced to prison for a crime committed on or after July 1, 1993, while the offender was imprisoned for an offense committed prior to July 1, 1993, and the offender is not eligible for the retroactive application of the KSGA, the new sentence begins when the offender is paroled or reaches the conditional release date on the old sentence, whichever is earlier.
  - If the offender was past the offender's conditional release date at the time the new offense was committed, the new sentence begins when the offender is ordered released by the Kansas Parole Board or reaches the maximum sentence date on the old sentence, whichever is earlier.
  - The new sentence is then served as otherwise provided by law. The period of postrelease supervision will be based on the new sentence. K.S.A. 2010 Supp. 21-4608(e)(2)

When consecutive sentences are imposed for multiple convictions in one case, stemming from multiple counts brought in one charging instrument, the total prison sentence imposed cannot exceed twice the base sentence. It is not necessary to reduce the duration of any of the non-base sentences in order to satisfy this rule because the limit applies only to the total controlling sentence. K.S.A. 21-4720(b)(4). This means that the sentencing court is not required to shorten the length of any of the individual non-base sentences given to an offender, as long as the court orders that the total sentence given to the offender is adjusted so that it does not exceed twice the base sentence. The term "base sentence" applies to the base sentence actually imposed not to the maximum base sentence that could have been imposed according to the sentencing grid. *State v. Snow*, 282 Kan. 323, 341-42 (2006).

If sentences for off-grid and on-grid (sentencing guidelines) convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease period will be based on the off-grid crime. K.S.A. 21-4720(b)(2)

When an offender is sentenced for multiple convictions of crimes carrying both presumptive prison and nonprison sentences, if the sentence for the primary crime is prison, the entire imprisonment term of consecutive sentences, will be served in prison. K.S.A. 21-4720(b)(6)

The postrelease supervision period will be the longest supervision period imposed for any of the multiple convictions, including the lifetime parole in conjunction with a life sentence imposed for

an off-grid crime. Even in the case of consecutive prison sentences, postrelease supervision periods will not be aggregated. In addition, in cases of multiple nonprison sentences, even if the underlying prison sentences are ordered to run consecutively, the nonprison terms shall not be aggregated or served consecutively. However, if the nonprison term is revoked the offender will serve the prison terms consecutively. K.S.A. 21-4720(b)(4), (b)(7) and (b)(8)

### **Determining the Base Sentence and Primary Crime**

In all sentencing cases involving multiple convictions, the sentencing court must establish the base sentence for the primary crime. The primary crime is determined pursuant to K.S.A. 21-4720(b)(2) as follows:

- The primary crime is generally the crime with the highest severity ranking. However, an off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences. The primary on-grid offense shall be sentenced with full criminal history and forms the base sentence for the guidelines sentence. The off-grid sentence remains primary overall, but is added to the guidelines sentence or concurrent to the guidelines sentence, as determined by the court.
- In situations where more than one crime is classified in the same category, the sentencing judge must designate which crime will serve as the primary crime.
  - A presumptive imprisonment crime is primary over a presumptive nonimprisonment crime. Therefore, in the instance of sentencing with the drug grid and nondrug grid, one crime having a presumption of imprisonment and one having a presumption of probation, the crime which presumes imprisonment shall be the primary crime.
  - When the offender is convicted of crimes sentenced on nondrug and drug grids, the primary crime is the one that carries the longest prison term. Therefore, in sentencing with the drug grid and nondrug, both crimes having the same presumption of probation or imprisonment, the primary crime shall be the crime with the longest sentence term.

The base sentence is where the severity level of the primary crime and the criminal history score intersect on the appropriate guidelines grid and shall be the presumed sentence in months. The base sentence will have the full criminal history score assigned. However, non-base sentences will not have criminal history scores applied and shall be calculated in the criminal history I column of the grid according to the severity level of the crime. K.S.A. 21-4720(b)(3) and (b)(5)

### **Departure Factors**

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Any party filing a motion to depart must state in its motion the type of departure sought and the reasons relied upon. Both the prosecution and defense shall have a reasonable time to prepare for a departure hearing, and the sentencing court shall transmit to both parties, copies of the presentence investigation report prior to the hearing. The State must provide notice of a departure hearing to any victim or the victim's family, and the sentencing court shall review the victim impact statement. Parties may brief the sentencing court in writing and make oral arguments to the court at the hearing. K.S.A. 21-4718(a)(1) and (a)(3)

Upward durational departure sentencing was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face.” In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to provide for a procedure that allows the jury to determine all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. These amendments became effective upon publication on June 6, 2002.

Facts that would increase the penalty beyond the statutory maximum must now be submitted to a jury. K.S.A. 21-4716(b). A county or district attorney seeking an upward durational departure sentence must file such motion not less than 30 days prior to the date of trial unless the trial is to take place in less than 30 days then such motion shall be filed within 5 days from the date of the arraignment. K.S.A. 21-4718(b)(1). The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented to the jury during the trial of the matter or in a jury proceeding following the trial. K.S.A. 21-4718(b)(2). The determination of the aggravating factors shall be by a unanimous jury vote, on a special jury verdict form and based on the reasonable doubt standard. K.S.A. 21-4718(b)(4) and (b)(7)

At the conclusion of the departure hearing or within 20 days thereafter, the sentencing court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties, and shall enter an appropriate order. K.S.A. 21-4718(a)(2). Whenever the sentencing court departs from the presumptive guidelines sentence, the court must make findings of fact as to the reasons for departure regardless of whether a hearing is requested. K.S.A. 21-4718(a)(4). If a factual aspect of the current crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, that factual aspect may be used as an aggravating or mitigating factor to justify a departure from the presumptive sentence only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime. K.S.A. 21-4716(c)(3)

In determining aggravating or mitigating circumstances, the sentencing court shall consider:

- any evidence received during the proceeding, including the victim impact statement;
- the presentence investigation report;
- written briefs and oral arguments of either the State or counsel for the defendant; and
- any other evidence relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable. K.S.A. 21-4716(d)(1)-(4)

### **Mitigating Factors - K.S.A. 21-4716 (c)(1)(A) - (E) and (e)**

The following nonexclusive list of statutorily enumerated factors may be considered in determining whether substantial and compelling reasons for a downward dispositional departure exist:

- A. The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction;
- B. The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense;

- C. The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor;
- D. The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse; or
- E. The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense. K.S.A. 21-4716(c)(1)(A) - (E)

Subsection (e) provides additional mitigating factors to be considered. It provides that, "Upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist. In considering this mitigating factor, the court may consider the following:

- the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the prosecutor's evaluation of the assistance rendered;
- the truthfulness, completeness and reliability of any information or testimony provided by the defendant;
- the nature and extend of the defendant's assistance;
- any injury suffered, or any danger or risk of injury to the defendant or the defendant's family resulting from such assistance; and
- the timeliness of the defendant's assistance."

#### **Aggravating Factors - K.S.A. 21-4716(c)(2)(A) - (H)**

The following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

- A. The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity that was known or should have been known to the offender;
- B. The defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense;
- C. The offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim, whether or not the defendant's belief or perception was correct;
- D. The offense involved a fiduciary relationship which existed between the defendant and the victim;
- E. The defendant, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation to commit any person felony regardless of whether the defendant knew the age of the individual was under 16 years of age;

- F. The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender as defined by this section;
- G. The defendant was incarcerated at the time the crime was committed; or
- H. The crime involved two or more participants in the criminal conduct, and the defendant played a major role in the crime as the organizer, leader, recruiter, manager, or supervisor.

