KACSO—2025 Fall Conference

Presentence Investigation 101

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Overview

- PSI Basics and Refresher
- New Kansas Appellate Cases
- FAQ

PSI Cover Sheet Issues

- Subject in custody awaiting sentencing?
  - Determined as of date of report
- Placement Options
  - Court Services or Comm. Corrections
- Determining Primary offense (most severe)
  - Drug grid vs. Non-drug grid
  - Special Rule 41 (traffic priors become person felonies for felony leaving the scene, 8-1602)
    - Case where SL6 leaving scene could be worse than SL5 Manslaughter or SL4 I/V Manslaughter while DUI

Notice in the Complaint

- #32 (Drug Felony w/ Possession of Firearm)
- #52 (Crim. Discharge with minor present)
- #53 (Offense compelled an abortion)
- These rules require proof of additional fact(s) that wouldn't otherwise be part of charge
  - As opposed to special rule 1 (person felony with firearm) which usually is proven with charge (gun used to shoot/rob/injury/threaten/etc.)

Prior Criminal Threat Convictions

What about criminal threats?

- State v. Boettger, 310 Kan. 800 (10/25/19)
  - Reckless crim. threat convictions unconstitutional
- Counterman v. Colorado, 600 U.S. 66 (2023)
  - Reckless crim. threat convictions constitutional
- State v. Phipps, 320 Kan. 616 (6/27/25)
  - Note Counterman but pass on overruling Boettger b/c Phipps had completed his sentence (moot)
- K.S.A. 21-6810(d)(9) currently controls
  - Once unconstitutional, it can't be used

Criminal History Classification

- The Kansas Supreme Court found that the provision in the Kansas criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), that allows for a criminal conviction if a person makes a threat in reckless disregard of causing fear is unconstitutionally overbroad. See *State v. Boettger*, 310 Kan. 800, 801, 450 P.3d 805 (2019).
- Then, *Counterman v. Colorado* was decided….

Counterman v. Colorado

- Defendant charged under a Colorado stalking statute
- Counterman moved to dismiss under First Amendment grounds
- "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 216 L. Ed. 2d 775, (2023)

Criminal Threat Classification

In *State v. Phipps*, the Kansas Court of Appeals held that *Counterman v. Colorado* effectively overrules *State v. Boettger*. See *State v. Phipps*, 63 Kan.App.2d 698, 707, 539 P.3d 227. (Kan. App. 2023)(*review granted* January 29, 2024). In *Counterman v. Colorado*, the United States Supreme Court found that the First Amendment requires proof of a defendant's subjective understanding of the threatening nature of a statement to be punished as a crime, but a mental state of recklessness is sufficient to establish a true threat. See *id*. The COA found the holding in *Counterman* applies to any pending case in Kansas in which the defendant's sentence is not final. See *id* at 711.

Counterman applied to cases in Kansas: *State v. Phipps*

- Prior conviction of Criminal Threat from 2010
- District Court included conviction in his criminal history after holding a hearing where state presented a transcript of the plea hearing; district court found facts supported both a reckless and intentional threat conviction
- Defendant argues that due to *State v. Boettger,* prior criminal history conviction should not be included, tried to distinguish *Boettger* from *Counterman*, COA rejected his argument
- COA said, "the Kansas Supreme Court had never addressed the question noted that the United States Supreme Court had never explicitly considered whether a conviction for recklessly making a threat can be a true threat or instead violates the First Amendment. But the United States Supreme Court has now explicitly addressed this question in *Counterman*."

Kansas Supreme Court has now said….

- Our Legislature's direction was clear. If a prior conviction arose under a statute "that has since been determined unconstitutional by an appellate court," it cannot be counted in a criminal history score. Nothing in the plain language of the statute qualifies this limitation by considering subsequent repudiations of an appellate court's holding that a statute is unconstitutional.
- As applied here, *Boettger*, 310 Kan. at 822, held that the portion of K.S.A. 2018 Supp. 21-5415 criminalizing reckless criminal threat is unconstitutional. This holding further invalidated the corresponding portion of K.S.A. 2003 Supp. 21-3419, under which Smith's 2003 conviction arose. And while the parties argue at length as to whether *Counterman v. Colorado*, 600 U.S. 66, 81-82, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), effectively overruled Boettger, this consideration is irrelevant under the plain language of K.S.A. 21-6810(d)(9), which asks only whether an appellate court "has since" ruled the statute unconstitutional—not whether that holding remains good law.

