

KANSAS SENTENCING COMMISSION



**Recommendations
Of The
KANSAS SENTENCING COMMISSION**

KANSAS SENTENCING COMMISSION

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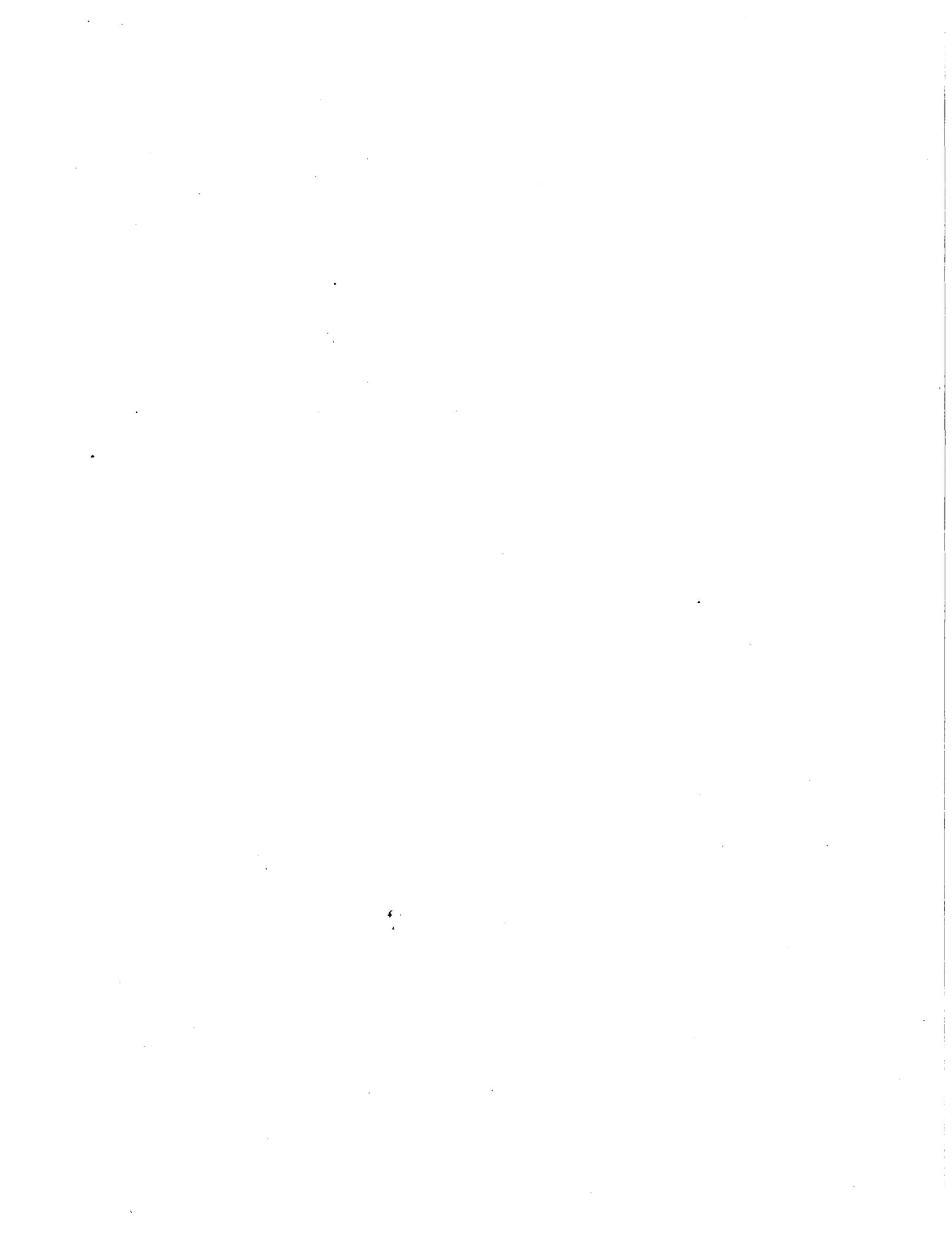
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January 15, 1991

To Members of the Kansas Legislature:

As Chairman of the Kansas Sentencing Commission, I am pleased to submit our final report. This report represents many months of hard work by Commission members and staff. We believe the report represents a more rational sentencing system. It should be noted that the Commission was made up of representatives from virtually every area of the criminal justice system. There were a host of competing ideas about many items contained in this report. I believe the strength of this report lies in our ability to discuss these issues and to meld competing points of view into a product endorsed by the larger group.

The final report provides a rational sentencing system that substantially increases the penalties for crimes against persons, and increase the likelihood that drug sellers go to prison. The sentencing system is designed to significantly reduce racial and geographical disparity. Current estimates indicate that prison population would not increase, however, there will be an increase in the number of persons who receive community based sanctions.

