

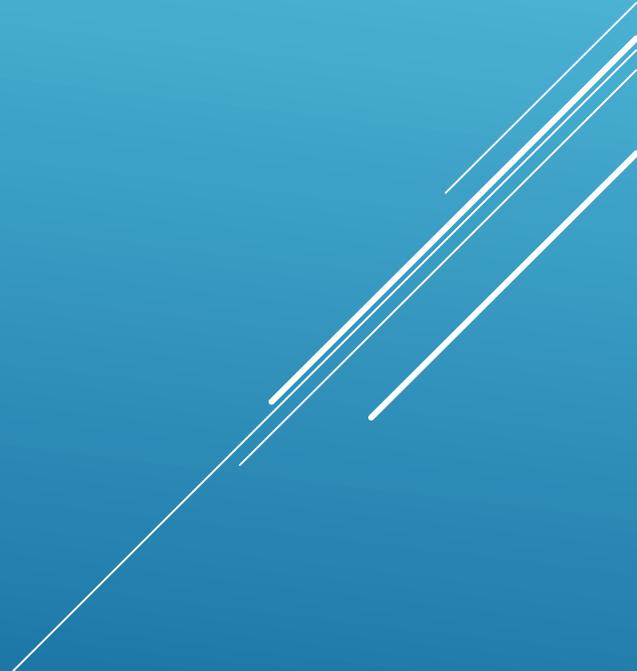


HB 2170 Webinar

Francis Givens, Special Projects Director

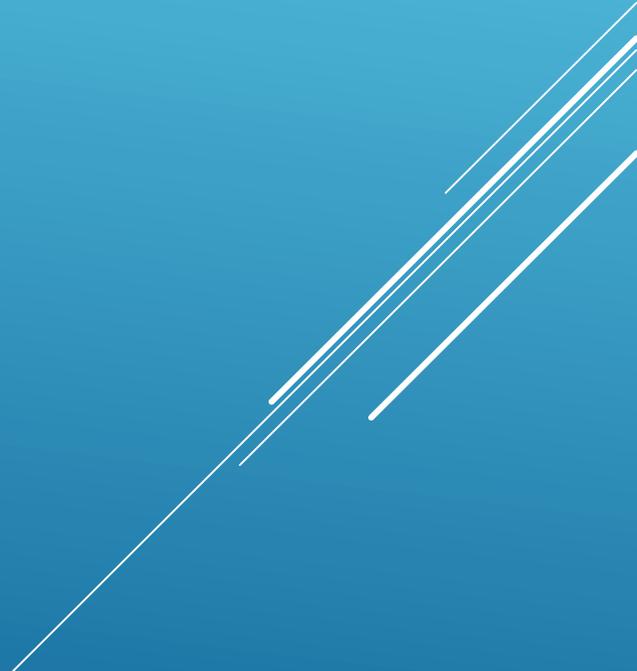
January 29<sup>th</sup> 2020

# WELCOME TO KSSC'S WEBINAR!

- ▶ Survey Results
  - ▶ 45 minutes
  - ▶ Q&A Feature
  - ▶ Follow-Up Survey
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.

- ▶ A defendant is given a chance on probation with an underlying prison sentence, defendant violates the conditions of probation, what should happen?

K.S.A. 22-3716

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# HISTORY

→ Changes made by Justice Reinvestment Initiative (2013 HB 2170)

→ “Quick dip”/”dunks” instead of full revocation

→ Graduated sanction scheme

1. 2/3 days in county jail for a “first” violation (up to 18 days)
2. 120 and/or 180 days in KDOC for subsequent violations
3. Revocation

# 2-3 DAY QUICK DIPS IN COUNTY JAIL

- ▶ “SWIFT & CERTAIN” SANCTION
- ▶ “Research has shown that one of the most effective ways to change offender behavior is to use swift and certain responses that can be quickly applied by supervision officers. The quicker punishments can be handed down, the more effective they can be in changing probationer behavior. The short jail stays are more cost-effective and cause less disruption to an offender’s pro-social network than a lengthy jail or prison sentence.”
- ▶ <https://www.sentencing.ks.gov/legislation/justice-reinvestment/frequently-asked-questions>