State v. Smith, 563 P.3d 697, 718 (Kan. February 14, 2025).

Consolidation

What is consolidation?

The court may order two or more complaints, informations or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment. K.S.A. 2024 Supp. 22-3203.

Why does it matter if a case is considered consolidated?

If cases are consolidated, the counts will be in one case and NOT scored against each other; not prior convictions

If the cases are not consolidated, the counts will be in separate cases and will be scored against each other for criminal history purposes; count as prior convictions

What is considered a prior conviction?

K.S.A. 2024 Supp. 21-6810(a) states that, "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**, and amendments thereto, which occurred prior to sentencing in the current case, regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case."

Consolidation

- In *Shipley*, where a defendant argued that his two cases were effectively consolidated, the Court of Appeals found that the cases counted as prior convictions for criminal history purposes because the cases were never joined for trial. See *State v. Shipley*, 62 Kan.App.2d 272, 280, 510 P.3d 1194 (Kan. App. 2022). Shipley had no trial because he pleaded, but his cases were set for trial on the same day, he pleaded to both cases by a joint plea agreement on the same day, and he was sentenced in both cases on the same day. *Id*. at 276. Neither party asked the court to consolidate the cases for trial. See *id*. at 272.
- The COA found that the district court did not err in relying on the convictions in each complaint to calculate a criminal history score in the other. See *id*. at 273.

Consolidation Continued

"Second, although Shipley insists the cases could have been joined under K.S.A. 22-3202 and K.S.A. 22-3203, **the fact remains that they were not joined.** Although Shipley entered pleas on the same day and the plea agreement deals with both cases, **the district court never ordered the cases joined for trial. And because the cases were never "joined for trial," as is required here to prevent his convictions from being "prior convictions" under K.S.A. 2020 Supp. 21-6810(a), the district court was duty bound to use the convictions in each case to calculate the criminal history score in the other.** See *Roderick*, 259 Kan. at 115-16, 911 P.2d 159 (holding that the district court should count multiple convictions entered on same date in different cases in determining a defendant's criminal history score). Our cases have consistently so held. See *State v. Helko*, No. 112,961, 2016 WL 1296081, at *1 (Kan. App. 2016) (unpublished opinion) (finding convictions in one case qualified as "prior conviction[s]" for criminal history scoring purposes even though defendant was convicted in that case and in another case on the same day and sentenced for both cases at one hearing); *State v. Freimark*, No. 108,839, 2013 WL 5976056, at *2 (Kan. App. 2013) (unpublished opinion) ("when a defendant is convicted of crimes in two separate cases on the same day and sentenced in both cases at one hearing, the convictions in each case are scored against the other case for criminal history purposes"); *State v. Loggins*, No. 90,171, 2004 WL 1086970, at *6 (Kan. App. 2004) (unpublished opinion) ("The fact the court set the cases for sentencing on the same date, likewise, did not prevent them from being prior convictions for purposes of Loggins' criminal history.")." *State v. Shipley*, 62 Kan.App.2d 272, 279, 1201, 510 P.3d 1194 (Kan. App. 2022).

Consolidation

- Anderson was charged with 3 separate cases
- District Court consolidated cases before plea hearing
- At sentencing, defendant argued criminal history score of "C" should only be applied to one primary count
- Anderson was sentenced as if he had 3 separate cases
- *State v. Anderson*, No. 124,727, 2023 WL 176658 (Kan. App. January 13th, 2023) (unpublished opinion).