I want to thank Ben Coates, Executive Director, and all members of the Sentencing Commission staff for their dedication to prepare the best plan possible. They have spent many extra hours in moving ahead as quickly as possible. I also want to commend the Commission members. Their attendance and concern evidences a desire on the part of each individual to contribute to this effort. It is my hope that the enclosed report will reflect not only the work of the Commission, but the vision of the Legislature in regard to this very important venture.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert T. Stephan".

Robert T. Stephan
Attorney General

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Table of Contents

Chapter 1	Introduction -----	1-7
Chapter 2	Racial and Geographical Disparity -----	8-26
Chapter 3	The Crime Seriousness Scale -----	27-44
Chapter 4	The Criminal History Scale -----	45-53
Chapter 5	Legal Issues and Procedures -----	54-62
Chapter 6	Presentence Investigation -----	63-66
Chapter 7	Presumptive Sentence -----	67-77
Chapter 8	Concurrent and Consecutive Sentences -----	78-81
Chapter 9	Departure Sentences -----	82-97
Chapter 10	Appellate Review -----	98-102
Chapter 11	Behavior Attitude Adjustment Time -----	103-104
Chapter 12	120 Day Call Backs -----	105-106
Chapter 13	Parole Board -----	107-108
Chapter 14	Post Release Supervision -----	109-111
Chapter 15	Future Role of Commission -----	112-113
Chapter 16	Other Recommendations -----	114-115



CHAPTER 1

INTRODUCTION

FORMATION OF THE COMMISSION

The Criminal Justice Coordinating Council recommended the development of a Kansas Sentencing Commission. These recommendations were presented during the 1989 Legislative session in the form of Senate Bill 50. The Bill passed, was signed by the Governor and became law in the spring of 1989. Prison overcrowding was a major concern that prompted the Coordinating Council to recommend the Commission, and the Legislature to enact Senate Bill 50. The bill directs the Commission to:

- Establish appropriate sentencing dispositions for all felony crimes (ranges, placements, probation or incarceration);
- Minimize sentencing disparity, especially in the areas of race and geography;
- Make recommendations concerning the future role of the Parole Board and good time credits;
- Consider current practices and resources.

Commission members were appointed by August of 1989, an Executive Director was hired in late September, and four additional staff members began working November 1, 1989.

The Commission has met on a twice a month basis since its inception. One of the first activities undertaken was the development of a mission statement and the articulation of goals. These issues were formed after considerable debate and represent the consensus of the Commission.

Mission Statement

The Kansas Sentencing Commission is charged with the development of uniform sentencing guidelines that establish a range of presumptive sentences. These sentences will be based on the following assumptions:

- Incarceration should be reserved for serious offenders;
- The primary purposes of a prison sentence are incapacitation and punishment.

GOALS

- To develop a set of guidelines that promote public safety by incarcerating violent offenders;
- To reduce sentence disparity to ensure the elimination of any racial, geographical or other bias that may exist;
- To establish sentences that are proportional to the seriousness of the offense and the degree of injury to the victim;
- To establish a range of easy to understand presumptive sentences that will promote "truth in sentencing";
- To provide state and local correctional authorities with information to assist with population management options and program coordination;
- To provide policy makers information that will enhance decisions regarding resource allocations.

The mission statement represents a substantial departure from the status quo. It clearly establishes that prison is not rehabilitation, it is punishment. The Commission endorsed this change, but maintained that rehabilitation efforts should not be diminished once the decision has been reached to incarcerate. The major difference lies in the reason for incarceration not the treatment available once incarcerated. Once this change in philosophy occurs, the nature of deciding who shall go to prison and the method for deciding how this decision is reached must undergo some radical changes.

These changes will challenge many existing, strongly held, beliefs and practices. However, they will bring about a system that:

- Emphasizes public safety;
- Decreases racial and geographic disparity;
- Is predictable;
- Is easy to understand;
- Is based upon the criminal culpability of the offender, not demographic or socio-economic variables.

RATIONALE FOR GUIDELINES

Several other states, as well as, the federal government have adopted sentencing guidelines. In fact, almost half of the states either have guidelines, are in the process of developing them, or are considering their development. Minnesota, Washington and California have had structured sentencing since the early 1980's.

a) History in Other States

Guideline efforts in other states, notably Minnesota and Washington, have been successful. They do not control crime, but they do provide decision makers the ability to rationally plan for resource development and management. Guidelines reduce racial and geographical biases by eliminating all but the severity of the current offense and past criminal history from the sentencing decision. This creates a "level playing field" for everyone being sentenced. Persons from all over the state and of all racial and socio-economic backgrounds are judged using a standard set of criteria. Guidelines states have been able to control the flow of inmates going into the system by setting priorities on who should be incarcerated. This setting of priorities allows the legislature to make rational funding decisions. If there is a strong belief that certain types of crimes should be punished more severely, then the legislature must allocate adequate resources. If they are not willing to allocate adequate resources, they must forego the planned increase in punishment, or decide to reduce the penalties for other categories of crime.

b) Proportionality

Making the punishment proportional to the crime is a key ingredient in guideline systems. This concept involves the development of a hierarchy of harms that result from different levels of criminal activity. Once this ordering process takes place, guideline sentences ensure that the punishment fits the harm. Criminal codes often grow in a patchwork fashion, with new crimes added every legislative session. These crimes are placed into an existing hierarchy, usually without a great deal of effort being expended to ascertain the harm relative to other crimes. The decision to rank the seriousness of a crime is often an ad hoc event driven by some exceptional set of concerns.