# 120/180 DAY PRISON SANCTIONS

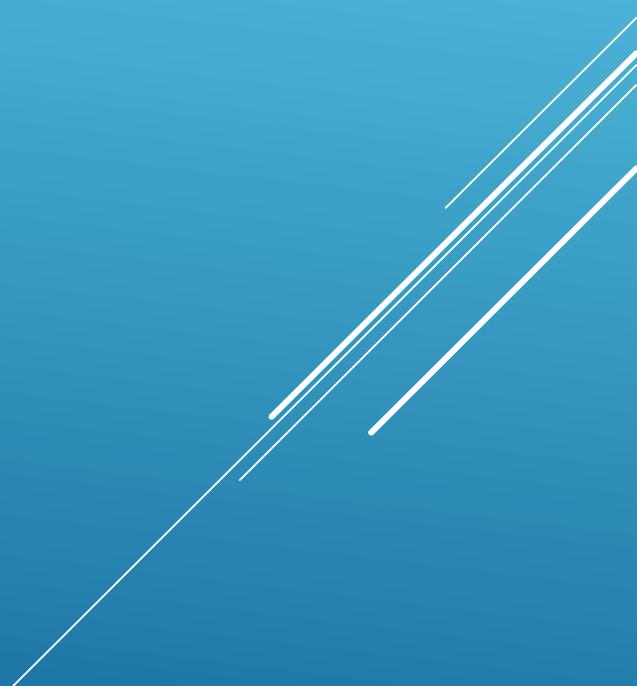
- No programming in KDOC during this time
- Purely punitive

## HOW LONG VIOLATORS SPENT IN KDOC ON 120/180 DAY PRISON SANCTIONS ON AVERAGE:

- 120 day sanctions: 34 days
- 180 day sanctions: 63 days

\*source: FY 2019 Kansas Department of Corrections Admissions Data

# PROBLEMS WITH IMPLEMENTATION OF HB 2170

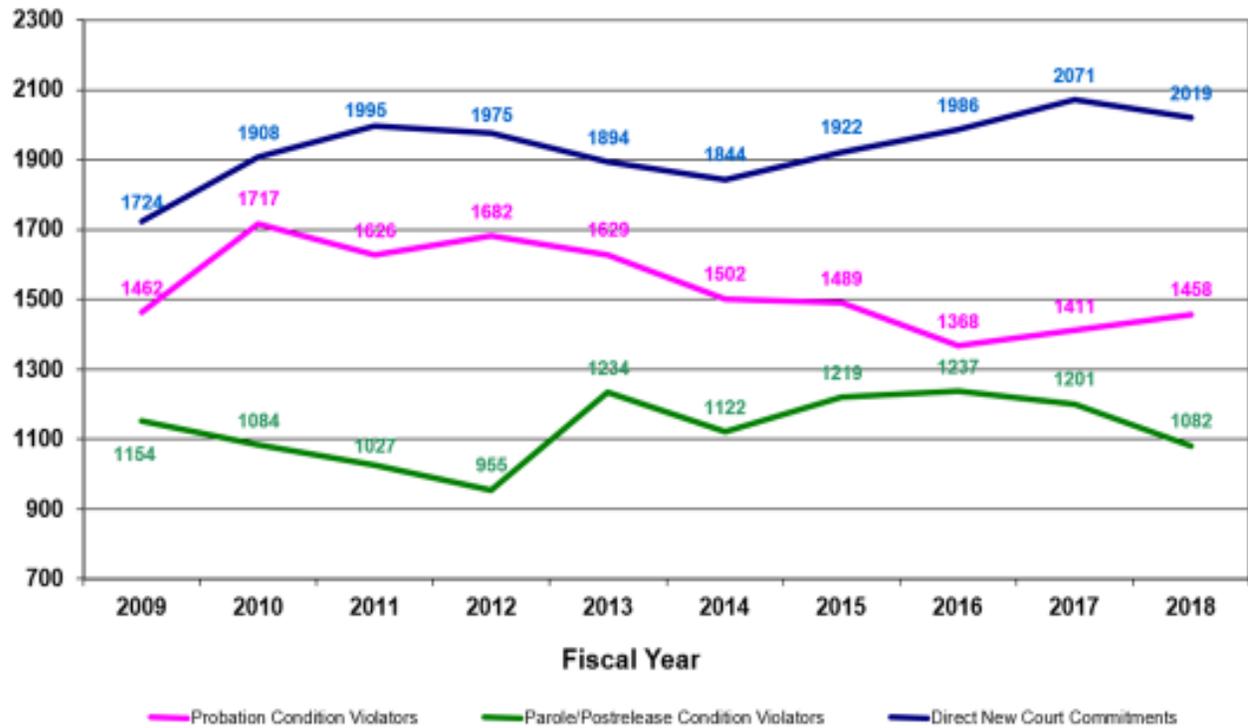
- ▶ Pursuant to the statute, courts could withhold the authority of probation officers (CSO's and CC officers) to administer the 2/3 day sanction without a hearing.
  - ▶ The graduated sanction scheme was not being followed by all courts.
  - ▶ What other issues did you see?
- 