**Additional Aggravating Factors for Drug Grid - K.S.A. 2010 Supp. 21-4717(a)(1) – (4)**

In addition to the factors listed above, the following aggravating factors which apply to drug felonies committed on or after July 1, 1993, may be considered in determining whether substantial and compelling reasons for departure exist:

1. The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. Two or more of the following nonexclusive factors constitute evidence of major organized drug manufacture, production, cultivation or delivery activity:
  - a. The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity;
  - b. The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity;
  - c. The presence of drug transaction records or customer lists that indicate a drug sale activity of major size;
  - d. The presence of manufacturing or distribution materials such as, but not limited to, drug recipes, precursor chemicals, laboratory equipment, lighting, irrigation systems, ventilation, power-generation, scales or packaging material;
  - e. Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense;
  - f. Possession of large amounts of illegal drugs, or substantial quantities of controlled substances;
  - g. A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation, or delivery of controlled substances.
2. The offender possessed illegal drugs:
  - a. With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
  - b. With the intent to sell, deliver or distribute, or which were sold, or offered for sale in the immediate presence of a person under 18 years of age;
3. The offender, 18 or more years of age, employs, hires, uses, persuades, induces, entices, coerces any individual under 16 years of age to violate or assist in avoiding detection or apprehension for violation of any provision of the uniform controlled substances act, or any attempt, conspiracy or solicitation to commit a violation of any provision of the uniform controlled substances act, regardless of whether the offender knew the individual was under 16 years of age;
4. The offender was incarcerated at the time the crime was committed. K.S.A. 2010 Supp. 21-4717(a)(1)-(4). In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement. K.S.A. 2010 Supp. 21-4717(b)



## **Sex Offenders Postrelease Supervision Departure**

The sentencing court may depart from the normal postrelease supervision period to a period of up to 60 months if it is found that the primary crime of conviction is sexually violent or sexually motivated and the court states on the record substantial and compelling reasons to impose a departure. K.S.A. 2010 Supp. 22-3717(d)(1)(D)(i) and (ii). The sentencing court may order a psychological evaluation be prepared and the recommended program be completed by the offender. The department of corrections or the parole board shall ensure that court ordered sex offender treatment be carried out. K.S.A. 2010 Supp. 22-3717(d)(1)(D)(iv)

## **Durational and Dispositional Departures**

When imposing a departure sentence, the sentencing court should begin with the grid block corresponding to the severity level of the crime of conviction and the offender's criminal history. A sentence that is an upward durational departure cannot exceed twice the maximum presumptive sentence. There is no limit on a downward durational departure. K.S.A. 2010 Supp. 21-4719(b)

The sentencing court may also depart from the presumptive disposition in the case by sentencing an offender for whom the presumptive sentence is probation to prison (upward dispositional departure), or by sentencing an offender for whom the presumptive sentence is prison to a nonprison sanction (downward dispositional departure). See K.S.A. 2010 Supp. 21-4719(c) and (d). When the sentencing judge imposes a prison sentence as a dispositional departure, the term of imprisonment shall not exceed the maximum duration of the presumptive imprisonment term. If an upward dispositional departure is combined with an upward durational departure, the sentencing court must define separate substantial and compelling reasons for both departures. See K.S.A. 2010 Supp. 21-4719(c)(2). However, this requirement does not apply in the case of a downward dispositional and durational departure combination.

K.S.A. 2010 Supp. 21-4719(a) was amended during the 2009 Legislative Session to provide that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; and further provides that the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to no less than 50% of the center of the range of the sentence for such crime.

## **Departure and Consecutive Sentencing Combination**

The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:

1. The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively. K.S.A. 21-4720(c)(1)
2. When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime. K.S.A. 21-4720(c)(2)
3. The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation. This means that the total prison term of the

consecutive sentences must also remain within the limit of double the base sentence including the departure sentence. K.S.A. 21-4720(c)(3)

### **Example**

An offender is convicted of kidnapping (severity level 3), aggravated burglary (severity level 5), and theft with a loss of at least \$1,000 but less than \$25,000 (severity level 9). The offender has one prior person felony conviction placing him in criminal history Category D. If the jury determines, based on the reasonable doubt standard, that substantial and compelling reasons exist to impose an upward durational departure sentence for the kidnapping, that departure may be imposed in conjunction with the imposition of consecutive sentences for the remaining convictions of aggravated burglary and theft. Both the limits on the total consecutive term and the limits applicable to upward durational departure sentences apply.

The sentencing court begins by establishing a base sentence for the primary sentence. In this fact pattern, the most serious crime of conviction is the kidnapping, with a presumed imprisonment sentence of 94 months, which becomes the base sentence. The two remaining convictions at criminal history Category I have presumptive sentences of 32 and 6 months respectively. (If the sentencing court wished only to sentence these offenses consecutively, the total sentence could not aggregate to a sum greater than two times the base without a durational departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be  $2 \times 94$ , or 188 months. Here, the total sum of  $94 + 32 + 6$  would be 132 months, a consecutive sentence clearly within the limit of twice the base sentence.)

Assume that the jury establishes a finding for an upward durational departure sentence for the kidnapping conviction based on the presence of an aggravating factor and the court imposes three consecutive sentences for the three offenses in this case.

Base sentence: Kidnapping @ Maximum Presumptive Sentence = 100 months  
(Kidnapping at severity level 3, criminal history "D" on the nondrug grid)  
Other sentences: Aggravated Burglary and Theft = 32 and 6 months.  
(Aggravated Burglary at severity level 5, criminal history "I" and  
Theft at severity level 9, criminal history "I" on the nondrug grid)

The base sentence may be enhanced to a maximum departure length of up to 200 months, or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the total imprisonment term of the consecutive sentences, including the departure term, shall not exceed twice the departure of the enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed  $2 \times 200$ , or 400 months. The sum of  $200 + 32 + 6$ , or 238 months is well within the limit of 400 months.

The sentencing court may choose to depart and impose a longer sentence for the aggravated burglary and theft if independent substantial and compelling reasons exist to justify those departures. The aggregate consecutive sentence becomes  $200 + 64 + 12$ , or 276 months, which is still within the limit of 400 months. This sentence would represent a durational departure sentence within a consecutive sentence context, and the limits on the total duration of such a sentence are sometimes referred to as the "double-double rule." The application of the so-called "double-double" rule allows a sentencing court considerable discretion in fashioning a sentence for exceptional cases that warrant both an upward durational departure and consecutive sentencing.

## **Reporting Dispositions to the Kansas Bureau of Investigation and the Kansas Sentencing Commission**

The sentencing guidelines Journal Entry of Judgment form approved by the Kansas Sentencing Commission must be completed for each felony conviction for a crime committed on or after July 1, 1993. K.S.A. 2010 Supp. 22-3426(d). The court shall forward a signed copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2010 Supp. 21-4714 to the Kansas Sentencing Commission within 30 days after sentencing. K.S.A. 22-3439(a)

For crimes committed on or after July 1, 1993, when a convicted person is revoked for a probation violation, a Journal Entry of Revocation form as approved by the Kansas Sentencing Commission shall be completed by the court. K.S.A. 2010 Supp. 22-3426a. For probation revocations that result in the defendant's imprisonment in the custody of the department of corrections, the court shall forward a signed copy of the Journal Entry of Revocation to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2010 Supp. 74-9101(b)(5)

The court shall insure that information concerning dispositions for all other felony probation revocations based upon crimes committed on or after July 1, 1993, and for all class A and B misdemeanor crimes and assault as defined in K.S.A. 21-3408, committed on or after July 1, 1993, is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of that final disposition. K.S.A. 22-3439(c)

Likewise in the municipal courts, the municipal judge shall ensure that information concerning dispositions of city ordinance violations that result in convictions comparable to class A and B misdemeanors under Kansas criminal statutes is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of final disposition. K.S.A. 2010 Supp. 12-4106(e)

The Kansas Sentencing Commission staff will review felony Journal Entries and will notify the sentencing court in writing when a possible illegal sentence has been identified. The information gathered from the sentencing guidelines forms provides a database to assess the impact of the sentencing guidelines on state correctional resources, the impact of proposed revisions to the sentencing guidelines, and improves the availability and reliability of criminal history record information.