Guideline systems provide a rational basis for placing new crimes in a seriousness content. This contextual framework maximizes proportionality by placing crimes with similar harms within a given level. This exercise is usually a two step process: 1) the legislature determines the elements of the crime; and 2) a guidelines review group places it in a severity level which is based upon established principles. This process reduces disparity among crimes.

c) Fairness

Like proportionality, fairness is a key concept. The elimination of non-offense and non-criminal history factors from the sentencing process provides a "level playing field" for all offenders. The disposition is a function of actual present and past criminal activity, not a judgment based upon

punishment may become a function of employment status, marital status, amount of education, or a subjective assessment of one's chances for rehabilitation. These factors often reflect social patterns of inequality and offenders may be punished due to these inequities. Most guidelines states do not use these external factors, in fact, some have adopted statutes that expressly prohibit their use.

Several guideline states, as well as, the federal government found racial and geographical disparity in their pre-guideline studies. Sentencing guidelines have been credited with reducing or eliminating these conditons. A 1988 Rand Corporation study credits the California structured sentencing system with the virtual elimination of racial disparity.

The Kansas Commission found similar disparity in a survey of cases sentenced in FY 1989. Like other states, the disparity is not deliberate, and does not stem from the actions of any actor or group of actors. Instead the disparity appears to be an artifact of the factors used to make decisions. When socio-economic variables are utilized, non-whites are disadvantaged. When only the current offense and prior criminal history are considered these disadvantages disappear or are significantly reduced.

d) Violent Crime/Property Crime

Criminal codes reflect levels of punishment based upon operational definitions of harm. These punishments differentiate between violent crime and property crimes. Violent crimes usually carry greater potential punishments than property crimes. However, this is not always the case and a review of the criminal code may well reveal some "special property crimes" ranked higher than person crimes. Guidelines systems punish violent crimes more severely. In fact, in Minnesota, Washington and Oregon, the penalties for current violent offenses are greater, and persons with prior histories of violent offenses get additional penalties. The Oregon criminal history score makes real distinctions between person and non-person crimes. One prior person felony carries a greater weight than any number of prior property offenses when the penalty is assessed for a current crime. Thus, guidelines systems provide a rational method to ensure that violent person crimes routinely receive greater punishments. If prison is punishment, and punishment is to be proportional to the harm committed, then prison should be reserved for those who inflict the most harm.

e) Drug Crime Dilemma

The sale and possession of restricted substances is the most rapidly growing offense of conviction. In a sample of 3,285 cases sentenced in FY 1989, drug crimes made up 24 percent of the convictions. The U.S. Bureau of Prisons forecast that one-half of its population will soon be made up of drug offenders.

Harsher penalties and increased law enforcement activities will likely continue this trend. It became apparent that the Commission must separate drug and non-drug offenses. Several guidelines states developed separate sentencing systems to deal with drug offenses.

It is apparent that drug crimes and other crimes grow at different paces and need different strategies. Current sentencing practices do not take these differential growth rates into account.

COMMISSION ACTIVITIES

The Commission was formed during the 1989 Legislative session. The bill that created the Commission named several ex-officio members and gave the Courts, the Governor and the Legislature appointments as well. Legislative appointments were to be non-voting. The appointments were made by mid-August and the first meeting was called by the Chairperson Attorney General Robert T. Stephan on August 19, 1989.

The Commission was made up of the following members:

Attorney General

Robert T. Stephan, Chairperson, Topeka

Chief Justice or Designee

Judge Gary W. Rulon, Kansas Court of Appeals,
Vice-Chairperson, Emporia

Secretary of Corrections or Designee

Steven J. Davies, Ph.D., Secretary of Corrections, Topeka

Parole Board Chairperson or Designee

Carla Stovall, Chairperson, Kansas Parole Board, Topeka

Appointments by the Chief Justice

Judge James M. Macnish, Jr., Third Judicial District, Topeka
Judge Richard B. Walker, Ninth Judicial District, Newton
Gary L. Marsh, Chief Court Services Officer, Emporia

Appointments by the Governor

Jillian Waesche, Public Defender, Wichita
Shelley Bloomer, Private Defense Counsel, Osborne
Paul Morrison, Johnson County District Attorney, Olathe
Allen Flowers, Chief of Police, Coffeyville
Dave Meneley, Detective, Topeka Police Department
John Burchill, Community Corrections Program Director, Salina

Appointments by the Senate President and the Minority Leader, and the Speaker of the House and the Minority Leader, serve ex officio, without vote

Senator Jerry Moran, Thirty-seventh District, Hays
Senator Frank Gaines, Sixteenth District, Augusta
Representative Martha Jenkins, Forty-second District, Leavenworth
Representative Kathleen Sebelius, Fifty-sixth District, Topeka

Once formed, the Commission held regular semi-monthly meetings in Topeka. The Commission reviewed information from other guidelines states, heard testimony from local and national criminal justice professionals, and visited several correctional facilities. The Commission decided early on to restrict their activities to adult felony offenses.