# ACTUAL IMPLEMENTATION OF HB 2170 FY 2015-2019

►\*Source: KSSC Probation Revocation JE Database.

Reason for Revocation & Not Using Prison Sanction	FY 15	FY 16	FY 17	FY 18	FY 19
Public Safety Threat	164	385	397	393	324
Failure of a program/treatment	625	519	562	767	582
Warrant allegation	8	8	11	10	20
Failure to avoid contact w/victim/offender/designated place	72	69	55	77	78
Failure to report change of residence/phone/job	233	231	239	269	262
Failure to maintain/secure employment	186	154	138	202	208
Curfew violation	65	52	49	62	46
Failure to obey established rules	52	104	121	272	528
Allegation of a new crime	410	466	579	816	835
Failure to pay restitution	331	269	325	430	392
Failure to report	834	766	843	924	1140
Failure of drug test	668	555	681	962	835
Failure to abstain from alcohol	239	179	177	291	287
Abscond/escape	429	347	256	289	186
Other	137	112	135	99	48
Unknown	60	38	44	70	71
Defendant requested to serve sentence in DOC	23	43	37	63	80

## KANSAS PRISON ADMISSION TRENDS Admissions by Three Major Types



Note: FY 2014 through FY 2017 probation condition violators include probation violators with new conviction.

## PRISON ADMISSIONS 2009-2018

►\*Source: KDOC Admissions File

# LEGISLATIVE CHANGES IN 2019

→To address these issues, KSSC created a HB 2170 subcommittee

→SB 18 passed in the 2019 legislative session

## **SB 18 CHANGES:**

### **Courts can no longer withhold the authority of the CSO's and CC officers to administer 2/3 day jail sanctions**

If the defendant waives the right to a PV hearing, then the probation officer can impose the 2/3 day sanction with the concurrence of the chief CSO or CC director without scheduling another court hearing. See K.S.A. 22-3716(b)(4)

### **An additional 18 days is authorized for the 2/3 day sanctions, so defendant can now be given 2/3 day jail sanctions totaling 36 days**

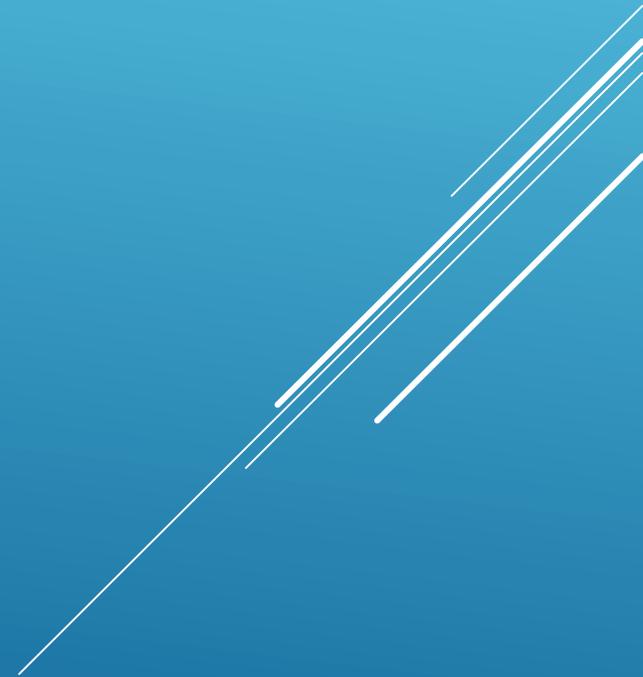
### **The 120/180 day prison sanctions are now eliminated**

### **Up to 60 day jail sanctions remain in the statute**

# WHAT LAW APPLIES WHEN THERE IS A VIOLATION?

- ▶ The law at the time of the probation violation. See *State v. McGill*, 51 Kan. App. 2d 92, 95, 340 P.3d 515 *rev. denied* 302 Kan. 1017 (2015).
- ▶ K.S.A. 22-3716(c)(10) The violation sanctions provided in this subsection shall apply to any violation of conditions of release or assignment or a nonprison sanction occurring on and after July 1, 2013, **regardless of when the offender was sentenced for the original crime or committed the original crime for which sentenced.**

WHAT OPTIONS ARE  
AVAILABLE NOW?!?