## CHAPTER VII: APPEALS

### **Appellate Review Principles – K.S.A. 21-4721**

A departure sentence is subject to appeal by the defendant or the state, to the appellate courts in accordance with rules adopted by the Supreme Court. K.S.A. 21-4721(a). Pending review of the sentence, the sentencing court, or the appellate court may order the defendant confined or placed on conditional release, including bond. K.S.A. 21-4721(b). On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

- Any sentence within the presumptive range in the appropriate grid block of the sentencing grid; or
- Any sentence resulting from a plea agreement between the state and the defendant as accepted by the sentencing court on the record. K.S.A. 21-4721(c)

Appellate review for a departure sentence is limited to whether the court's findings of fact and reasons justifying departure are supported by evidence on the record and constitutes substantial and compelling reasons for departure. K.S.A. 21-4721(d). In any appeal, the appellate court may review a claim that:

- A departure sentence resulted from partiality, prejudice, oppression or corrupt motive;
- The sentencing court erred in including or excluding a prior conviction or juvenile adjudication for criminal history scoring purposes; or
- The sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes. K.S.A. 21-4721(e)

The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. K.S.A. 21-4721(f). In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case, the court shall follow all of the provisions of K.S.A. 21-4720 concerning the sentencing of multiple conviction cases. K.S.A. 21-4720(b)(5)

The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors. K.S.A. 21-4721(i)

## CHAPTER VIII: COMMUNITY SANCTIONS AND POSTRELEASE SUPERVISION

### Postrelease Supervision

Upon completion of the prison portion of the imposed sentence, most inmates will be released to serve a term of postrelease supervision, plus the amount of good time earned and retained while imprisoned. K.S.A. 2010 Supp. 22-3717. A table of postrelease terms, in number of months, and the effective date of those changes, is included below:

Severity Level	On or after 7/1/93 (SB 423)	On or after 4/20/95 (SB 360)	On or after 7/1/00 (SB 323)	On or after 11/1/03 (SB 123)
1 Nondrug	24	36	36	36
2 Nondrug	24	36	36	36
3 Nondrug	24	36	36	36
4 Nondrug	24	36	36	36
5 Nondrug	24	36	24	24
6 Nondrug	24	36	24	24
7 Nondrug	12	24	12	12
8 Nondrug	12	24	12	12
9 Nondrug	12	24	12	12
10 Nondrug	12	24	12	12
1 Drug	24	36	36	36
2 Drug	24	36	36	36
3 Drug	24	36	24	24
4 Drug	12	24	12	12

However, under the language found in K.S.A. 1993 Supp. 22-3717, for crimes committed prior to April 20, 1995, postrelease supervision lengths, for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, were for a period of 24 months. Despite the retroactive application of the changes made to postrelease supervision periods under K.S.A. 22-3717 in the 2000 Kansas Legislative Session, it appears that offenders sentenced for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, for crimes committed prior to April 20, 1995, continue to receive the postrelease supervision periods applicable for those crimes at the time the crimes were committed.

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term will determine the period of supervision for offenders ordered to serve more than one sentence, whether concurrent or consecutive. K.S.A. 2010 Supp. 22-3717(d)(1)(F)

If an offender is convicted of a sexually motivated crime, as defined in 2010 Supp. K.S.A. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2010 Supp. 22-3717(d)(1)(D)(i) and (ii). The Kansas Parole Board may, in its

discretion, grant early discharge from this extended postrelease supervision period upon completion of any treatment programs and completion of the longest presumptive postrelease supervision period associated with any of the crimes for which the prison sentence was being served. K.S.A. 2010 Supp. 22-3717(d)(1)(D)(vi)

An offender convicted of a sexually violent crime, as defined in K.S.A. 2010 Supp. 22-3717(d)(1)(G), committed on or after July 1, 2006, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life.

Offenders convicted of crimes deemed sexually violent or sexually motivated must register with local law enforcement agencies according to the habitual sex offender registration act, K.S.A. 2010 Supp. 22-4901 through K.S.A. 22-4910, and amendments thereto. K.S.A. 2010 Supp. 22-3717(d)(1)(D)(vii)

The Parole Board reviews release plans. However, the Board is unable to make any changes regarding release dates for offenders sentenced under the KSGA. K.S.A. 2010 Supp. 22-3717(i)

Offenders convicted of certain child sex offenses wherein the offender was 18 years of age or older and the victim was less than 14 years of age, committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Kansas Parole Board. When the Parole Board orders the parole of an inmate pursuant to this subsection, the Board shall order, as a condition of parole, that the inmate be electronically monitored for the duration of the inmate's natural life. K.S.A. 2010 Supp. 22-3717 (u)

The Parole Board determines release of offenders sentenced to other off-grid sentences. Discharge from parole is also determined by the Parole Board, but generally an offender may not be discharged from parole within a period of less than one year after release from prison. K.S.A. 22-3722

If an offender is revoked from a nonprison sanction and a prison sentence is imposed, in most cases the offender is not required to complete a postrelease supervision period. This does not apply to offenders sentenced to a nonprison sanction pursuant to a dispositional departure, whose offense falls within a border box, offenders sentenced for a sexually violent crime or a sexually motivated crime, whose nonprison sanction was revoked as a result of a conviction for a new misdemeanor or felony offense, for offenders sentenced to serve a sentence for another felony offense that is not excluded from postrelease supervision. This subsection is applied retroactively. K.S.A. 2010 Supp. 22-3716(e) and 22-3716a(e)

## **Violations of Conditions of Release- Probation or Postrelease Supervision:**

### **Probation**

Notwithstanding the provisions of any other law to the contrary, an offender whose nonprison sanction is revoked and a term of imprisonment imposed pursuant to either the sentencing guidelines grid for nondrug or drug crimes shall not serve a period of postrelease supervision upon the completion of the prison portion of that sentence. However, this does not apply to:

- Offenders sentenced to a nonprison sanction pursuant to a dispositional departure;
- Offenders whose offense falls within a border box of either the sentencing guidelines grid for nondrug or drug crimes;

- Offenders sentenced for a "sexually violent crime" or a "sexually motivated crime" as defined by K.S.A. 2010 Supp. 22-3717, and amendments thereto;
- Offenders whose nonprison sanction was revoked as a result of a conviction for a new misdemeanor or felony offense; or
- Offenders who are serving or are to begin serving a sentence for any other felony offense that is not excluded from postrelease supervision by this subsection on the effective date of this subsection. K.S.A. 2010 Supp. 22-3716(e)

When an offender is sentenced for a felony committed while the offender was on felony probation (or other felony nonprison status), a consecutive sentence is generally mandated, and the sentencing court may sentence the offender to prison for the new offense even if that offense otherwise presumes a nonprison sentence. This is not considered a departure and does not require additional substantial and compelling circumstances on the record. K.S.A. 2010 Supp. 21-4603d(f) and K.S.A. 2010 Supp. 22-3716(b)

### **Postrelease Supervision**

For crimes committed before April 20, 1995, a finding of a technical violation of the conditions of postrelease supervision will result in imprisonment for a period not to exceed 90 days from the date of the final revocation hearing; for crimes committed on or after April 20, 1995, a technical violation will result in imprisonment for six months and such time may be reduced by not more than 3 months based upon the inmate's conduct, work and program participation during the imprisonment period. K.S.A. 2010 Supp. 75-5217(b). If the violation results from a conviction of a new felony, upon revocation of postrelease supervision, the offender will serve the entire remaining balance of the postrelease supervision period in prison even if the new conviction does not result in a new prison term, including the amount of good time which had been earned before release. K.S.A. 2010 Supp. 75-5217(c). If an offender is returned to prison with a new misdemeanor conviction, upon revocation, the offender shall serve a period of confinement to be determined by the Kansas parole board, which shall not exceed the remaining balance of the period of postrelease supervision. K.S.A. 2010 Supp. 75-5217(d)

### **Conversion of Sentence for a Crime Committed After July 1, 1993, but Before March 24, 1994**

Prior to March 24, 1994, if an offender was sentenced to prison for a crime committed after July 1, 1993, and while the offender was on parole or conditional release for a crime committed prior to July 1, 1993, the old sentence was to be converted into a determinate sentence to run consecutive to the new sentence as follows:

1. Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
2. Thirty-six months for class A or B felonies or the conditional release date whichever is shorter.

The converted sentence for crimes committed prior to July 1, 1993, was to be aggregated with the new consecutive guidelines sentence. See K.S.A. 1993 Supp. 22-3717(f)(1) and (2).