The Commission considered a wide range of topics. Many of these topics were assigned to subcommittees. These subcommittees developed proposals to bring back to the full Commission for further discussion and final action .

The Chairperson appointed subcommittees to address the following topics:

- Crime Severity - to develop a proposal to classify existing felonies and to provide a suggested ranking of these crimes;
- Criminal History - to develop a proposal that suggested how to deal with a convicted felon's prior criminal history;
- Data Analysis - to review other states' data collection forms and to develop one to use in a field survey;
- Legal Issues - to propose changes that would account for a host of legal issues that would affect pleas, hearings and the disposition of felony cases;
- Presentence Investigation - this was a joint committee with the Office of Judicial Administration to review potential changes in the Presentence Sentence Investigation Report that might result from decisions reached by the Commission;
- Good Time - to discuss the pros and cons of retaining some form of behavior control for sentenced felons;
- Consolidation of Field Services - to discuss the feasibility of consolidating probation, community corrections and parole services;
- Drug Grid - to develop a recommendation for a separate grid to deal with drug offenses.

Some groups met on a regular basis for several months and others met once or twice depending upon the scope of the task. One group, the Criminal History subcommittee, held a series of public hearings across the state.

DECISIONS REACHED

The Commission reached a series of decisions that will be described in detail throughout the remainder of the report. The Commission decided to recommend a presumptive sentencing system that provides an appropriate sentence for a crime based upon the crime of conviction and the person's past criminal history. The sentencing court may depart from the presumptive sentence. However, reasons for a departure must be explained on the record and are appealable. This presumptive sentencing system is represented by a matrix or grid. The grid does not consider factors external to the crime of conviction and the criminal history of the offender.

The Commission also decided to recommend:

- 1) a separate grid for drug crimes;
- 2) the cessation of discretionary release by the Parole Board;
- 3) the repeal of the 120 day call back provision;
- 4) a change in good time practices;
- 5) a study to review the feasibility of the consolidation of field services;
- 6) revised presentence investigation practices;
- 7) a set of suggested departure criteria;
- 8) an appellate process;
- 9) a monitoring system;
- 10) a consolidation of the criminal justice data base;
- 11) changes in the misdemeanor reporting system;
- 12) several related statutory amendments that will facilitate the transition into guidelines.

The Commission recommends that these changes become effective July 1, 1992.

CHAPTER 2

RACIAL AND GEOGRAPHICAL DISPARITY

INTRODUCTION

The Sentencing Commission was charged with the task of investigating the presence or absence of racial and/or geographical biases in the sentencing process. Answers to these questions were not available through any central information repository. It became apparent that baseline data would have to be collected using court and Department of Corrections records.

The Sample

A random sample made up of 2,518 felony probationers and 1,226 new felony court commitments to the Department of Corrections was drawn. These cases came from all 31 judicial districts and represented 83 percent of the persons placed on felony probation in Fiscal Year 1989 and 58 percent of all felons sent to the Department of Corrections during FY 1989. The sample focused on "C", "D", and "E" felonies. The cases were drawn from Department of Corrections Fiscal Year 1989 commitment records and from the Office of Judicial Administration's probation caseload statistics.

Several part-time data collectors were hired and trained. These data collectors, along with permanent Commission staff spent four months in the field reading journal entries, pre-sentence investigations, and State Reception and Diagnostic Center (S.R.D.C.) reports. Sixty-four pieces of information were collected on each case using a structured data collection form.

This effort yielded a database of 3,285 completed records. About 14 percent of the original cases were not read due to a large number of cases where pre-sentence reports were not completed and several cases had no journal entries. There were some lost records and several cases were incorrectly reported on the original data source, that is, the data source indicated that it was a felony but the charge had been reduced to a misdemeanor. All told, the final sample yielded 73 percent (2,241) of the total FY 1989 felony probationers and 50 percent (1,044) of the Fiscal Year 1989 prison commitments.

Data from these cases was entered into a computerized database and has been analyzed by Commission staff and a statistician from Washburn University.