# NON-GRID FELONIES AND MISDEMEANORS

**K.S.A. 22-3716(b)(3)(B) Except as otherwise provided**, if the original crime of conviction was a misdemeanor or a felony specified in K.S.A. 2019 Supp. 21-6804(i), and amendments thereto, and a violation is established, the court may:

(i) Continue or modify the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction and **impose confinement in a county jail not to exceed 60 days**. If an offender is serving multiple probation terms concurrently, any confinement periods imposed shall be imposed concurrently;

(ii) impose an intermediate sanction of confinement in a county jail, to be imposed as a **two-day or three-day consecutive period**. The total of all such sanctions imposed pursuant to this subparagraph and subsection (b)(4) shall not exceed 18 total days during the term of supervision, except as provided in subsection (h); or

*[Additional 18 days allowed in subsection (h) allowing for 36 days total.]*

(iii) revoke the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction and require the defendant to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence that might originally have been imposed.

→ **No requirement that defendant served previous sanction**

→ Revocation is not the only option

# ON GRID FELONIES

## K.S.A. 22-3716(c)(1)

(c)(1) Except as otherwise provided, if the original crime of conviction was a felony, other than a felony specified in K.S.A. 21-6804(i), and amendments thereto, and a violation is established, the court may impose the following sanctions:

(A) Continuation or modification of the release conditions of the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction;

(B) continuation or modification of the release conditions of the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction and an intermediate sanction of confinement in a **county jail to be imposed as a two-day or three-day consecutive period**. The total of all such sanctions imposed pursuant to this subparagraph and subsection (b)(4) shall not exceed 18 total days during the term of supervision, except as provided in subsection (h); or

(C) if the **violator already had a sanction imposed** pursuant to subsection (c)(1)(B) related to the crime for which the original supervision was imposed, **revocation** of the probation, assignment to a community corrections services program, suspension of sentence or nonprison sanction and requiring such violator to serve the sentence imposed, or any lesser sentence and, if imposition of sentence was suspended, imposition of any sentence that might originally have been imposed. **[exceptions in 22-3716(c)(7)]**

K.S.A. 22-3716(c)(9) 60 day sanction in county jail

# RESPONSES TO PROBATION VIOLATIONS FOR ON-GRID FELONIES POST JULY 1, 2019

## Modify the conditions of probation

**K.S.A. 22-3716(c)(1)(A)**

**“(A) Continuation or modification of the release conditions of the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction;”**



# RESPONSES TO PROBATION VIOLATIONS FOR ON-GRID FELONIES POST JULY 1, 2019

## 2/3 day jail sanctions

### K.S.A. 22-3716(c)(1)(B)

“(B) continuation or modification of the release conditions of the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction and an intermediate sanction of confinement in a **county jail to be imposed as a two-day or three-day consecutive period**. The total of all such sanctions imposed pursuant to this subparagraph and subsection (b)(4) shall not exceed 18 total days during the term of supervision, except as provided in subsection (h)”

**(h) authorizes 18 additional days for a total of 36**

# RESPONSES TO PROBATION VIOLATIONS FOR ON-GRID FELONIES POST JULY 1, 2019

## 60 day jail sanction

### K.S.A. 22-3716(c)(9)

(9) “If the original crime of conviction was a felony, except for violations of K.S.A. 8-1567 or 8-2,144, and amendments thereto, and the court makes a finding that the offender has committed one or more violations of the release conditions of the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction, the court may impose **confinement in a county jail not to exceed 60 days** upon each such finding. **Such confinement is separate and distinct from the violation sanctions provided in subsection (c)(1)** and shall not be imposed at the same time as any such violation sanction.”

*[Statute is clear that this is not part of the graduated sanction scheme]*

HOW OFTEN ARE YOU  
USING THE 60 DAY  
SANCTION?