### **Conversion of Sentence for a Crime Committed After March 24, 1994**

On or after March 24, 1994, if an offender is sentenced to prison for a crime committed on or after July 1, 1993, while on probation, parole, conditional release or in a community corrections program, for a crime committed prior to July 1, 1993, and the offender is not eligible for retroactive application of the KSGA under K.S.A. 21-4724, the new sentence will not be aggregated with the old sentence. Instead, the offender will not begin to serve the new sentence until he or she is paroled, or reaches the conditional release date on the old sentence. K.S.A. 2010 Supp. 22-3717(f)

If the offender was past the conditional release date at the time the new offense was committed, the new sentence shall begin when the offender is ordered released by the Kansas Parole Board or reaches the maximum expiration date of the old sentence, whichever is earlier. Then the offender will begin to serve the new sentence, which will also govern the postrelease supervision term. However, if the old sentence was life or an indeterminate term with life as the maximum, the offender will remain under supervision for life, or until discharged by the Parole Board. K.S.A. 2010 Supp. 22-3717(f)



## CHAPTER IX: RETROACTIVITY

### **Retroactive Application of Sentencing Guidelines**

The retroactive provision of the KSGA applies to offenders incarcerated who would have been considered presumptive probation candidates had they been sentenced as if their crimes occurred on or after July 1, 1993, or who would have been placed in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, had they been sentenced as if their crimes occurred on or after July 1, 1993. K.S.A. 21-4724(b)(1). For offenders sentenced before July 1, 1993, the Kansas Department of Corrections (KDOC) was required to assess each offender's possible eligibility for retroactive application of the KSGA by determining the severity level of the crime(s) of conviction as if the crime(s) had occurred on or after July 1, 1993, and the offender's criminal history. K.S.A. 21-4724(c)(1)

Once an offender was determined to be eligible for the retroactive application of the sentencing guidelines, the KDOC was to issue a report indicating such to the offender, prosecutor, and the sentencing court. K.S.A. 21-4724(c). The criminal history classification determined by KDOC was to be deemed correct unless an objection was filed by either the offender or the prosecution within the 30 days provided to request a hearing. K.S.A. 21-4724(c)(4). If a hearing was requested within the 30 days, the parties could challenge the KDOC's determination of the crime severity or the criminal history, or seek a departure sentence if the offender was eligible for conversion of the sentence to a guidelines sentence. K.S.A. 21-4724(d)

If no hearing was requested, the sentence was converted and the offender was released after serving the midpoint sentence of the range in the applicable sentencing guidelines grid block. K.S.A. 21-4724(d)(1). If a hearing was requested, the sentencing court determined whether the offender was eligible for conversion to a guidelines sentence and the appropriate duration of that sentence, within the limits imposed by the sentencing guidelines. K.S.A. 21-4724(d)(2). The presence of the offender in person at the hearing was not required but counsel had to be appointed. K.S.A. 21-4724(d)(4), (5). No sentence could be increased through retroactive application of the guidelines. K.S.A. 21-4724(e)

For those offenders who committed crimes prior to July 1, 1993, but who were sentenced after that date, the sentencing court was to impose a sentence pursuant to the law in effect before July 1, 1993. However, the sentencing court was also required to compute the appropriate sentence had the offender been sentenced pursuant to the KSGA. K.S.A. 21-4724(f)

K.S.A. 21-4724(b)(1) also contains a provision concerning the modification of sentences for individuals convicted of pre-July 1, 1993, crimes that, had the crime been committed after July 1, 1993, would have been classified in grid blocks 3-H, or 3-I of the drug grid. K.S.A. 21-4724(b)(1) provides that such drug grid 3-H or 3-I crimes may be converted to KSGA determinate sentences "*pursuant to the provisions of subsection (c) of K.S.A.21-4705, and amendments thereto.*" This provision created the commonly referred to "small sale" exception for marijuana which allowed for the conversion of sentences equivalent to 3-H or 3-I drug grid sentences for only those individuals who fit within the "small sale" of marijuana definition that was found at K.S.A. 21-4705(c). See *State v. Hackler*, 21 Kan. App. 2d 325, 900 P.2d 241 (1995). However, the changes made in K.S.A. 1996 Supp. 21-4705 eliminated the definition of a "small sale" of marijuana exception from subsection (c)

of the statute, and thus effectively eliminated the possibility of having a pre-guidelines conviction that would equate to a 3-H or 3-I drug grid conviction converted to a determinate sentence.

### **2000 Retroactivity Provisions**

Legislation passed during the 2000 Kansas Legislative Session, found at K.S.A. 2000 Supp. 21-4611(d), also contained provisions with retroactive application for sentences under the Kansas Sentencing Guidelines Act. For a full description of those provisions, please see the “**TIMELINE OF CERTAIN IMPORTANT EVENTS RELATED TO THE KSGA**” located on the KSC website at [www.kansas.gov/ksc](http://www.kansas.gov/ksc).

## **SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT**

### **Crime severity and criminal history control sentencing decisions**

The KSGA provides invaluable guidance to the sentencing court in the form of a rational sentencing structure based on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids reflect the sentences that are presumed to be appropriate in the vast majority of cases when these two factors are taken into consideration to determine whether the offender should be sent to prison and for what length of time.

### **Good Time**

The terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA are of a pre-established, binding duration. In other words, the offender will actually serve the sentence imposed by the sentencing court. The offender may earn good time in an amount no greater than:

- 20% for crimes committed on or after July 1, 1993 and prior to April 20, 1995;
- 15% for crimes committed on or after April 20, 1995; or,
- 20% for crimes of drug severity level 3 or 4 or, nondrug severity level 7, 8, 9, or 10, committed on or after January 1, 2008. K.S.A. 21-4706(a) and 21-4722(a)(2).

Although good time serves to reduce the portion of the sentence that must be served in prison, the amount of good time earned is added to the period of postrelease supervision, so that the entirety of the term will not be affected or reduced. K.S.A. 21-4722(b)

In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision shall not negate the existence of such period of postrelease supervision. K.S.A. 2010 Supp. 21-4704(e)(2)

### **Guidelines leave room for properly justified exercise of discretion**

The KSGA offers an objective approach to sentencing without placing undue limitations on the discretion of the sentencing court. The guidelines establish presumptive rather than mandatory sentences. Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines. The sentencing court may similarly depart upward or downward from the presumptively appropriate duration of any prison term established by the sentencing guidelines. Such departures must be supported on the record by substantial and compelling reasons, which may include aggravating or mitigating circumstances specifically enumerated in non-exclusive lists of departure factors found within the sentencing guidelines provisions.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. Both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were subsequently amended to correct the upward durational departure problem arising from *Gould*. Effective June 6, 2002, the jury determines all

aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. Evidence of aggravating circumstances is either presented during the trial of the matter or in a bifurcated jury proceeding following the trial.

Certain offenses (i.e., those that fall into border boxes on the guidelines grids) allow the sentencing court the option to impose a nonprison sentence without making a departure. However, the sentencing court also has the discretion to decide whether sentences should run concurrently or consecutively and this authority allows imposition of a sentence up to twice the maximum presumptive term of imprisonment if substantial and compelling reasons for the departure are adequately stated on the record. K.S.A. 21-4720

### **Forms help make a record**

In order to assist the sentencing court in making a complete record of all aspects of the sentencing proceedings, the Journal Entry of Judgment form, approved by the Kansas Sentencing Commission, facilitates inclusion of all requisite information and findings for the record in a concise and efficient manner. Pursuant to K.S.A. 2010 Supp. 22-3426, the journal entry must be on a form approved by the Kansas Sentencing Commission and this form must be used for all felony cases sentenced on or after July 1, 1993. The sentencing court must forward a copy of the Journal Entry of Judgment, attached together with the Presentence Investigation Report to the Kansas Sentencing Commission within thirty (30) days of the sentencing. K.S.A. 22-3439(a)

Each Journal Entry of Probation Revocation Hearing must also be on a form approved by the Kansas Sentencing Commission and be sent to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 2010 Supp. 22-3426a(c), and K.S.A. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, must still be submitted to the Kansas Sentencing Commission. K.S.A. 2010 Supp. 74-9101(b)(5). Information for felony probation revocations based upon crimes committed on or after July 1, 1993 (and all class A and class B misdemeanor crimes and assault as defined in K.S.A. 21-3408, committed on or after July 1, 1993), must also be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. See K.S.A. 22-3439(c)

### **Court not bound by plea agreements**

The sentencing court remains free to accept or reject any plea agreement reached by the parties that is otherwise authorized by the KSGA. While plea bargaining may not be used to exact a promise from the prosecutor not to allege prior convictions that will enhance the crime severity level of the offense, or will affect the determination of the offender's criminal history category, plea bargaining is otherwise permissible. K.S.A. 21-4707(b)(4) and K.S.A. 2010 Supp. 21-4713.