Selected Offender Characteristics

The following statistics provide an overview of selected offender characteristics:

Sample Demographics

Race

White ----- 69%
Non-White ----- 31%

Sex

Male ----- 83%
Female ----- 17%

Marital Status

Single ----- 48%
Married ----- 45%
Separated ----- 7%

Education Level

High School Dropout ----- 38%
High School Graduate ----- 62%

Classifications of Felonies

"B" = 1%
"C" = 20%
"D" = 27%
"E" = 52%

Most Frequently Occurring Crimes

Drug Crimes ----- 24%
Theft ----- 16%
Burglary ----- 14%
Forgery ----- 8%
Indecent Liberties
with a Child ----- 3%
Aggravated Burglary ----- 2%

Type of Legal Representation

Private Counsel ----- 34%
Court Appointed Attorney ---- 66%

Basis for Conviction

Plea Bargain ----- 71%
Pleaded Guilty ----- 20%
Trial ----- 5%
Nolo Contendere ----- 4%

History of Alcohol Abuse

None ----- 17%
Light ----- 36%
Heavy ----- 47%

History of Drug Abuse

None ----- 31%
Light ----- 26%
Heavy ----- 43%

Type of Crime

Person ----- 19%
Property ----- 48%
Drug ----- 26%
Other ----- 7%

Prior Juvenile Felony Conviction Record

None ----- 84%
1-3 ----- 14%
4+ ----- 2%

Prior Adult Felony Conviction Record

None ----- 69%
1-3 ----- 24%
4+ ----- 7%

Prior Prison Terms

None ----- 83%
1-3 ----- 16%
4+ ----- 1%

The sample is representative, it is diverse, and it reflects a full range of criminal behavior, as well as an even balance of responses. Sample dispositions included 38 percent commitments to prison and 62 percent remained in the community. However, once sentenced to prison, 366 persons were called back and placed on probation, thus the final outcome yielded a ratio 68 percent probation to 32 percent incarceration.

Size of Judicial Districts by Number of Cases Read

There are wide variations in the sizes of judicial district felony caseloads. In order to make reasonable comparisons of geographical and racial imprisonment rates, judicial districts were grouped into three distinct categories by number of cases read. These categories were:

- Small districts with less than 75 felony cases;
- Medium districts with between 76 and 150 felony cases;
- Large districts with over 151 felony cases.

Results were aggregated, no statistics were compiled on a district by district basis. Some judicial districts started out in one category, but due to the cases available to be read, were moved to a different category. Several jurisdictions waived the presentence investigations and data was not available from other sources. Thus, these districts were moved into a category based upon the number of cases available to be read.

A district by district listing can be found in Appendix A. Small districts tend to be rural areas made up of several small counties. Medium districts represent those areas with one or two counties and a medium-sized city (i.e., Salina, Hutchinson). Large districts represent the four large metropolitan areas: Wyandotte county, Johnson county, Sedgwick county and Shawnee county.

FINDINGS

Decision Point Analysis

Several key decision points were analyzed. Each of these points represents an area where the system makes a critical decision about someone's liberty status. Points analyzed were:

- 1) the original disposition passed out at the time of sentencing (probation or prison);
- 2) the length of the minimum sentence (controls parole eligibility);
- 3) the decision to call back an inmate within 120 days from date of sentencing and modify the sentence to probation;
- 4) the decision to revoke a probation sentence and send the offender to prison;
- 5) the actual time served once in prison.

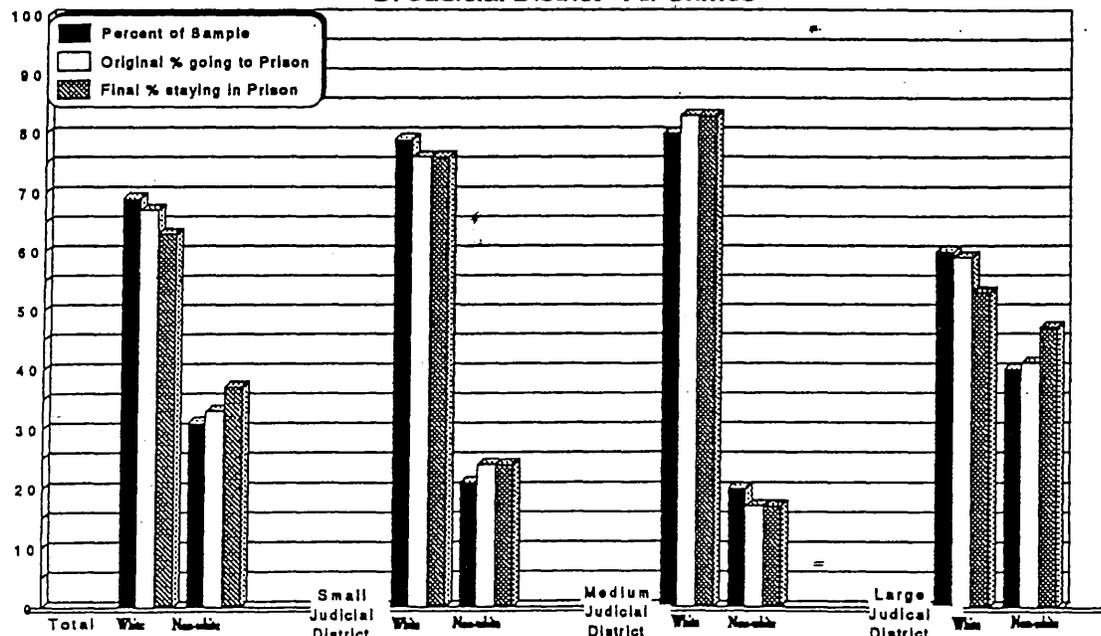
These points were analyzed by race. The non-white category was made up of Blacks, Hispanics, Asians, and American Indians. Geographical comparisons used the three different sizes of judicial districts. Notable differences were found at each decision point. Overall non-whites did not fare as well as whites in virtually every category. There were some marked differences in disposition by size of judicial districts. These differences by size of judicial district indicate geographical bias. In most cases, the racial differences were the result of findings in large judicial districts.

