



KSSC Webinar

SB 123 Eligibility, Case Updates & FAQ

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KSSSC AGENCY MISSION

To develop monitoring procedures and reporting methods to evaluate the guideline sentencing system where public safety is the focus; to advise and consult in developing mechanisms to link sentencing practices with correctional resources and policies; and to determine the impact of guidelines on the state's prison population. Agency resources are devoted to this mission at the direction of the Commission.

WHAT DO WE DO?

- ▶ Desk Reference Manual
- ▶ Annual Report
- ▶ Involvement with legislative process
- ▶ Impact Statements
- ▶ Respond to Research Requests
- ▶ Administer SB 123 program
- ▶ Training for Criminal Justice groups
- ▶ Staff Attorney email for questions
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Senate Bill 123 was approved during the 2003 Legislative session and implemented in fiscal year 2004, **with the goal of treating non-violent drug offenders and reserving prison sentences for those offenders who commit serious, violent crimes.** The program provides funding to eligible offenders for community based substance abuse treatment for up to their 18 month term of probation. This treatment is furnished by treatment providers state-wide who have been certified to provide appropriate treatment by the Kansas Department of Corrections. The program is maintained through coordinated efforts among the Kansas Sentencing Commission, Community Corrections, Court Services, and certified treatment providers.

OVERVIEW OF SB 123

GOAL

To provide community intervention and the opportunity for treatment to certain offenders with substance abuse problems in order to address more effectively prison recidivism of substance abusers in the state prison system, which should be reserved for serious, violent offenders.



- ▶ Administration
- ▶ Monitoring
- ▶ Evaluation
- ▶ Training
- ▶ Payment services
- ▶ Publications and
- ▶ Informational meetings

WHAT DOES KSSC DO?

WHO IS ELIGIBLE?

(a) There is hereby established a nonprison sanction of certified drug abuse treatment programs for certain offenders who are sentenced on or after November 1, 2003. Placement of offenders in certified drug abuse treatment programs by the court shall be limited to placement of adult offenders, convicted of a felony violation of K.S.A. 21-5705 or 21-5706, and amendments thereto, whose offense is classified in grid blocks:

(1) 5-C, 5-D, 5-E, 5-F, 5-G, 5-H or 5-I of the sentencing guidelines grid for drug crimes and such offender has no felony conviction of K.S.A. 65-4142, 65-4159, 65-4161, 65-4163 or 65-4164, prior to their repeal, K.S.A. 21-36a03, 21-36a05 or 21-36a16, prior to their transfer, or K.S.A. 21-5703, 21-5705 or 21-5716, and amendments thereto, or any substantially similar offense from another jurisdiction; or

(2) 5-A, 5-B, 4-E, 4-F, 4-G, 4-H or 4-I of the sentencing guidelines grid for drug crimes, such offender has no felony conviction of K.S.A. 65-4142, 65-4159, 65-4161, 65-4163 or 65-4164, prior to their repeal, K.S.A. 21-36a03, 21-36a05 or 21-36a16, prior to their transfer, or K.S.A. 21-5703, 21-5705 or 21-5716, and amendments thereto, or any substantially similar offense from another jurisdiction, if the person felonies in the offender's criminal history were severity level 8, 9 or 10 or nongrid offenses of the sentencing guidelines grid for nondrug crimes, and the court finds and sets forth with particularity the reasons for finding that the safety of the members of the public will not be jeopardized by such placement in a drug abuse treatment program.

MANDATORY

Adult offenders convicted of drug possession, (K.S.A. 2019 Supp. 21-5706) who: (1) have NO felony conviction(s) of drug manufacturing* (K.S.A. 2019 Supp. 21-5703), drug cultivation* (K.S.A. 2019 Supp. 21-5705), drug distribution* (K.S.A. 2019 Supp. 21-5705) or unlawful use of proceeds of a drug crime* (K.S.A. 2019 Supp. 21-5716); -AND- (2) (A) whose offense is in the 5-C, 5-D, 5-E, 5-F, 5-G, 5-H or 5-I grids blocks of the drug grid. See K.S.A. 2019 Supp. 21-6824(a)(1).