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- ▶ According to the Kansas Sentencing Commission:
  - ▶ in FY 2015, 16.2% (947 cases) of probation violation hearings resulted in the defendant serving an up to 60-day sanction in county jail.
  - ▶ in FY 2016, 15.9% (1,059 cases) of probation violation hearings resulted in the defendant serving an up to 60-day sanction in county jail.
  - ▶ in FY 2017, 16.5% (1,166 cases) of probation violation hearings resulted in the defendant serving an up to 60-day sanction in county jail.
  - ▶ in FY 2018, 16.9% (1,377 cases) probation violation hearings resulted in the defendant serving an up to 60-day sanction in county jail.
  - ▶ in FY 2019, 17.4% (1,441 cases) probation violation hearings resulted in the defendant serving an up to 60-day sanction in county jail.
- ▶ \*Source: KSSC Probation Revocation JE Database.

# FY 2015-2019

## Use of the 60 day sanction

# 60 DAY SANCTION CONTINUED

## ▶ ***State v. Chardon***

- ▶ Defendant entitled to jail credit towards underlying PV sanction time (not just underlying sentence) for time in jail awaiting hearing/disposition on the 60 day jail credit.
- ▶ In *Chardon*, where a defendant was in jail for 65 days awaiting disposition of a probation violation, the Court found that the defendant should have been credited the 65 days towards his 60 day sanction because the 60 day sanction is “separate and distinct” from the intermediate sanctions where the legislature made it clear that the sentence cannot be served by prior confinement credit. See *State v. Chardon*, No. 119,464, 2019 WL 3977828 (Kan. App.2019)(unpublished opinion).

# 60 DAY SANCTION CONTINUED

## ▶ ***State v. Allen***

- ▶ 60 day jail sanctions must be served concurrently on multiple cases.
- ▶ *In Allen*, a defendant was on probation for two separate cases and was ordered to two 60 day jail sanctions to run consecutively by two different judges, the Court found that the defendant could only be ordered to serve 60 days because the statute is clear that the sanctions must be run concurrently. See *State v. Allen*, 55 Kan. App. 2d 87, 407 P.3d 661 (Kan.App 2017).

# RESPONSES TO PROBATION VIOLATIONS FOR ON-GRID FELONIES POST JULY 1, 2019

## Revocation

### Previous Sanction (K.S.A. 22-3716(c)(1)(C))

“(C) if the violator **already had a sanction imposed pursuant to subsection (c)(1)(B)** related to the crime for which the original supervision was imposed, revocation of the probation, assignment to a community corrections services program, suspension of sentence or nonprison sanction and requiring such violator to serve the sentence imposed, or any lesser sentence and, if imposition of sentence was suspended, imposition of any sentence that might originally have been imposed.”

[2/3 day quick dips referenced as a previous sanction, however, 60 day sanctions are not.]

# RESPONSES TO PROBATION VIOLATIONS FOR ON-GRID FELONIES POST JULY 1, 2019

## Revocation

Reasons to revoke without a previous sanction (K.S.A. 22-3716(c)(7))

1. Public safety/offender welfare
2. Dispositional departure
3. New misdemeanor/felony
4. Offender absconds

# REVOCACTION WITHOUT PREVIOUS SANCTION

## Public safety/offender welfare

K.S.A. 22-3716(c)(7)(A) 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 such sanction;

# PUBLIC SAFETY/OFFENDER WELFARE CONTINUED

**Implicit comments are not enough.** *See State v. Clapp*, 308 Kan. 976, 425 P.3d 605 (2018).

- Referenced prior weapons cases, defendant's dangerous criminal history and dishonesty with ISO
- 60 day jail sanction to be suspended when defendant went to inpatient treatment ordered at original sentencing, sentenced to 180 days prison at first PV hearing, revoked at second PV hearing
- COA upheld revocation and also considered language used at first PV hearing
- The Supreme Court stated, "we discern the district court's remarks to Clapp were akin to the reasoning historically relied upon by district courts in exercising unfettered discretion to revoke probation for any violation and impose an underlying prison sentence." *Id.* at 991.

# PUBLIC SAFETY/OFFENDER WELFARE CONTINUED

**Broad statements about continued drug usage and past behavior are likely not enough.** See *State v. Duran*, No. 119,303 2019 WL 2554125 (Kan.App. 2019)(unpublished opinion).