Original Versus Final Dispositions

Chart 1 provides an overview of the number of persons sent to prison at the time of sentencing versus the number who end up there after a 120 day call back or a probation violation. The basic assumption is that all things being equal, these two dispositions should mirror the percent of white and non-whites found in the sample. This was not the case. Whites made up 69 percent and non-whites made up 31 percent of the sample; therefore, if no system bias occurs, one would expect a like ratio to occur for the outcomes. The original sentence yielded a prison bound population of 67 percent white and 33 percent non-whites, a variance of two percentage points in favor of whites. However, this difference became more pronounced at the final disposition phase, the two percentage point disparity increases to six points (63% white - 37% non-white). Both these differences are statistically significant (P = .09 original and P = .000 final).

These differences do not hold for all sizes of judicial districts. Chart 1 indicates that racial differences are pronounced in the large judicial districts. These large districts account for over half of the total sample and a large percentage difference has an impact. Small districts follow a similar pattern, but the differences are not statistically significant. Medium districts actually incarcerate fewer than expected minorities.

Chart 1
White And Non-white Imprisonment Percentage Compared To Percent White And Non-white In The Total Sample By Original Disposition(1) And Final Outcome(2) By Size Of Judicial District - All Crimes



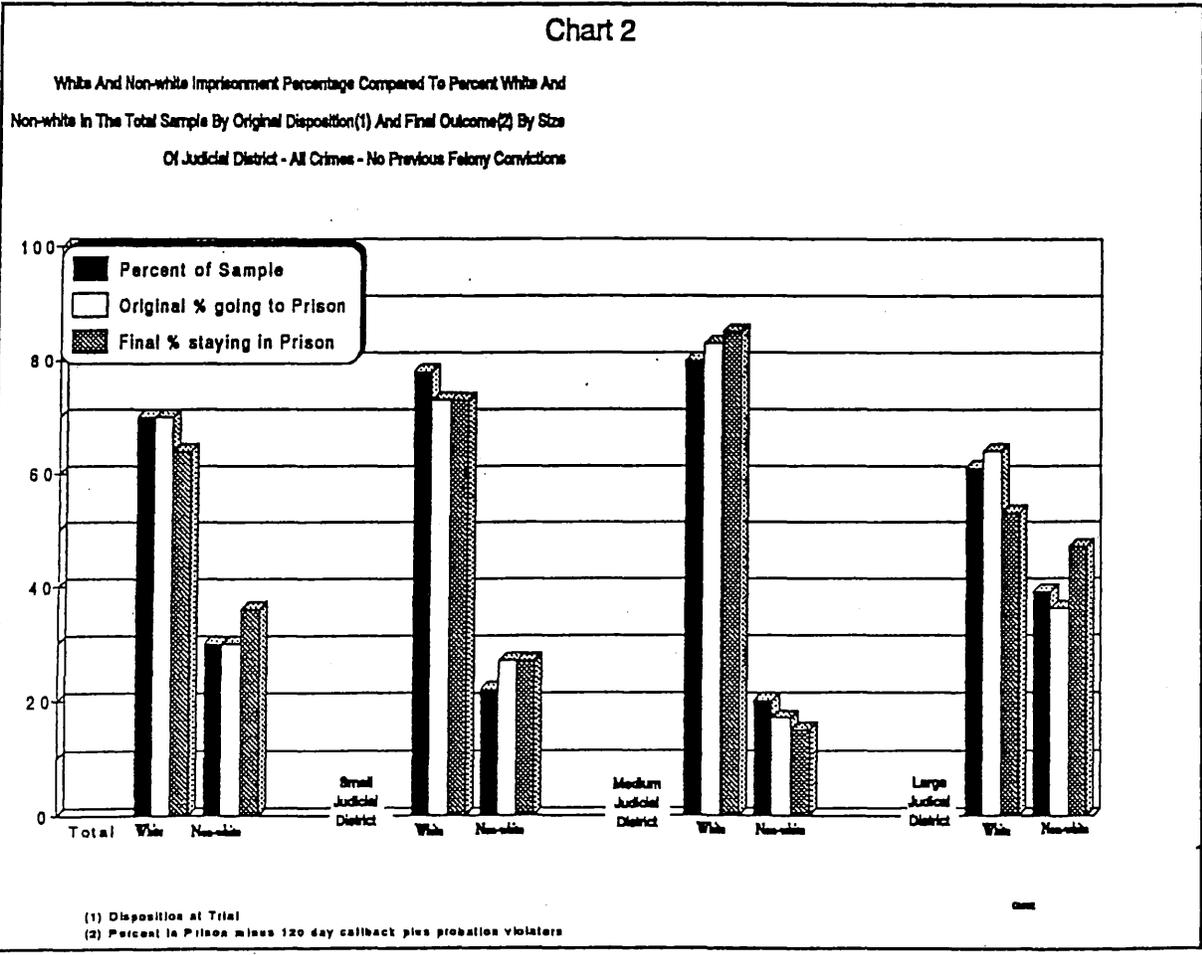
(1) Disposition at Trial
 (2) Percent in Prison minus 120 day callback plus probation violators