*or substantially similar offense from another jurisdiction

DISCRETIONARY

Adult offenders convicted of 21-5705 or 21-5706 whose offense is in the 5-A, 5-B, 4-E, 4-F, 4-G, 4-H or 4-I grids blocks of the drug grid if:

- ▶ Offender has NO felony conviction(s) of drug manufacturing* (K.S.A. 2019 Supp. 21-5703), drug cultivation* (K.S.A. 2019 Supp. 21-5705), drug distribution* (K.S.A. 2019 Supp. 21-5705) or unlawful use of proceeds of a drug crime* (K.S.A. 2019 Supp. 21-5716)*; AND
- ▶ 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. See K.S.A. 2019 Supp. 21-6824(a)(2).

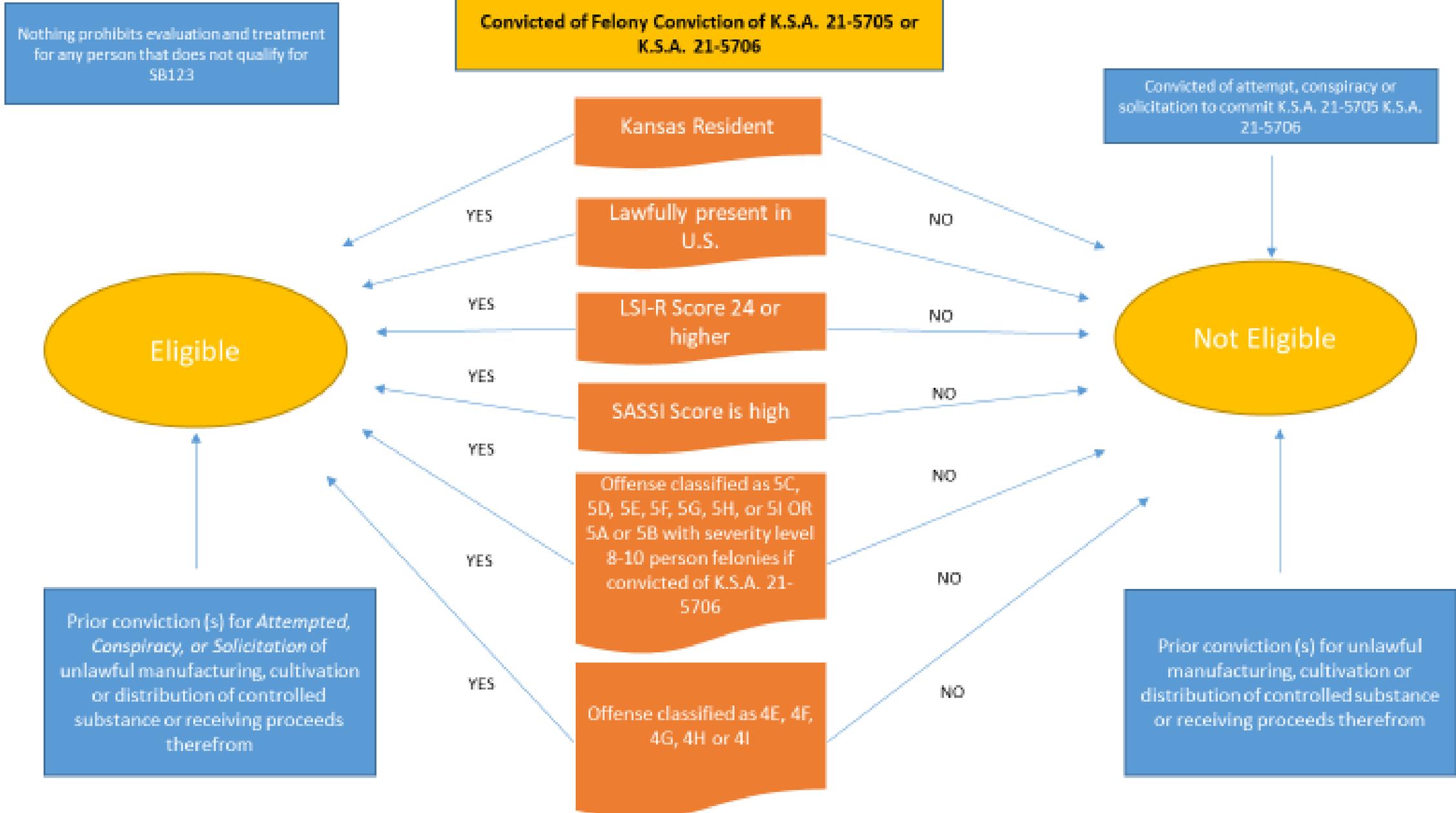
*or substantially similar offense from another jurisdiction

OFFENDER IS NOT ELIGIBLE IF.....