Consolidation

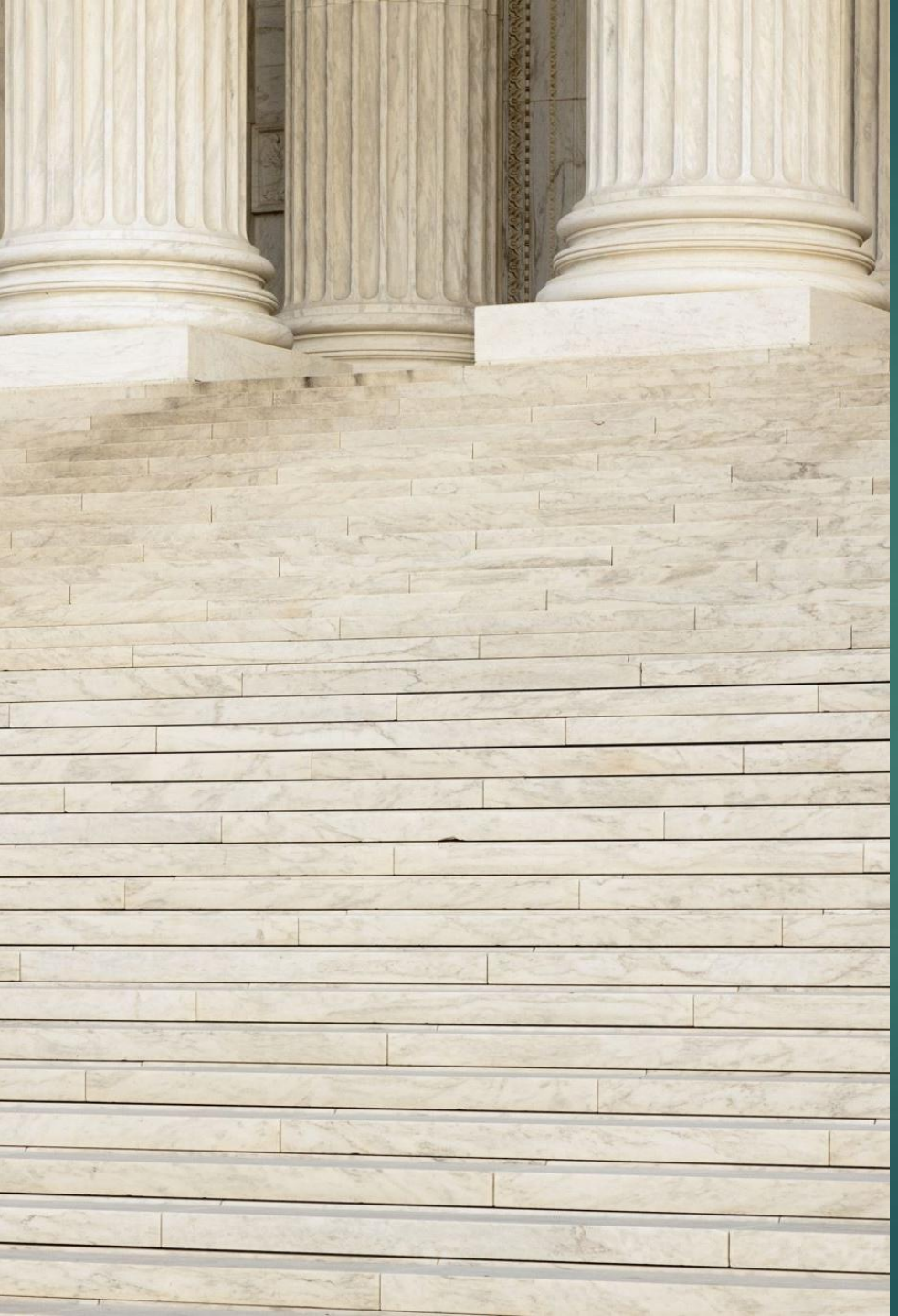
Where the district court consolidated a defendant's 3 cases and sentenced the defendant using a separate primary crime for each, the Kansas Court of Appeals remanded the case for the district court to designate a base sentence for the most severe crime among the three cases to serve as the base sentence for all. See *State v. Anderson*, No. 124,727, 2023 WL 176658 at *6, (Kan. App. January 13th, 2023) (unpublished opinion). The Court of Appeals found the differential treatment violated his constitutional right to equal protection because Anderson's controlling prison sentence was several months longer than it would have been if the State had filed only one charging document. Id. at *1.

When cases are consolidated, should separate PSIs be completed?

Jail Credit

Jail Credit
K.S.A. 2024 Supp. 21-6615(a)

In any criminal action in which the defendant is convicted, the judge, if the judge sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the sentencing order of the journal entry of judgment. Such date shall be established to reflect and shall be computed as an allowance for the time which the defendant has spent incarcerated ***pending the disposition of the defendant's case***. In recording the commencing date of such sentence the date as specifically set forth by the court shall be used as the date of sentence and all good time allowances as are authorized by the secretary of corrections are to be allowed on such sentence from such date as though the defendant were actually incarcerated in any of the institutions of the state correctional system.