The major differences occur after initial sentencing. Even though non-whites start off at a small disadvantage in small and large districts, these disadvantages become more severe by the final disposition stage.

An analysis of minimum sentences imposed indicates that non-whites receive longer original sentences (2.2 years white, 2.6 years non-whites). This is in line with findings from a study of 1,700 inmates paroled in FY 1989 who were sentenced prior to FY 1989 (2.3 years white, 2.8 years non-white).

The next step in the analysis was to dismiss the notion of prior felony convictions tainting the picture. Chart 2 makes the same comparisons as Chart 1, except none of the individuals sentenced had any previous adult felony convictions. Thus, prior adult felony history is not a factor. The final outcomes are virtually identical to those discussed earlier. However, the noted overall disparity occurs after the original sentence. The expected outcomes at original sentencing are in line, in fact, they are exactly what one would expect. However, there are statistically significant differences by the final disposition point, whites are under-represented by six percentage points and non-whites are significantly over-represented ($P = .0007$). Again the major differences occur in the large judicial districts.

There is a three point difference at the original disposition which becomes eight points by the time of the final disposition. Similar findings occur in small districts. Again, medium districts imprison a lower percent of non-whites than expected.

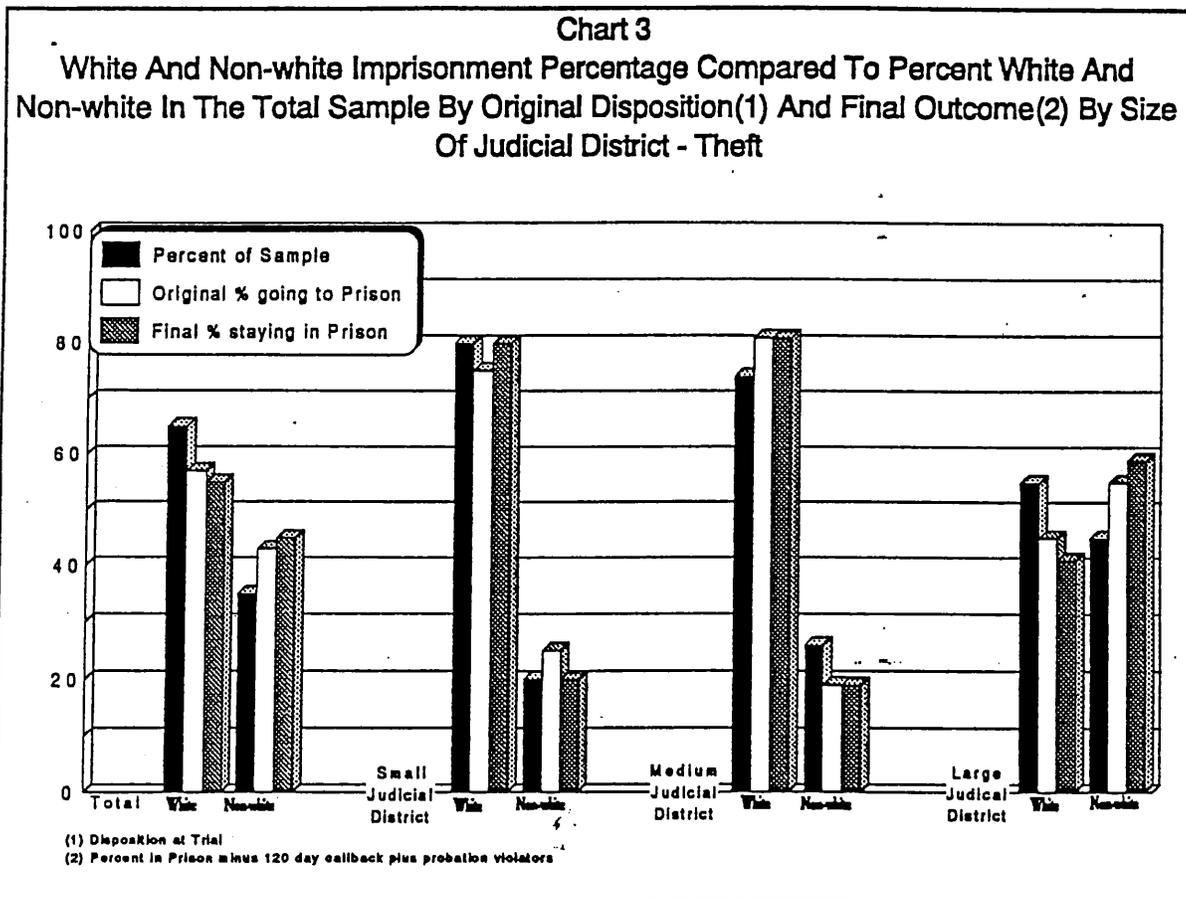


An analysis of minimum sentences received indicated similar patterns: 2.1 years for whites and 2.3 years for non-whites (P = .07). These findings are similar to those found in the review of persons released in FY 1989 (2.3 whites vs. 3.0 non-whites).

