



Mastering KSApp: FAQ Session for PSI

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Registration Questions

Can we count prior Criminal
Threat convictions in the
criminal history?



Criminal Threat

- 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....
- 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).

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. Keel issues

- How to score prior possession of marijuana
- How to score prior failure to register


What if the
prior
conviction's
classification
has
changed?

The classification of a prior conviction will be made in accordance with the law applicable at the time of the current crime of conviction. See *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).

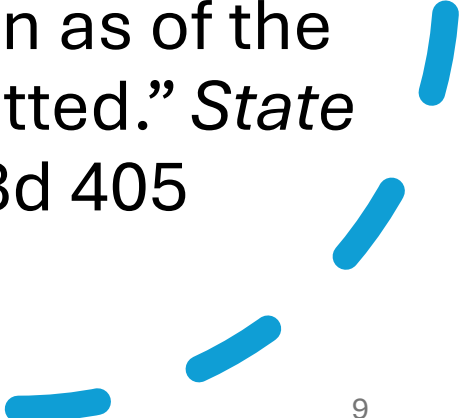


State v. Terrell

- Current conviction of Aggravated Escape
- Prior conviction of failure to register
- Registration offense was a nonperson felony when defendant was convicted of it, but was a person felony when he was convicted of aggravated escape
(underlying offense for which he had to register for was rape which made it a PF)
- District Court classified failure to register conviction as person felony under *Keel*
- See *State v. Terrell*, 315 Kan. 68, 504 P.3d 405 (2022).



Under the KSGA, all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, are to be classified as person or nonperson as of the time the new crime is committed. The Court specifically said, “We conclude that the better understanding of the statutory sentencing scheme requires that all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, be classified as person or nonperson as of the time the new infraction is committed.” *State v. Terrell*, 315 Kan. 68, 75, 504 P.3d 405 (2022).





Primary Crime Determination

- When there is more than one conviction, the sentencing court must establish the base sentence for the primary crime.
- 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. 2025 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. 2025 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. 2025 Supp. 21-6819(b)(2).

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

If an offense covers date ranges, what year PSI should be used?

Status of Jail Credit



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.


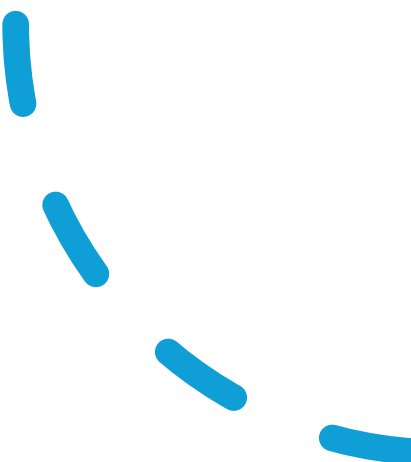
- (2) When computing the defendant's sentence, the following shall not be considered time spent incarcerated pending disposition of the defendant's case:
 - (A) Any time awarded as credit in another case when consecutive sentences are imposed on a defendant; or
 - (B) any time spent incarcerated in another 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 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.

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

- 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.**

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- The Kansas Court of Appeals recently held that the amendments in the jail credit statute (K.S.A. 2024 Supp. 21-6615) do not apply retroactively, but rather, the version of the statute in effect at the time the crime was committed applies. See *State v. Mitchell*, 579 P.3d 970, 972 (Kan. App. 2025).
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When can you count out of state convictions on special rules with three or more convictions.
Please distinguish.

Special Rule 26 – 3rd or Subsequent Drug Possession

- The sentence for a third or subsequent felony conviction of K.S.A. 2025 Supp. 21-5706 shall be presumed imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2025 Supp. 21-6805(f)(1). There is no indication in the statute it would include priors that are substantially similar offenses from another state.
- The Kansas Court of Appeals held that K.S.A. 21-6805(f) does not allow for the inclusion of prior out-of-state convictions when applying Special Rule 26. See *State v. Bermudez*, No. 127,257, 2026 WL 709697 at *6 (Kan. App. March 13, 2026)(unpublished opinion).

Special Rule 5 – Persistent Sex Offender

- The sentence for any persistent sex offender, as defined in K.S.A. 2025 Supp. 21-6804(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. 2025 Supp. 21-5503, and the offender has at least one prior conviction for rape in this state or a comparable felony from another jurisdiction. K.S.A. 2025 Supp. 21-6804(j).

Questions?

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