State v. Hopkins

- Pled to two counts of premeditated murder & sentenced to hard 50
  - At the time of sentencing, there was a MTR probation in a theft case; he also was charged with a new crime relating to his escape from custody
  - As part of his plea deal, the new escape case was dismissed, the State agreed to withdraw MTR and a separate pending case in another county was dismissed
- Spent 572 days in jail awaiting sentencing
  - District Court did not award defendant any jail credit
- KS Supreme Court overruled prior case law and stated that the defendant will be awarded the 572 days of jail credit against his hard 50 sentences
- Prior rule "unworkable"
- The award of credit under K.S.A. 2022 Supp. 21-6615(a) is not limited to time spent "solely" in custody for the charge for which the defendant is being sentenced.

See *State v. Hopkins*, 317 Kan. 652, 652, 537 P.3d 845 (2023).

Since 1978 we have held that the language in K.S.A. 2022 Supp. 21-6615(a) requires the sentencing judge to award a defendant credit for all time spent in custody "solely" on the charge for which the defendant is being sentenced while awaiting disposition of his or her case, and that a defendant is not entitled to credit for time " 'which he has spent in jail upon other, distinct, and wholly unrelated charges.' " *Smith*, 309 Kan. at 981, 441 P.3d 1041; *Campbell*, 223 Kan. 528, Syl. ¶ 2, 575 P.2d 524. But the statute does not say that. *State v. Hopkins*, 317 Kan. 652, 655-56, 537 P.3d 845 (2023).

The Kansas Supreme Court recently overruled prior case law by finding that the award of jail credit under K.S.A. 2022 Supp. 21-6615(a) is not limited to time spent "solely" in custody for the charge for which the defendant is being sentenced. See *State v. Hopkins*, 317 Kan. 652, 652, 537 P.3d 845 (2023). Rather, the Court held that a defendant shall be awarded jail time credit for all time spent in custody pending the disposition of his or her case. See *id*. at 657.

Amendments to Jail Credit Statute

K.S.A. 21-6615. Deduction of time spent incarcerated or in confinement, residential facility or community correctional residential services program. (a) (1) In any criminal action in which the defendant is convicted, the judge, if the judge sentences the defendant to confinement, shall direct that for the purpose of computing the defendant's sentence and parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the sentencing order of the journal entry of judgment. Such date shall be established to reflect and shall be computed as an allowance for the time that the defendant has spent incarcerated pending the disposition of the defendant's case. The defendant shall be entitled to have credit applied for each day spent incarcerated. In recording the commencing date of such sentence the date as specifically set forth by the court shall be used as the date of sentence and all good time allowances as are authorized by the secretary of corrections are to be allowed on such sentence from such date as though the defendant were actually incarcerated in any of the institutions of the state correctional system.

- (2) When computing the defendant's sentence, the following shall not be considered time spent incarcerated pending disposition of the defendant's case:
- (A) Any time awarded as credit in another case when consecutive sentences are imposed on a defendant; or
- (B) any time spent incarcerated in another jurisdiction if no hold has been issued in such jurisdiction for the case being sentenced.

State v. Ervin, 320 Kan. 287, 566 P.3d 481 (2025).

- Defendant sentenced to life in prison with parole eligibility after 724 months in prison **consecutive to all other cases**
- Judge did not give all days jail credit as to avoid duplicate credit
- On appeal, defendant argued the judge's failure to allow a credit for all of his time in jail (the 346 days not credited plus the 403 days credited) is contrary to K.S.A. 21-6615(a) and *State v. Hopkins*, 317 Kan. 652, 537 P.3d 845 (2023).
- State argues that Hopkins doesn't clarify jail credit in consecutive sentences.

- K.S.A. 21-6615(a), as worded when Ervin was sentenced, directed courts to credit a defendant with "an allowance for the time which the defendant has spent incarcerated pending the disposition of the defendant's case.
- This language required the district judge to award one day of credit for each day that Ervin was incarcerated pending disposition of this case regardless of whether he received an allowance for some or all that time against a sentence in another case.
- The Court then says, "Finally, we note that the Legislature acted expeditiously to amend the statute following *Hopkins*. See L. 2024, ch. 96, §§ 7, 13. We mention this to clarify that our focus is on the language of K.S.A. 21-6615. **The State does not ask us to apply the 2024 amendments retroactively, and we leave for another day any questions about whether the amendments are retroactive or about application of the amended statute**.

State v. *Ervin*, 320 Kan. 287, 566 P.3d 481 (2025).

State v. *Hekekia-Dixon*, No. 127,216, 2025 WL 2886609 (Kan. App. October 10, 2025)(unpublished opinion).