- ▶ Offender is a resident of another state and is returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision; or
- ▶ offender is not lawfully present in the United States and being detained for deportation; or
- ▶ offender does not meet the risk assessment levels provided in subsection (c). [high risk drug abuse assessment and moderate or high risk criminal risk-need assessment]

See K.S.A. 21-6824(h)(1)

Senate Bill 123 Eligibility (KSA 21-6804) as of July 1, 2019



IS AN
OFFENDER
CONVICTED OF
AN ATTEMPTED
DRUG CHARGE
ELIGIBLE?

Offenders convicted of attempted possession are not eligible for SB 123. See *State v. Perry-Coutcher*, 45 Kan. App. 2d 911, 254 P.3d 566 (2011). Likewise, offenders convicted of conspiracy and solicitation to commit drug possession will not be eligible for SB 123 treatment.

ARE DACA RECIPIENTS ELIGIBLE FOR SB 123 TREATMENT?

If the DACA recipient is not being detained for deportation and has met the other qualifications for SB 123, KSSC believes the recipient is eligible for SB 123 treatment.

DO SPECIAL
RULES TRUMP
THE
MANDATORY
SB 123
TREATMENT?

It depends.

SB 123 IS MANDATORY FOR
OFFENDERS WHO QUALIFY.
SEE *STATE V. ANDELT*, 289 KAN.
763, 765, 217 P.3D 976 (2009).

SPECIAL RULE 9

- ▶ If offender commits new felony while incarcerated and serving a sentence for a felony, on probation, assignment to a community correctional services program, parole, conditional release or postrelease supervision for a felony, a new sentence shall be imposed consecutively and the **court may sentence the offender to imprisonment** for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. See K.S.A. 2019 Supp. 21-6604(f)(1).
- ▶ In *State v. Andelt*, where the defendant committed a crime while on felony parole, the Court found that he should have been sentenced to SB 123 instead of prison because SB 123 is mandatory for qualifying offenders whereas K.S.A. 21-4603d(f)(1) gives district courts discretion to impose a prison sanction when probation is presumed if an offender commits a new crime while on felony bond. See *State v. Andelt*, 289 Kan. 763, 772, 217 P.3d 976 (2009).

SPECIAL RULE 26

- ▶ Third or subsequent drug possession shall be presumed imprisonment. K.S.A. 2019 Supp. 21-6805(f)(1).
- ▶ A sentencing court need not impose probation with drug treatment when the three strikes rule applies. *State v. Daniels*, No. 119,946, 2019 WL 4725329, at *3 (Kan.App.2019) (unpublished opinion).

BORDER BOX

Even if the offender's criminal history places them in a border box on the drug grid, SB 123 treatment is mandatory if the offender meets the criteria outlined in K.S.A. 2018 Supp. 21-6824. See *State v. Swazey*, 51 Kan. App. 2d 999, 1004, 357 P.3d 893 (2015).

- ▶ Defendant pled to Possession of Methamphetamine (SL5DF) while he was on parole in another case
- ▶ Criminal history D (presumed prison; border box), but qualified for SB 123
- ▶ Judge sentenced defendant to prison. The court said that “[t]here [was] no question ... that Mr. Stefan is in need of substantial treatment.” But considering Stefan's probation violations from a different case and a prior failed attempt at drug treatment, the court found that ordering Stefan to receive additional drug-treatment services wouldn't be effective. The court said that it was declining to make the border-box findings that treatment would be more effective than imprisonment. See K.S.A. 2018 Supp. 21-6804(q). *State v. Stefan*, No. 120,536, 2019 WL 3367815 at *1 (Kan.App. 2019)(unpublished opinion).
- ▶ Even for crimes committed when another special statutory rule applies, such as when the new offense was committed while the defendant is on felony parole, the district court must follow the specific directive of K.S.A. 2019 Supp. 21-6824(c). *Id.* at 2.
- ▶ Specific SB 123 statute controls over general sentencing statutes

STATE V. STEFAN



The court may order an offender who otherwise does not meet the assessment score requirements of subsection (c) to undergo **one additional drug abuse assessment** while such offender is on probation. Such offender may be ordered to undergo drug abuse treatment pursuant to subsection (a) if such offender is determined to meet the requirements of subsection (c). **The cost of such assessment shall be paid by such offender.** K.S.A. 2019 Supp. 21-6824(i).