The offender may enter a plea to the charged offense, or to a lesser or related charge in return for the dismissal of other charges or counts, a recommendation for a particular sentence within the appropriate sentencing range on the grid, a recommendation for a departure sentence where departure factors exist and are stated on the record, an agreement that a particular charge or count will or will not be filed, or any other promise not prohibited by law. K.S.A. 21-4707(b)(4), K.S.A. 2010 Supp. 22-3210, and 21-4713.

## **Informing the offender of the possible penalties when accepting a guilty or *nolo contendere* plea**

Whether the sentencing court accepts or rejects any proposed plea agreement, the court will often be making a decision whether to accept a plea of guilty or no contest from the offender before coming into possession of all criminal history information that is required for imposition of sentence. Nevertheless, the sentencing court is still able to advise the offender of the sentencing consequences of the plea by simply informing the offender of the entire range of sentences provided by the grid for the severity level of the crime to which the plea is being entered. K.S.A. 21-4707 and K.S.A. 2010 Supp. 22-3210(a)(2)

While subsequently discovered prior convictions cannot then be used to enhance the severity level of the crime to which a plea has been accepted, they can be counted in the offender's criminal history. K.S.A. 21-4707(c)(4)

### **Presentence Investigation Report is mandatory**

Another benefit of the KSGA for the sentencing court is the fact that a Presentence Investigation Report is mandatory, which ensures that the court will be in possession of the most complete criminal history information involving the offender as is available. K.S.A. 2010 Supp. 21-4714(a)

### **Challenges to criminal history; other hearings**

If the offender does not agree in open court to the criminal history as reflected in the Criminal History Worksheet/Presentence Investigation Report and gives written notice of any errors contained there, the prosecutor will have to prove the disputed elements by a preponderance of the evidence at the hearing, and the sentencing court is authorized to give the prosecution reasonable time to produce such evidence. The offender must specify the exact nature of any alleged error if he/she objects to his/her criminal history worksheet. K.S.A. 2010 Supp. 21-4715(c)

If any party seeks imposition of a departure sentence, a hearing on the matter must be held, and the parties must be given adequate time to prepare and present their arguments regarding the proposed departure. Written arguments may be submitted and oral arguments presented, and the sentencing court must review any victim impact statement. Copies of the Presentence Investigation Report must be provided to the parties prior to the hearing. The sentencing court will have up to twenty (20) days to rule. K.S.A. 21-4718(a)(1), and (2). Any departure from the presumptive sentence must be supported by substantial and compelling reasons stated on the record. K.S.A. 21-4716(a), and 21-4720(c)(1), and K.S.A. 2010 Supp. 21-4717(a) and 21-4719(c)(2).

### **Appeals**

Any sentence imposed by the sentencing court which is within the presumptive sentencing range provided for the crime on the proper grid, or which results from a plea agreement between the parties and is approved by the sentencing court on the record, is generally not appealable unless the determination of the severity level of the crime, or the criminal history of the offender are brought into question. A departure sentence is appealable to the extent that the reasons justifying the departure must be found to be supported by the evidence in the record and are substantial and compelling.

Otherwise, review of departure sentences on appeal is limited to claims that the sentence resulted from partiality, prejudice, oppression, or corrupt motive. K.S.A. 21-4721

### **Extended jurisdiction juvenile cases**

Under K.S.A. 2010 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2010 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases.

## **SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA**

### **1. ANNOUNCE THE CASE.**

### **2. HAVE COUNSEL STATE THEIR APPEARANCES FOR THE RECORD.**

### **3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.**

- A. Specify whether a plea agreement was involved, if any of the charges were dismissed and whether the case involved a bench trial or a trial by jury.

### **4. HAVE BOTH PARTIES ACKNOWLEDGE RECEIPT OF THE PRESENTENCE INVESTIGATION REPORT (PSI).**

### **5. ASK BOTH PARTIES IF THEY HAVE CHALLENGES TO THE CRIMINAL HISTORY.**

- A. Require the parties to answer on the record.
- B. Address the defendant personally and ask whether he or she admits the criminal history set out in the Criminal History Worksheet. K.S.A. 2010 Supp. 21-4715
- C. If challenges to the criminal history exist, take up each challenge and rule on each challenge. The offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet.
  - 1. Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.
  - 2. A certified or authenticated copy of a Journal Entry is sufficient proof of a prior offense unless the defendant denies he or she is the person named. See *State v. Staven*, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).
  - 3. If time to challenge the criminal history was not available prior to the sentencing hearing, additional time must be provided. See *State v. Hankins*, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994).
  - 4. Burden is on prosecution when defendant objects to criminal history classification. See *State v. Schow*, 287 Kan. 529 (2008). However, if criminal history has previously been established, and the offender later challenges the established criminal history, the burden moves to the defendant pursuant to 2009 Legislation. K.S.A. 2010 Supp. 21-4715(c)
- D. If changes are made to the defendant's criminal history, the court should also make the changes on the Criminal History Worksheet.

- E. If the defendant's criminal history score changes due to a revision, the court should offer counsel a continuance to file a departure request or other presentence preparation required by the change(s).

**6. ANNOUNCE THE CRIMINAL HISTORY SCORE.**

**7. ASK THE PARTIES IF THERE IS ANY LEGAL REASON WHY SENTENCE SHOULD NOT BE PRONOUNCED AT THIS TIME.**

**8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.**

- A. There is no prescribed proceeding for a departure hearing under K.S.A. 21-4718.
- B. A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.
- C. If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, "or within 20 days thereafter." K.S.A. 21-4718(a)(2)

**9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.**

- A. This is not required by statute but it is the safest practice. In the event the PSI is not available in a timely manner, or other reasons arise which do not allow adequate time to prepare and present arguments regarding the issues of "departure sentencing," a continuance must be granted. K.S.A. 21-4718(a)(1)

**10. IF A DEPARTURE IS SOUGHT, CONDUCT A HEARING ON THE DEPARTURE MOTION(S). ALLOW COUNSEL TO ADDRESS THE COURT AND ALSO ALLOW THE WITNESSES FOR EITHER PARTY TO TESTIFY.**

- A. Sentencing for an upward durational departure was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face." Facts that would increase the penalty beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt. K.S.A. 21-4716(b)
- B. A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or, within 5 days from the date of the arraignment if the trial is to take place in less than 30 days from the date of the arraignment. K.S.A. 21-4718(b)(1)
- C. The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in the jury proceeding following the trial. K.S.A. 21-4718(b)(2)
- D. The jury shall determine, based on the reasonable doubt standard, whether aggravating factors exist that may serve to enhance the maximum sentence. If one or more aggravating



factors are found to exist, by a unanimous jury vote, such factors shall be reported to the court on a special jury verdict form. K.S.A. 21-4718(b)(4) and (b)(7)

**11. ASK IF ANY VICTIMS OR OTHERS WISH TO SPEAK.**

- A. Following the rule in *State v. Parks*, 265 Kan. 644, 962 P.2d 486 (1998), non-victims and non-family members may also be permitted to submit written statements and/or speak.

**12. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION.**

- A. Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow such statements or evidence.

**13. ANNOUNCE THE BASE SENTENCE FROM THE APPROPRIATE GRID.**

- A. "I hereby establish Count \_\_\_ as the base sentence. For the offense of \_\_\_\_\_, a severity level \_\_\_ (person or nonperson) \_\_\_ (drug or nondrug) felony, on which the defendant has a criminal history score of \_\_\_, thus placing him/her in grid block \_\_\_\_\_. I hereby sentence the defendant to a term of \_\_\_ months in the custody of the Secretary of Corrections. On this sentence the defendant may earn up to \_\_\_ percent good time credit and is subject to \_\_\_ months of post-release supervision." If a fine is to be imposed, announce the fine and the reasons for the fine. K.S.A. 21-4607

**14. ANNOUNCE ANY DEPARTURES FROM THE BASE SENTENCE AND THE REASONS FOR THE DEPARTURE(S).**

- A. Statutory mitigation and aggravation factors may be found at K.S.A. 21-4716 (nondrug) and K.S.A. 2010 Supp 21-4717 (drug).
- B. Sentencing courts must provide separate reasons based upon facts in the record, for any/every durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).
- C. Reasons for departure must be "substantial and compelling." See K.S.A. 21-4716(a), K.S.A. 2010 Supp. 21-4717(a) and K.S.A. 2010 Supp. 21-4719(c)(2). If the court is imposing a durational postrelease supervision departure under K.S.A. 2010 Supp. 22-3717(d), specifically state on the record the substantial and compelling reasons relied upon to impose a departure. See *State v. Anthony*, 273 Kan. 726 45 P.3d 852 (2002).
- D. Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. K.S.A. 21-4718(a)(4)
- E. For sex offenders, a post-release supervision period of up to 60 months may be ordered. K.S.A. 2010 Supp. 22-3717(d)(1)(D)(i). When imposing a durational postrelease supervision departure under K.S.A. 2010 Supp. 22-3717(d), state specifically on the record the substantial and compelling reasons to impose a departure. See *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002).