- Arrested in Geary County for possession of fentanyl while registering under KORA, bonded out after 1 day, pled guilty, AWOL for multiple sentencing hearings, warrant never executed
- Held in Sedgwick County jail, awaiting her sentence in another case for a violation of the Kansas Offender Registration Act (KORA) when she had a Zoom sentencing hearing for the Geary County case
- Geary County judge gave her 1 day of jail credit
- COA affirmed

State v. Hekekia-Dixon, No. 127,216, 2025 WL 2886609 (Kan. App. October 10, 2025)(unpublished opinion).

- Hekekia-Dixon's case is significantly different [than *Ervin*]. Hekekia-Dixon was released on bond in her Geary County case after spending one day in jail, and she was never held in custody again in Geary County. She failed to appear for sentencing in Geary County and a bench warrant was issued for her arrest but was never executed and was later recalled. Meanwhile, she was arrested on a Sedgwick County warrant for a case in that county charging her with a KORA violation, and she was held in the Sedgwick County jail only on that case. She was later sentenced in the Geary County case in a Zoom hearing.
- Under these facts, we find that Hekekia-Dixon does not receive jail credit in the Geary County case for the time she was incarcerated in the Sedgwick County case. Hekekia-Dixon would receive credit in her Geary County case for the time she was in the Sedgwick County jail if she was held in jail for both cases. Under those circumstances, she would get credit in both cases—that is what Ervin holds. But the record shows she was held in the Sedgwick County jail only in the Sedgwick County case, not the Geary County case. These facts are distinguishable from the facts in Ervin.

Do the amendments to the jail credit statute apply retroactively?

- Unpublished decision
- In short, K.S.A. 2024 Supp. 21-6615(a) includes no language indicating that the legislature intended to apply it retroactively to pending cases awaiting sentencing. In the absence of any such indication, **the 2024 amendments apply only to sentences for crimes committed on or after May 23, 2024**. *State v. Mitchell*, No. 127,852, 2025 WL 2810400 at *7 (Kan. App. October 3, 2025)(unpublished opinion).

Deferred Adjudications

Conviction Defined

"Conviction" includes a judgment of guilt entered upon a plea of guilty.

K.S.A 2024 Supp. 21-5111(d)

Deferred adjudications and other processes that result in a finding of guilt without punishment from a foreign jurisdiction may be counted in the defendant's criminal history. See *State v. Macias*, 30 Kan. App. 2d 79, 39 P.3d 85 (2002). **However, an entry of a judgment of guilt by the foreign court is necessary to meet Kansas' definition of a conviction**. See *State v. Hankins*, 304 Kan. 226, 372 P. 3d 1124 at 1132 (2016).

In *State v. Hankins*, where a defendant completed Oklahoma's deferred judgment procedure successfully, the Court found that there was no conviction for criminal history purposes because the defendant was discharged from the program without a court adjudication of guilt and a court order to expunge his guilty plea and to dismiss his case without prejudice. See *id*. at 1132.

Additionally, in *State v. Looney*, where the defendant had pled guilty to enter Texas' deferred judgment program and had not finished his probationary period, the Court found that there was no conviction for criminal history purposes because the court never entered a judgment or adjudication of guilt. *State v. Looney*, No. 117,398, 2018 WL 3485727 (Kan.App.2018) (unpublished).

Oklahoma Deferred Judgment

- Defendant had a prior Oklahoma accelerated deferred judgment for domestic assault & battery
- Distinction b/w deferred judgment and accelerated deferred judgment in Oklahoma
- Deferred judgment:
  - Operates similarly to diversion
  - Defers not only a defendant's sentence but also judgment
  - Cannot be included in defendant's criminal history
- Accelerated Deferred Judgment:
  - Occurs when a defendant violates his/her deferred judgment
  - Operates as a judgment of guilt
  - Included in defendant's criminal history

See *State v. Waterman*, 63 Kan.App.2d 799, 839, 540 P.3d 378 (Kan. App. 2023).