- Defendant committed a new crime while on probation
- Judge gave defendant the choice between probation and prison during dual violation/sentencing hearing
- Stated “no tolerance policy” while on probation, defendant would be revoked for any violation
- Defendant tested positive for methamphetamine 3 days after he was released
- Judge revoked him making comments about the offender’s welfare/public safety

# PUBLIC SAFETY/OFFENDER WELFARE CONTINUED

- District Court stated: “I understand your desire not to go to prison. I understand the rationalization that you justify your desire to not go to prison despite your long-term addiction. But I’m going to find that reinstatement of probation is not in your best interest, would not be in your welfare because you are likely to obtain new probation violation matters based on repeat behaviors, as you’ve already shown in the prior probation warrants. **Drug usage, weapon possession. You have the possibility of incurring new charges. Public safety’s impacted in a negative way because of the demonstrated history and the, again, possibility that you would have possession and possibly use of weaponry in the future. You would certainly be fueling the drug economy, which is illegal in and of itself.”** *Id.* at 765.
- COA: “.... “if courts are allowed to make an offender welfare finding based on the likelihood that a person addicted to drugs is going to relapse, then (c)(9) would swallow up the graduated sanctions system.” Likewise, if courts can make an offender welfare finding because a person might violate his or her probation again, the exception will swallow the rule. And if courts can base their public safety findings on such generalized conclusions that a defendant’s continued drug usage fuels the drug economy, all probation revocations for drug usage could result in such a finding and the bypassing of intermediate sanctions.” *State v. Duran*, No. 119,303 2019 WL 2554125 (Kan.App. 2019)(unpublished opinion).

# PUBLIC SAFETY/OFFENDER WELFARE CONTINUED

*State v. Duran*, No. 119,303 2019 WL 2554125 (Kan.App. 2019) (unpublished opinion).

- “Broad generalizations that equally could apply to all similar cases are not sufficiently particularized to meet the requirements of K.S.A. 2018 Supp. 22-3716(c)(9)(A).” *Id.* at 767.
- “A district court’s finding under K.S.A. 2018 Supp. 22-3716(c)(9)(A) that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by imposing intermediate sanctions for a probation violation is not specific enough to bypass intermediate sanctions if an appellate court must infer from the judge’s finding the particularized reasons why public safety would be jeopardized or the offender’s welfare would not be served.” *Id.*

# REVOCACTION WITHOUT PREVIOUS SANCTION

## Dispositional departure

K.S.A. 22-3716(c)(7)(B) Probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction was originally granted as the result of a dispositional departure granted by sentencing court pursuant to K.S.A. 2018 Supp. 21-6815.

# RETROACTIVE.... FOR NOW

- ▶ K.S.A. 2017 Supp. 22-3716(c)(9)(B) permits a district court to revoke a defendant's probation without having imposed a graduated sanction if probation was originally granted as the result of a dispositional departure. *State v. Tearney*, No. 120,340, 2019 WL 6973672 at \*1 (Kan.App. 2019)(unpublished opinion).
- ▶ **This dispositional departure exception, enacted on July 1, 2017, applies to probation violations which occur after July 1, 2013, even when those violations occurred before the dispositional departure exception.** *Id.*

# REVOCAION WITHOUT PREVIOUS SANCTION

## New misdemeanor or felony

K.S.A. 22-3716(c)(7)(C) Offender commits a new felony or misdemeanor while the offender is on probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction

- No requirement for conviction See *State v. Kyles*, 2015 WL 5613265 at \*4 (Kan.App.2015) (unpublished opinion).
- Traffic infractions don't count! See *Id.*

# REVOCACTION WITHOUT PREVIOUS SANCTION

## New misdemeanor or felony

*State v. Williams*, No. 112,228, 2015 WL 5613253  
(Kan.App.2015) (unpublished opinion)

- Defendant picks up murder charge while on probation
- Bound over at preliminary hearing (first degree murder and criminal possession of firearm)
- At PV hearing, judge took judicial notice that defendant had been bound over & commented that another judge found PC to bind defendant over
- Court commented that he reviewed that hearing and ruling made; found sufficient evidence for violation but didn't state which standard he used
- Defendant revoked
- COA reversed stating, "a district court may not impose a probable cause standard in place of the preponderance of the evidence standard. Since the mere fact that Williams was bound over for trial under the probable cause standard was insufficient evidence to revoke Williams' probation, and it appears the wrong legal standard was employed to determine whether Williams violated his probation, we reverse the district court's order revoking probation and remand the matter for a new probation revocation hearing." *Id.* at \*8.