**15. IF A SPECIAL RULE APPLIES, WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED.**

**Special Sentencing Rules**

- |                                      |  |
|--------------------------------------|--|
| K.S.A. 2010 Supp. 21-4704(h)         | 1. Person Felony Committed with a Firearm – presumed prison.   |
| K.S.A. 2010 Supp. 21-4704(g)         | 2. Aggravated Battery of a LEO, <i>committed prior to July 1, 2006</i> , if criminal history is 6H or 6I – presumed prison.  |
| K.S.A. 2010 Supp. 21-4704(g)         | 3. Aggravated Assault of a LEO, if criminal history is 6H or 6I – presumed prison.   |
| K.S.A. 2010 Supp. 21-4704(q)         | 34. Battery on a LEO Resulting in Bodily Harm- presumed prison and consecutive.  |
| K.S.A. 2010 Supp. 21-4705(g)         | 32. Drug Felony While in Possession of a Firearm – presumed prison. Results in additional 6 months imprisonment.   |
| K.S.A. 2010 Supp. 21-4705(g)         | 33. Drug Felony with a Firearm that Discharges– presumed prison. Results in additional 18 months imprisonment.   |
| K.S.A. 2010 Supp. 21-4704(k)         | 4. Felony Committed for the Benefit of a Criminal Street Gang –presumed prison.  |
| K.S.A. 2010 Supp. 38-2347            | 11. Extended Jurisdiction Juvenile Imposed– both juvenile and adult K.S.A. 2010 Supp. 38-2364 sentences imposed, adult sentence stayed, conditioned on successful completion of juvenile sentence. |
| <b>K.S.A. 2010 Supp. 21-3608a(b)</b> | <b>35. Aggravated Endangering of a Child– consecutive sentence required.</b>   |
| <b>K.S.A. 2010 Supp. 21-4704(r)</b>  | <b>36. Ballistic Resistant Material – worn/used in commission/attempt/flight from felony – presumed prison and consecutive.</b>  |
| K.S.A. 2010 Supp. 21-4704(j)         | 5. Persistent Sex Offender, if current conviction is presumed prison- double the maximum duration.   |
| K.S.A. 2010 Supp. 21-4705(e)         | 12. Second or Subsequent Manufacture of a Controlled Substance Conviction– presumed prison, twice the maximum duration.  |

K.S.A. 2010 Supp. 21-4705(f)	26. Third or Subsequent Felony Drug Possession occurring on or after July 1, 2008 - presumed prison. K.S.A. 2010 Supp. 21-36a06
K.S.A. 2010 Supp. 21-4704(l)	13. Residential Burglary with a Prior Residential, Non-Residential Building, or Aggravated Burglary Conviction – presumed prison.
K.S.A. 2010 Supp. 21-4704(p)	27. Burglary with Two or More Prior Convictions for a Violation of Theft, Burglary, or Aggravated Burglary – presumed prison.
K.S.A. 2010 Supp. 21-4704(p)	29. Felony Theft with Three or More Prior Convictions for a Felony Violation of Theft, Burglary, or Aggravated Burglary – presumed prison.
*K.S.A. 2010 Supp. 21-4704(p)	30. Substance Abuse Underlying Factor, Treatment More Effective to Reduce Reoffense Risk <u>and</u> Community Safety Served- KDOC Intensive Substance Abuse Treatment Program, Return to Court upon Successful Completion (For #27 or #29).
*This option is included in statute, but is unavailable.	
K.S.A. 2010 Supp. 21-4704(n)	31. Third or Subsequent Criminal Deprivation of a Motor Vehicle – presumed prison.
K.S.A. 2010 Supp. 21-4704(i)	16. Second Forgery, if criminal history is I to C – sentenced pursuant to sentencing requirements of K.S.A. 21-3710(b)(3), term of imprisonment not to be served in KDOC. (Criminal history A or B should be sentenced as a severity level 8 Nonperson Felony).
K.S.A. 2010 Supp 21-4704(i)	17. Third or Subsequent Forgery, if criminal history is I to C – sentenced pursuant to sentencing requirements of K.S.A. 21-3710(b)(4), term of imprisonment not to be served in KDOC. (Criminal history A or B should be sentenced as a severity level 8 Nonperson Felony).
K.S.A. 2010 Supp. 21-4603d(f)	9. Crime Committed While Incarcerated and Serving a Felony sentence, or While on Probation, Parole, Conditional Release, or Postrelease Supervision for a Felony – new sentence <b>shall</b> be imposed pursuant to consecutive sentencing provisions in K.S.A. 2010 Supp. 21-4608 and the court may impose prison even if presumption is nonprison. See also K.S.A. 2010 Supp. 21-4608(e)(2) (serving indeterminate sentence).

- K.S.A. 2010 Supp. 21-4603d(f)(2) 28. Crime Committed While Incarcerated in a Juvenile Correctional Facility for an Offense That Would Have Been a Felony if Committed by an Adult – presumed prison.
- K.S.A. 2010 Supp. 21-4603d(f) 10. Crime Committed While on Felony Bond, – new sentence **may** be imposed pursuant to consecutive sentencing provisions in K.S.A. 2010 Supp. 21-4608 and the court **may** impose a prison sentence even if presumption is nonprison.
- K.S.A. 2010 Supp. 21-4704(i) 6. Felony DUI, (third, fourth or subsequent conviction) – nongrid, sentenced pursuant to specific mandatory sentencing requirements of K.S.A. 2010 Supp. 8-1567, term of imprisonment not to be served in KDOC.
- K.S.A. 2010 Supp. 21-4704(i) 8. Felony Domestic Battery, nongrid, sentenced pursuant to specific mandatory sentencing requirements of K.S.A. 2010 Supp. 21-3412a(b)(3), term of imprisonment not to be served in KDOC.
- K.S.A. 2010 Supp. 21-4704(i) 21. Animal Cruelty, K.S.A. 2010 Supp. 21-4310(a)(1), K.S.A. 2010 Supp. 21-4310(a)(2)–(5); Second or subsequent conviction; or Working/Assistance dogs, K.S.A. 21-4318(c)-nongrid felony, sentenced pursuant to specific mandatory sentencing requirements of K.S.A. 21-4318(d), term of imprisonment not to be served in KDOC.
- K.S.A. 2010 Supp. 40-2,118 25. Fraudulent Insurance Act, any combination of acts occurring within 6 consecutive months involving \$25,000 or more – presumed prison.
- K.S.A. 2010 Supp. 17-12a508(a)(5) 15. Kansas Securities Act, violation resulting in a loss of \$25,000 or more – presumed prison.
- K.S.A. 2010 Supp. 9-2203(c) 19. Mortgage Business Act, second or subsequent conviction – presumed prison.
- K.S.A. 50-1013(a) 20. Loan Brokers Act, violation resulting in a loss of \$25,000 or more – presumed prison.

**16. IF A DURATIONAL DEPARTURE IS GRANTED, THE TOTAL LENGTH OF THE DEPARTURE SENTENCE CANNOT EXCEED TWICE THE BASE SENTENCE.**

See K.S.A. 21-4720(b)(4).

**17. ANNOUNCE ALL OTHER SENTENCES, AND WHETHER EACH SENTENCE IS CONCURRENT OR CONSECUTIVE, TO THE BASE SENTENCE.**

See K.S.A. 21-4720(b).