Waterman next argues that his accelerated deferred judgment for domestic assault and battery from Oklahoma should not have been included in his criminal history score. He relies on *State v. Hankins*, 304 Kan. 226, 233-39, 372 P.3d 1124 (2016), in support of his argument that the Oklahoma offense is a deferred judgment and cannot be included in his criminal history score. Waterman's reliance on Hankins is misplaced, as it fails to address the difference between a deferred judgment and an accelerated deferred judgment under Oklahoma law. In *Hankins*, the defendant received a deferred judgment, which, as the Kansas Supreme Court explained, operates similarly to diversion and defers not only a defendant's sentence but also judgment. A deferred judgment, similar to a diversion agreement, cannot be included in a defendant's criminal history score. 304 Kan. at 238- 39. Waterman's conviction was not a deferred judgment, it was an accelerated deferred judgment under Okla. Stat. Ann. § 991c(G), which operates as a judgment of guilt. The statute provides: "Upon any violation of the deferred judgment, other than a technical violation, the court may enter a judgment of guilt . . . ." Okla. Stat. Ann. § 991c(G). Thus, it appears that Waterman violated the conditions of his deferred judgment and received an accelerated deferred judgment—that is, a conviction/judgment of guilt. As a result, the Oklahoma conviction was properly included in his criminal history score. *State v. Waterman*, 63 Kan.App.2d 799, 839, 540 P.3d 378 (Kan. App. 2023).

Special Rules

Special Rules of Note

- #1 (Firearm used)
  - Can be determined from facts of case, but be careful if crime of conviction doesn't explicitly refer to a firearm/weapon used
    - For example: Agg Battery "in a manner whereby" or Agg Robbery involving bodily harm
- #41 (SL4 Leaving Fatality Scene after 7/1/24)
  - May be accompanied by 2nd Degree Reckless
  - Prior DUI/traffic offenses could make SL 4, CH A more severe than SL 2, CH F-I

Habitual special rules

- #26 (3rd or *subsequent* felony drug poss.)
  - State v. Lund, 65 Kan.App.2d 416 (2/14/25)
    - "3rd or subsequent" means convictions must pre-date date of offense
  - State v. Bell, 65 Kan.App.2d 160 (2024)
    - "2nd and 3rd" convictions occurred at same time, both couldn't be 3rd offense to trigger this rule
- Distinguished from #29 (3+ thefts), #16 and #17 (forgeries), and other rules that simply refer to number of "prior convictions"

SPECIAL RULE 26 THIRD OR SUBSEQUENT CONVICTION FELONY DRUG POSSESSION

Special Rule 26 is found in K.S.A. 21-6805(f)(1) and states the following: ***The sentence for a third or subsequent felony conviction*** of K.S.A. 65-4160 or 65-4162, prior to their repeal, K.S.A. 21-36a06, prior to its transfer, or K.S.A. 21-5706, and amendments thereto, shall be a presumptive term of imprisonment and the defendant shall be sentenced to prison as provided by this section. The defendant's term of imprisonment shall be served in the custody of the secretary of corrections in a facility designated by the secretary.

Special Rule 26

- No indication in the statute it would include priors that are substantially similar offenses from another state.
- Sentencing court can depart if substantial & compelling reasons exist. See *State v. Murrin*, No. 115,345, 2017 WL 658043 at *7 (Kan. App. 2017)(unpublished opinion), review denied July 25, 2017.

Do multiple counts of SL5 possession, on the same case, count towards Special Rule 26?

Special Rule 26 – *State v. Bell*

- Defendant had 2 separate pending cases, both possession of meth
- He pled no contest to both on the same day
- Cases were not consolidated
- Defendant had only 1 prior felony possession in his CH
- At sentencing, district court considered both cases to be a third felony possession, thus Special Rule 26 applied in both cases
- COA found that because Bell had one prior drug conviction, his two current convictions must logically be counted as a second and a third—not both designated as third convictions requiring presumptive prison.
- See *State v. Bell*, 65 Kan.App.2d 160, 561 P.3d 562 (Kan. App. 2024).

State v. Lund, No. 127,211, 2025 WL 496459 (Kan. App. February 14, 2025).

- Lund had 2 felony convictions for unlawful possession of a controlled substance in different counties, the first in January and the second in February.
- Lund had previously received a similar felony drug conviction more than a decade earlier.
- At sentencing for the January conviction, the district court applied Special Rule 26 (he had not yet been sentenced for the February conviction).
- The plain language of Special Rule 26 in K.S.A. 21-6805(f)(1) applies to a "third or subsequent felony conviction," which contains no ambiguity. According to the statutory language, the special sentencing rule only applies to the third or later qualifying conviction—which means there must be a first and second conviction before Special Rule 26 can be applied.
- At sentencing for the January conviction, he had 3 convictions for felony possession of controlled substance