WHAT IF AN OFFENDER DOES NOT MEET
ELIGIBILITY REQUIREMENTS AT THE TIME OF
SENTENCING?

REMINDERS FROM SB 123 DEPARTMENT

- ▶ If 2 cases are sentenced on the same day, both to SB 123, it tends to look like 1 case worth of funding, not two 18-month blocks.
- ▶ As above, only one case is available for funding at a time, so despite having 2 open cases, offenders do not receive “double” treatment. The most recent case is the one that we encourage providers to bill on (when another case is opened, the old one is closed out)

REMINDERS FROM SB 123 DEPARTMENT CONT'D.

- ▶ SB6 and SB123 overlap is causing some problems, as Beacon holds the payment responsibilities for both funding streams. Only one can apply at a time.

REMINDERS FROM SB 123 DEPARTMENT CONT'D.

- ▶ Some ISO's are opening cases pre-sentence in TOADS, securing treatment and a CPA, and then sending offenders to treatment that is then reimbursed through SB 123 prior to sentencing. **Eligibility based on assessment and case history does not make the offender eligible; only upon sentencing should they be receiving treatment through 123 funds for anything other than presentence assessment.**



- ▶ <https://sentencing.ks.gov/sb-123>
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KSSC RESOURCES

2020 CASE UPDATE – SELECTED DECISIONS AFFECTING SENTENCING*

*This is not an exhaustive list of all cases affecting sentencing. To review all recent cases, visit <https://www.kscourts.org/Cases-Opinions/Opinions>.

State v. Patterson III

- Armed Robbery; victim killed by accomplice of Defendant
- Defendant was 19 at time of crime

The Kansas Supreme Court held the hard 25 life sentence is not categorically disproportionate as applied to young adults convicted of felony murder. *State v. Patterson III*, 455 P.3d 792, 804 (Kan. 2020).

State v. Downing

- Defendant convicted of burglary of a dwelling
- Owner of building testified that no one lived there at the time; no plans to rent it out
- Owner also testified that family members had lived in the building before he owned it

In a burglary of a dwelling case, where the owner testified that no one lived at the building and he had no plans to live there or rent it out, the Kansas Supreme Court found the dwelling requirement was not met because there was no present, subjective intent that the building be used as a dwelling. See *State v. Downing*, 456 P.3d 535 (Kan. 2020).

State v. Carter

- Defendant robbed a Dollar General store using a Taser
- District Court found that a dangerous weapon was used; defendant required to register as violent offender

The Kansas Supreme Court ruled that a Taser used by the defendant in an aggravated robbery is a deadly weapon for purposes of the Kansas Offender Registration Act (KORA). See *State v. Carter*, 459 P.3d 186, 192 (Kan. 2020). Although the district judge made an oral finding that there was a “dangerous weapon involved”, instead of the finding required by statute, the Court found that indicating a deadly weapon was used in the commission of the crime on the journal entry was enough to satisfy the requirement for KORA. See *id.* at 189.

State v. Fowler

- Defendant convicted of Possession of Methamphetamine, Violation of Protective Order and Felony Domestic Battery
- Defendant's two prior misdemeanor Domestic Battery convictions were used to calculate his criminal history for the primary grid conviction (Possession of Meth) as well as to elevate the current Domestic Battery charge from a misdemeanor to a felony
- Defendant argued this violated the rule against "double counting"

The Kansas Supreme Court held that a sentencing judge's use of the same two prior misdemeanor domestic batteries both to calculate a defendant's criminal history for his or her base sentence on a current primary grid crime and to elevate a current domestic battery to a felony does not violate K.S.A. 2015 Supp. 21-6810(d)(9)'s restriction on double counting. *State v. Fowler*, 457 P.3d 927 Syl. ¶ 2 (Kan. 2020).