# REVOCAION WITHOUT PREVIOUS SANCTION

## Absconding

K.S.A. 22-3716(c)(7)(D) Offender absconds from supervision while offender is on probation assignment to a community correctional services program, suspension of sentence or nonprison sanction

### **Absconding defined in *State v. Dooley***

“the State must show, and the district court must find, that the probation violator engaged in some course of action (or inaction) with the conscious intent to hide from or otherwise evade the legal process, such as intentionally avoiding probation supervision by hiding within or secretly leaving the jurisdiction.” *State v. Dooley*, 308 Kan. 641, 423 P.3d 469 (2018).

# ABSCONDING CONTINUED

*Dooley* Court goes on to say:

“Evading the legal process of the court includes the offender’s conduct in intentionally avoiding probation supervision, for example, by intentionally avoiding detection by one’s probation officer. In determining whether an offender has “abscond[ed] from supervision,” district courts must consider whether the offender’s “acts show the intent that inheres in the definitions of ‘abscond’—not simply that the [offender] failed to attend one meeting with a probation officer or could not be located for a brief period of time, but that the [offender] sought to ‘evade the legal process of a court by hiding within or secretly leaving the jurisdiction.’ ” 345 Or. at 36, 188 P.3d 262 (quoting Webster’s Third New Int’l Dictionary 6).” *Id.* at 480.

# ABSCONDING CONTINUED

Dooley applied in *State v. Walker*

- o Defendant was on probation and parole in Kansas
- o A year of non-reporting, went to Texas without notifying P.O., record not clear how he returned to KS or how long he was in TX
- o Revoked as an absconder and new misdemeanor in district court (box checked on J.E.)

## COA stated:

"There were no facts before the district court to conclude Walker absconded from supervision because **no evidence suggested he was hiding within or secretly leaving the jurisdiction to evade legal process.** No one testified about Walker's whereabouts during his nearly year-long nonreporting period. The affidavits filed with the district court show Walker did not notify his ISO he was leaving Kansas until he was already in Texas in July 2016. However, the affidavits are silent about whether Walker left Kansas to evade legal process." *State v. Walker*, No. 118,411, 2018 WL 6005242 (Kan.App. 2018) (unpublished opinion).

→ Court noted that no one testified about defendant's whereabouts

→ Make a clear record of offender's whereabouts and why it is believed the offender has absconded.

# ABSCONDING CONTINUED

## **State v. Oatis**

- o Defendant reported to P.O. once; provided a local KS address and phone number
- o Oatis tried to call P.O. twice in 2012, but no caller ID; P.O called the number he had been given with no response
- o P.O. learned that Oatis was living in Illinois & had been charged with crimes there
- o At violation hearing in 2018, Oatis was revoked as an absconder

## **COA stated:**

“The evidence shows that after two phone calls, Oatis left the state and did not try to contact the CSO. Then for over five years, Oatis made no attempt to contact his probation officer. He purposely chose to evade the legal process of the district court by secretly leaving the jurisdiction.” *State v. Oatis*, No. 120,014, 2019 WL 4230102 at \*3 (Kan.App. 2019) (unpublished opinion).

“Based on the evidence, a reasonable person could conclude that Oatis did more than just fail to report. See *State v. Anhorn*, No. 111,903, 2015 WL 3632493, at \*3 (Kan. App. 2015) (unpublished opinion) (failing to report for three months, leaving the state without telling the probation officer or providing a forwarding address, and being arrested out of state provides substantial evidence that a probationer departed secretly and thus absconded using the Huckey standard). Oatis' secret move to Illinois and his consistent flouting of the conditions of his probation for over five years show his intent to evade the legal process.” *Id.* at \*4.

# HELPFUL TOOLS PROVIDED BY KSSC

- <https://sentencing.ks.gov/>
  - Desk Reference Manual
  - Sign up for quarterly newsletter
  - Staff Attorney Email
    - [KSSCAAttorney@ks.gov](mailto:KSSCAAttorney@ks.gov)
  - Training
    - [Francis.givens@ks.gov](mailto:Francis.givens@ks.gov)
  - Forms
    - JE for sentencing and PV
    - Sample PV hearing waiver (created by OJA)

Questions

Comments

Concerns

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