- Ordinary meaning of the phrases "prior conviction" and "third or subsequent felony conviction" are different.
- "Prior" commonly means "before," and "subsequent" commonly means "after," and thus they apply to a different set of possible convictions.
- The "prior conviction" language applies to all types of criminal convictions when calculating a defendant's criminal history generally.
- However, the "third or subsequent" language in K.S.A. 21-6805(f)(1) applies only to Lund's felony convictions for unlawful possession of a controlled substance. This is more akin to habitual offender enhancements.
- Like the panel's decision in *Bell*, this court finds that Special Rule 26 in K.S.A. 21-6805(f)(1) permitting a presumptive prison sentence for a third or subsequent qualifying felony drug conviction only applies to the sequentially third or later such conviction. A third qualifying conviction necessarily requires a first and second qualifying conviction.
- ***The plain language of K.S.A. 21-6805(f)(1) is clear and unambiguous, and its sentencing enhancements apply to a defendant's chronological third or subsequent felony conviction for unlawful possession of a controlled substance.***

See State v. Lund, No. 127,211, 2025 WL 496459 (Kan. App. February 14, 2025).

Convictions in the alternative

- A single act may constitute more than one crime (most often in the context of a death)
- While the record of trial and verdict may reflect alternative convictions, a defendant may only be sentenced for one count… whichever is most severe
- Special Rule #42 (I/V Manslaughter while DUI)
  - 2nd Degree Reckless can be an alternative charge
  - Prior DUI offenses could make SL 4, CH A more severe than SL 2, CH F-I

Special Rules 41, 42, and 44

- Each enhance prior DUIs to some form of felony, even if prior was a misdemeanor
- K.S.A. 8-1567(j) provides guidance on what counts as a prior DUI conviction within 8-1567
  - State v. Myers, 314 Kan. 360 (2021), says that includes City of Wichita and surrounding states
- These special rules do not incorporate K.S.A. 8-1567(j), which means more restrictive "comparable" (i.e. same or narrower) applies
  - State v. Schrader, 308 Kan. 708 (2018)

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. 2024 Supp. 21-6819(b)(2).

What is the primary crime in a multiple conviction case?

- Generally, the crime with the highest severity ranking is the primary crime.
- Presumptive imprisonment crime is primary over a presumptive nonimprisonment crime.

See K.S.A. 2024 Supp. 21-6819(b)(2)

What should be listed as the primary crime when there is an off-grid and grid felony in the same case?

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. See K.S.A. 2024 Supp. 21-6819(b)(2). Additionally, if the sentences are consecutive, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and postrelease term is based on the off-grid sentence. Id.

What is the primary crime when an offender is convicted of crimes sentenced on the nondrug and drug grids?

When the offender is convicted of crimes sentenced on nondrug and drug grids, and when the crimes simultaneously have a presumption of imprisonment and probation, the sentencing judge shall use the crime which presumes imprisonment as the primary crime. Additionally, 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. See K.S.A. 2024 Supp. 21-6819(b)(2).

What is the primary crime when there is a nongrid and a grid crime?

What is the primary crime when a special rule is involved?

State v. Kimberlin, 362 P.3d 195, Kan. App. 2d. 15 (Kan. App. 2015).