State v. Roberts

The Kansas Court of Appeals ruled that when restitution is ordered, the language of K.S.A. 2018 Supp. 21-6604(b)(2) requires the district court to establish a plan for “payment of restitution.” See *State v. Roberts*, 2020 WL 858103 at *6 (Kan. App. February 21, 2020).

- **Senate Sub. for HB 2034**

Senate Sub. for HB 2034

Requires a court to order restitution and to specify that ordered restitution shall be due immediately, unless the court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments, or the court finds compelling circumstances that would render restitution unworkable, either in whole or in part.

State v. Coleman

- Revoked from probation with dispositional departure exception
- Committed offense before statute's effective date (July 1, 2017)

The Kansas Supreme Court held that, “the K.S.A. 2017 Supp. 22-3716(c)(9)(B) exception, which allows a trial court to revoke a probationer's probation without first imposing graduated sanctions if the probation was granted as a result of a dispositional departure, applies only to probationers whose offenses or crimes of conviction occurred on or after July 1, 2017.” *State v. Coleman*, 460 P.3d 828, 832 (Kan. 2020).

State v. Ratliff

- Defendant committed offense in November 2017; placed on probation
- Defendant asked for a 180 day sanction at PV hearing, he was revoked instead
- The district court did not believe the 120/180 sanctions were still available

The Court of Appeals held that the statutory amendment eliminating the 120/180 day probation violation sanctions only applies to probationers who committed their underlying crimes after July 1, 2019. See *State v. Ratliff*, No. 121,800, 2020 WL 2097488 at *2 (Kan.App. 2020) (unpublished opinion).

State v. Timmons

- Convicted of Attempted Failure to Register as a Drug Offender when the offense was a person felony
- When defendant committed current crime, the prior Attempted Failure to Register as a Drug Offender was a non-person felony

The Court of Appeals applied *Keel* to rule that the prior registration offense should be classified as a non-person felony because when the defendant committed the current conviction, the failure to register offense was classified as a nonperson felony. See *State v. Timmons*, No. 120,251, 2020 WL 2503273 at *5 (Kan.App. 2020) (unpublished opinion).

State v. Mejia

- Defendant had 3 prior Missouri convictions that were used to elevate the DUI from a misdemeanor to a felony

The Court of Appeals ruled that the holding in *Wetrich* does not apply to DUI cases because the Legislature has amended K.S.A. 8-1567 to permit charging and sentencing enhancements for DUIs based on out-of-state convictions under statutes that are comparable to Kansas law—meaning “similar to” rather than the same as or narrower than Kansas law. See *State v. Mejia*, 2020 WL 2602059 at *1 (Kan. App. May 22, 2020).



FREQUENTLY ASKED QUESTIONS



WHAT SHOULD BE LISTED AS THE PRIMARY CRIME WHEN THERE IS AN OFF-GRID AND A GRID-FELONY IN THE SAME CASE?

The Primary Offense is generally the crime with the highest severity ranking. However, when an off-grid crime is part of a multiple count case, the primary on-grid crime should be used for determining the base guideline sentence, using full criminal history. DRM Appendix A Page 3.

WHAT SHOULD BE LISTED AS THE PRIMARY CRIME WHEN THERE IS A NON-GRID AND A GRID-FELONY IN THE SAME CASE?

- ▶ The Primary Offense will be the grid-felony. See *State v. Fowler*, 55 Kan. App. 2d 92, 408 P.3d 119 (Kan.App. 2017).
- ▶ “In a multiple-conviction case, the sentencing judge must “establish a base sentence for the primary crime.” K.S.A. 2018 Supp. 21-6819(b)(2). “The primary crime is the crime with the highest crime severity ranking.” K.S.A. 2018 Supp. 21-6819(b)(2). If there are multiple crimes with the same severity ranking, the district judge must “designate which crime will serve as the primary crime.” K.S.A. 2018 Supp. 21-6819(b)(2). If one or more convictions in the current case are off-grid crimes, those crimes are ignored to determine the appropriate sentences for any grid crimes. K.S.A. 2018 Supp. 21-6819(b)(2). Nongrid crimes that have sentences prescribed by individual statutes also are excluded from grid calculation and thus can never qualify as primary crimes under the KSGA. See K.S.A. 2015 Supp. 21-6804(i).” *State v. Fowler*, 457 P.3d 927, 931 (2020).



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