- A. The Court *must state on the record* if the sentence is concurrent or consecutive, otherwise it becomes a concurrent sentence by default except as provided by K.S.A. 2010 Supp. 21-4608(c), (d) and (e). K.S.A. 2010 Supp. 21-4608(a)
- B. The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The “Double-Double” Rule is found at K.S.A. 21-4720(b)(4) and was discussed and applied in *State v. Peterson*, 22 Kan. App. 2d 576, 920 P.2d 463 (1996).
- C. Only the primary crime will have the full criminal history applied. Non-base crimes will have a criminal history score of “I” applied, regardless of whether they are to run concurrently or consecutively. K.S.A. 21-4720(b)(5), see also *State v. Bowen*, 20 Kan. App. 2d 576, 890 P.2d 374 (1995).
- D. Announce the maximum earnable percentage of good time (20 percent for nondrug 7, 8, 9 or 10, or drug 3 or 4, or 15 percent for all other severity levels). K.S.A. 21-4722(a)(2)

**18. ANNOUNCE WHETHER PROBATION OR COMMUNITY CORRECTIONS PLACEMENT IS GRANTED. IF DEPARTING FROM A PRESUMPTIVE DISPOSITION, STATE THE REASONS ON THE RECORD. ANNOUNCE THE CONDITIONS AND THE DURATION OF PROBATION.**

In the event the offender is sentenced for a first or second violation of K.S.A. 2010 Supp. 21-36a06 (formerly K.S.A. 65-4160 or K.S.A. 65-4162), and the offender is eligible for certified drug abuse treatment under K.S.A. 2010 Supp. 21-4729 (2003 Senate Bill 123), the offender should be informed on the record that under the provisions K.S.A. 2010 Supp. 21-4729: certified drug abuse treatment may last for a period of up to 18 months; the offender may be responsible for repayment of the costs of treatment which will be determined by the sentencing court after an assessment by community corrections; if the offender is unsuccessfully discharged or voluntarily quits the mandatory treatment, the offender would be subject to the entire underlying prison sentence with no jail time credit for time spent in treatment; every condition violation shall be subject to some form of nonprison sanctions (i.e., county jail time, fines, community service, intensified treatment, house arrest, electronic monitoring, etc.); absent a judicial finding, condition violations alone will not result in discharge from treatment; and upon the successful completion of a certified drug abuse treatment program the offender will be discharged and not subject to postrelease supervision.

**19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING, IF THIS IS IN DISPUTE.**

**20. ESTABLISH THE NUMBER OF DAYS OF JAIL CREDIT TO WHICH THE DEFENDANT IS ENTITLED AND THE DEFENDANT’S “SENTENCE BEGINS DATE.”**

See K.S.A. 21-4614 and K.S.A. 21-4614a.

**21. ADVISE THE DEFENDANT THAT HE OR SHE MAY HAVE RIGHTS OF EXPUNGEMENT UNDER K.S.A. 2010 SUPP. 21-4619.**

**22. IF THE CASE WAS TRIED, OR IF YOU HAVE RULED ADVERSELY TO THE DEFENDANT AT THE HEARING, ADVISE THE DEFENDANT OF HIS OR HER RIGHT TO APPEAL UNDER K.S.A. 21-4721.**

**23. ADVISE THE DEFENDANT OF THE OBLIGATION TO REGISTER AS A SEX OFFENDER, IF APPLICABLE.**

See K.S.A. 22-4905(b)(1) and (b)(2)(A).

**24. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.**

See K.S.A. 2010 Supp. 21-4204(a)(2) through (a)(4).

**25. ADVISE THE OFFENDER OF THE LOSS OF CERTAIN CIVIL RIGHTS SUCH AS THE RIGHT TO VOTE UNTIL THE OFFENDER'S SENTENCE IS FULLY DISCHARGED.**

See K.S.A. 21-4615. Anyone convicted of a felony on or after July 1, 2002 may not vote until his or her sentence is completed. This specifically includes a sentence of probation.

**26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF THE SHERIFF, OR ESTABLISH A DATE TO REPORT IF A STAY OF EXECUTION IS GRANTED AND IF THE DEFENDANT IS NOT IN CUSTODY. ESTABLISH AN APPEAL BOND AMOUNT, IF REQUESTED. IF PROBATION AND/OR COMMUNITY CORRECTIONS IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND HOW TO REPORT TO THOSE AGENCIES.**

## SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION

### **Emphasis of guidelines is on criminal history and crime severity**

The KSGA places the emphasis of the sentencing phase of a criminal prosecution on the two factors that are generally of greatest concern to the prosecutor, the criminal history of the offender and the crime severity. The prosecution can focus its efforts on establishing by a preponderance of the evidence any challenged aspect(s) of the criminal history information provided in the presentence investigation report and presenting to the sentencing court any aggravating or mitigating circumstances which may provide substantial and compelling reasons for the court to consider imposing a departure sentence. Properly authenticated copies of Journal Entries of convictions or the mandatory presentence investigation reports prepared in conjunction with the prosecution of cases for crimes occurring on or after July 1, 1993, generally will be sufficient. Other properly authenticated documents that may be of use in proving criminal history include plea transcripts and charging documents such as an information, complaint, or indictment. The prosecution is entitled to reasonable time to obtain the necessary proof of prior convictions. K.S.A. 2010 Supp. 21-4715

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. K.S.A. 2010 Supp. 21-4715(c)

### **Plea agreements**

The prosecution may enter into plea negotiations and agreements with the offender, although there are some limitations on the type of agreement that can be reached. An agreement by the prosecutor not to allege prior convictions that will enhance the crime severity level or will affect the criminal history of the offender is **impermissible**. However, the prosecutor may agree to a dismissal of some charges or counts in return for a plea by the offender to the charged offense or to a lesser or related charge. The prosecution may also agree to file or not to file a particular charge or count, to make a recommendation for a particular sentence within the appropriate sentencing range on the grid, or to make a recommendation for a departure sentence where substantial and compelling departure factors exist and are stated on the record. K.S.A. 21-4707, and K.S.A. 2010 Supp. 22-3210, and 21-4713.

### **Departure hearings**

The prosecution may file a motion alleging that substantial and compelling aggravating circumstances exist which call for a more severe sanction than the presumptively appropriate sentence provided by the guidelines. If the grid establishes a presumptive nonprison sentence for the crime of conviction, the prosecution may seek a dispositional departure in the form of a prison sentence. If the grid establishes a presumptive prison sentence within the range of time provided within the appropriate grid block, the prosecution may seek an upward durational departure in the form of a longer prison sentence. The prosecution is also free to seek a downward dispositional or durational departure based on the existence of substantial and compelling mitigating circumstances. The KSGA

contains non-exclusive lists of aggravating and mitigating circumstances on which motions for departures can be based. K.S.A. 21-4716 and K.S.A. 2010 Supp. 21-4717

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 subsequently were amended to correct the upward durational departure problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. See K.S.A. 21-4716 and 21-4618.

Written and/or oral arguments may be presented to the sentencing court in support of any motion by the prosecution for a departure from the presumptive guidelines sentence or in response to any such motion by the offender when the matter of the proposed departure is set for hearing. The prosecution shall notify the victim(s) or their families of any departure hearings. See K.S.A. 21-4718, and 21-4720, and K.S.A. 2010 Supp. 21-4719.

K.S.A. 2010 Supp. 21-4719(a) was amended during the 2009 Legislative Session to provide that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; and further provides that the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to no less than 50% of the center of the range of the sentence for such crime.

### **Definite terms of sentence imposed**

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of specific duration, the prosecutor will be able to inform the victim(s) and their families about the amount of time the offender will serve in definite terms.

### **Using the Journal Entry of Judgment form to assist the court in making a proper record**

The prosecution can also help the sentencing court to make a complete record of all phases of the sentencing proceedings, which are required by the guidelines through use of the Journal Entry of Judgment form approved by the Kansas Sentencing Commission. The use of the Journal Entry form is mandated by the KSGA and it provides guidance in conducting the sentencing process by including all essential information and findings on the record. See K.S.A. 2010 Supp. 22-3426. This form must be used for all felony cases sentenced on or after July 1, 1993. In addition, the court must forward a copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2010 Supp. 21-4714, to the Kansas Sentencing Commission within 30 days of sentencing. K.S.A. 22-3439

All revocation of probation Journal Entries must be on a form approved by the Kansas Sentencing Commission (i.e., the Journal Entry of Probation Revocation Hearing) and must be sent to the Kansas Sentencing Commission within 30 days of final disposition. See K.S.A. 22-3439(b), and K.S.A. 2010 Supp. 22-3426a(c). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2010 Supp. 74-9101(b)(5). Information for felony probation revocations, which do not result in imprisonment in the KDOC, must



be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. K.S.A. 22-3439(c)

### **Appeals**

The prosecution may appeal when the sentencing court imposes a sentence that constitutes an unfavorable departure. If the sentencing court imposes a nonprison sentence that constitutes a departure because the guidelines establish a presumption for a prison sentence for the crime of conviction, this dispositional departure may be appealed by the prosecution. If the sentencing court imposes a prison sentence of shorter duration than the presumptive term provided by the guidelines for the crime of conviction, this durational departure may also be appealed by the prosecution. K.S.A. 21-4721

### **Extended jurisdiction juvenile cases**

Under K.S.A. 2010 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2010 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases.

## SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE

### Importance of accurate, verified criminal history

Because the KSGA focuses so heavily on the criminal history of the offender as a determining factor of the sentence that will be imposed, the defense will be provided with a copy of the mandatory presentence investigation report, including the criminal history worksheet and an opportunity to challenge any errors contained in the report. Immediately upon receipt of the report, the defense may file written notice to the prosecution and the sentencing court alleging errors in the proposed criminal history worksheet. The burden will then fall to the State to verify and establish by a preponderance of the evidence the accuracy of any disputed portions of the alleged criminal history, and the sentencing court is authorized to correct any errors. Consequently, the defense has an important role in ensuring that the sentence is based on an accurate criminal history that has been properly verified. See K.S.A. 2010 Supp. 21-4715.

In addition, because a sentencing court may take judicial notice of a prior criminal history worksheet as an accurate reflection of criminal history for use in a subsequent case, the offender may waive the right to challenge any errors contained in the worksheet by failing to do so when the worksheet is initially prepared and served on the parties. Failure to challenge any errors in the criminal history worksheet at a hearing on the proposed conversion of a sentence for a crime committed prior to July 1, 1993, to a KSGA sentence pursuant to the retroactivity provisions of the guidelines may also operate as a waiver of that opportunity in future cases. See K.S.A. 2010 Supp. 21-4714. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. K.S.A. 2010 Supp. 21-4715(c)

### Plea agreements

Plea bargaining remains an available tool for use by defense counsel, subject to certain limitations. The KSGA **prohibits** the use of plea bargaining which involves a promise from the prosecutor not to allege prior convictions that may operate to enhance the crime severity level or are included in the offender's criminal history. However, the offender may enter a plea to the charged offense or to a lesser or related charge in return for the dismissal of other charges or counts. The offender may also obtain from the prosecution a promise to recommend a particular sentence within the appropriate sentencing range on the grid. In addition, the offender is free to secure a promise from the State to recommend a departure sentence favorable to the offender where mitigating departure factors exist. An agreement that a particular charge or count will or will not be filed, or any other promise not explicitly precluded by the KSGA, is permissible. However, the sentencing court will not be bound by any plea agreement proposed by the parties. See K.S.A. 21-4707, and K.S.A. 2010 Supp. 22-3210, and 21-4713.

## **Can seek dispositional or durational departure on behalf of offender**

The offender may file a written motion alleging the existence of substantial and compelling mitigating circumstances that support the imposition of a less severe sanction than that provided by the KSGA for the crime of conviction. When the guidelines call for a prison sentence, the offender may move the sentencing court to impose a nonprison sentence as a dispositional departure. When the guidelines call for a prison sentence within the range of time provided by the appropriate grid block, the offender may move the sentencing court to impose a shorter prison sentence as a downward durational departure. See K.S.A. 21-4716, 21-4718, 21-4720, and K.S.A. 2010 Supp. 21-4717, and 21-4719.

The offender may also be given the opportunity to offer written and/or oral arguments at the hearing on a motion for a departure favorable to the offender or in opposition to any unfavorable departures that may be proposed by the prosecution or the sentencing court on its own motion. K.S.A. 21-4718

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2002 Supp. 21-4716 and K.S.A. 2002 Supp. 21-4718 were amended to correct the upward durational departure problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. See K.S.A. 21-4716 and 21-4618.

K.S.A. 2010 Supp. 21-4719(a) was amended during the 2009 Legislative Session to provide that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; and further provides that the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to no less than 50% of the center of the range of the sentence for such crime.

## **Can advise the offender about time to be served in definite terms**

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of definite duration, defense counsel will be able to advise the offender of the exact amount of time which the sentence will require the offender to serve once the criminal history is known.

## **Appeals**

The offender may appeal a sentence that constitutes a departure unfavorable to the offender. The imposition of a prison sentence where the guidelines provide a presumptive nonprison sentence is an appealable dispositional departure. The imposition of a prison sentence of greater duration than the guidelines presume is an appealable durational departure. A departure sentence is appealable on the grounds that substantial and compelling reasons justifying the departure are not supported by the record.

Appellate review of departure sentences imposed pursuant to the guidelines is otherwise limited to claims of partiality, prejudice, oppression, or corrupt motive, or claims challenging the crime severity ranking or the criminal history. See K.S.A. 21-4721.

### **Extended jurisdiction juvenile cases**

Under K.S.A. 2010 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2010 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases.

## SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR FIELD SERVICES OFFICERS

### Preparation of the Presentence Investigation Report

Field services officers, including court services officers and community corrections officers, are responsible for preparing the Presentence Investigation Report (PSI). The PSI report is mandatory in all felony cases under the KSGA. The primary purpose of the PSI report is to provide complete and accurate information about the criminal history of the offender, because criminal history is one of the two primary determining factors of the appropriate sentence established by the guidelines for the crime(s) of conviction. Consequently, the Criminal History Worksheet is an essential component of the PSI report. The PSI report will contain a computation of the presumptive sentence provided by the guidelines for the crime(s) of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender. The PSI report will not contain socio-economic information about the offender and should not contain sentencing recommendations to the sentencing court.

The criminal history worksheet should indicate the officer's source of information for each prior conviction listed, and copies of any verifying documents available to the officer should be attached, including criminal history worksheets prepared in prior cases in which sentencing occurred after July 1, 1993, and in which the worksheet was prepared in accordance with the requirements of the KSGA.

The criminal history worksheet can be challenged for accuracy by the defense or the prosecution, and a hearing will then be held in which the prosecution has the burden of proving prior convictions through certified copies of journal entries or any other properly authenticated documents and proving by a preponderance of the evidence that any challenged component of the history is correct. See K.S.A. 2010 Supp. 21-4715. The sentencing court has the duty and authority to correct any errors. A PSI report that has been prepared in accordance with the requirements of the KSGA after its effective date of July 1, 1993, can be the subject of judicial notice by a sentencing court in any subsequent felony proceeding. See K.S.A. 2010 Supp. 21-4714(f).

**NOTE:** The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.
- **Adults:** Do not include traffic infractions, diversions contacts with law enforcement, or arrests that do not result in conviction.

Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction.

The 2010 Presentence Investigation Report form contains a section on page 4 of the form to be used by field services officers to indicate which criteria of K.S.A. 2010 Supp. 75-5291(a)(2) is met by an offender who is being recommended for placement in a Community Corrections program. Please indicate for the sentencing court the specific criteria by which the offender may qualify for placement in Community Corrections.

## **SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS**

### **Providing documentation of prior convictions**

Because of the heavy focus on criminal history under the KSGA and the need to verify prior convictions that are counted in criminal history scoring, Clerks of the Courts may receive requests for certified copies of Journal Entries and other documents, including requests from other jurisdictions.

### **Presentence Investigation Report**

The Presentence Investigation Report (PSI), *with the exception of the sections containing the official version, the defendant's version, victim comments, and psychological (including drug and alcohol) evaluations of the defendant*, will be public record and can be kept in the court file. K.S.A. 2010 Supp. 21-4714

### **Copies of required documents**

A copy of the Journal Entry of Judgment, the Presentence Investigation Report, and the Criminal History Worksheet of the Presentence Investigation Report, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. K.S.A. 2010 Supp. 21-4714(g) and K.S.A. 22-3439(a)

A copy of the Journal Entry of Probation Revocation must be sent to the Kansas Sentencing Commission, along with a copy of the original Journal Entry of Judgment, the Presentence Investigation Report, and the Criminal History Worksheet within 30 days of the final disposition. K.S.A. 22-3439(b)

### **Extended jurisdiction juvenile cases**

Under K.S.A. 2010 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2010 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the "Special Rule Applicable" section of the adult Journal Entry of Judgment form labeled "Extended Jurisdiction Juvenile Imposed," to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases.