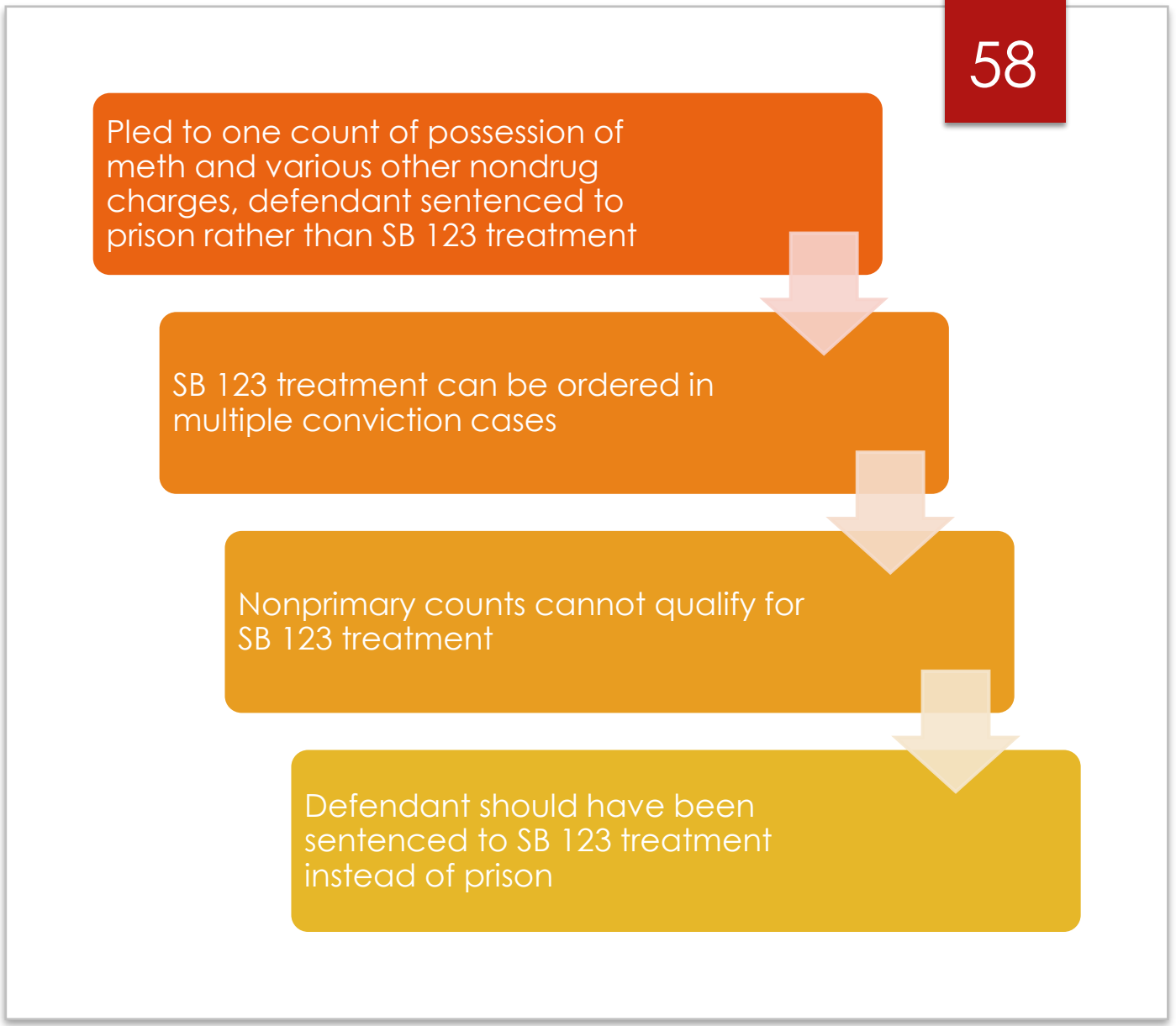
- In multiple conviction cases, the sentencing court first must apply Special Rule 26 to any third or subsequent conviction for possession of a controlled substance before designating the primary crime to be used in calculating the base and nonbase sentences under K.S.A.2014 Supp. 21–6819(b)(2).
- Because Counts 2 and 4 involved Kimberlin's third or subsequent felony drug possession convictions, however, application of the special rule set forth in K.S.A.2014 Supp. 21–6805(f)(1) was triggered. This special rule provides that the presumptive sentence for a third or subsequent felony drug possession conviction is prison. The sixth sentence of K.S.A.2014 Supp. 21–6819(b)(2) states that "[i]n the instance of sentencing with both the drug grid and the nondrug grid and simultaneously having a presumption of imprisonment and probation, the sentencing judge shall use the crime which presumes imprisonment as the primary crime." In this case, Kimberlin was convicted of a nondrug crime that had a presumptive probation sentence and two drug crimes that had presumptive imprisonment sentences. The fact that Counts 2 and 4 are listed on the drug grid as presumptive probation sentences when the special rule in K.S.A.2014 Supp. 21–6805(f)(1) does not apply is irrelevant to the facts presented here.

MULTIPLE CONVICTIONS AND SB 123

SB 123 Eligibilty in Multiple Conviction Cases

WHAT IF THE PRIMARY COUNT IS NOT SB 123 ELIGIBLE BUT ANOTHER COUNT QUALIFIES?

State v. Sims, Nos. 104,406, 104,407, 2011 WL 3891878 (Kan. App. 2011)(unpublished opinion).



SB 123+ Backstop

Scenario: defendant has counts that could qualify for SB 123+ but also the same count is presumptive prison because of Special Rule 27/29?

Is the offender eligible for SB 123+ treatment?

QUESTIONS?

How to Contact us

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