The next series of charts make similar comparisons for selected crimes. Drug offenses, thefts and burglaries were analyzed by race and judicial district size. These three offenses make up over 50 percent of the persons sent to prison.

Theft

Chart 3 indicates that there are significant differences in this category. One would expect a 65% white/35% non-white ratio of prison bound inmates. This was not the case. Non-whites experience

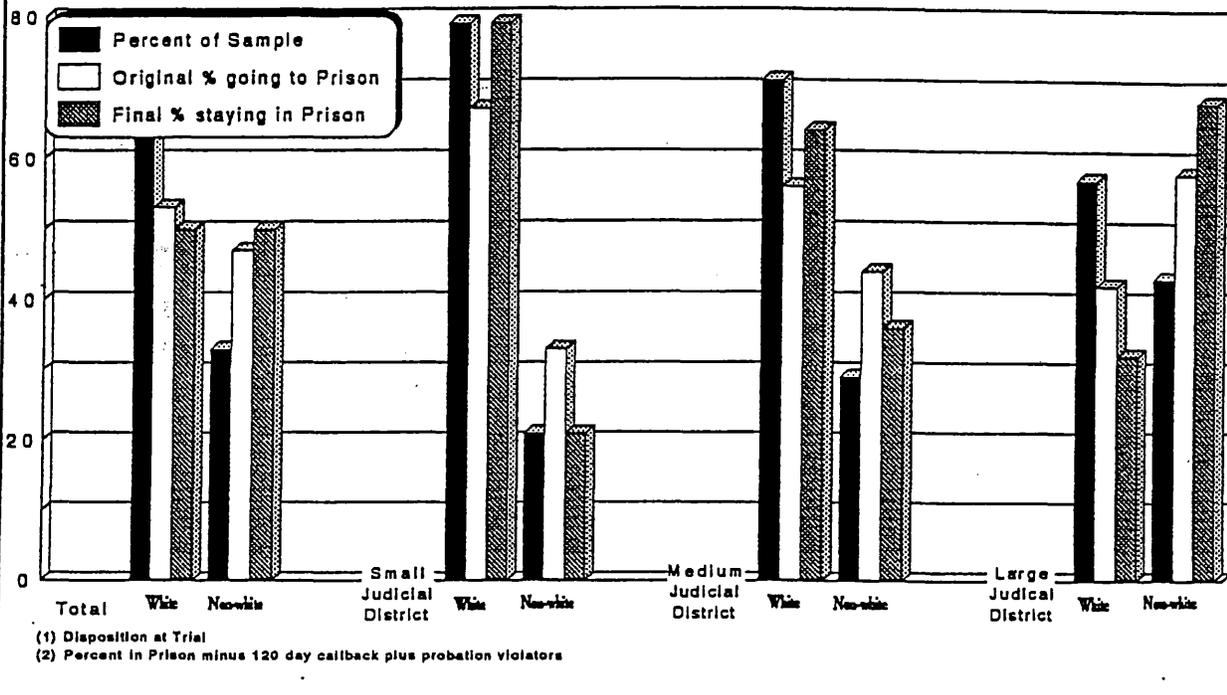


an eight percentage point disadvantage at original sentencing and a 10 percent disadvantage by final disposition. Forty-five percent of the final disposition group was non-white, while they only made up 35 percent of the sample. Large judicial districts have the largest variance, 14 percent more non-whites ended up in prison than were expected based on sample race ratios.

The minimum sentence imposed did not vary by race or judicial district, theft is an "E" felony and the minimum is capped at one year except for theft over \$50,000. -

Chart 4 provides an analysis of those persons sentenced who had no previous adult felony convictions. The results are the same, except they are more dramatic. The expected imprisonment rate

Chart 4
White And Non-white Imprisonment Percentage Compared To Percent White And Non-white In The Total Sample By Original Disposition(1) And Final Outcome(2) By Size Of Judicial District - Theft - No Previous Felonies



for non-whites is 33 percent, however at the initial decision 48 percent were sent to prison and the final decision sent 50 percent, a 17 percentage point disparity. This finding is true for all sizes of judicial districts, but is most pronounced in the large judicial districts. Again, the analysis did not indicate any significant differences in the minimum sentences.

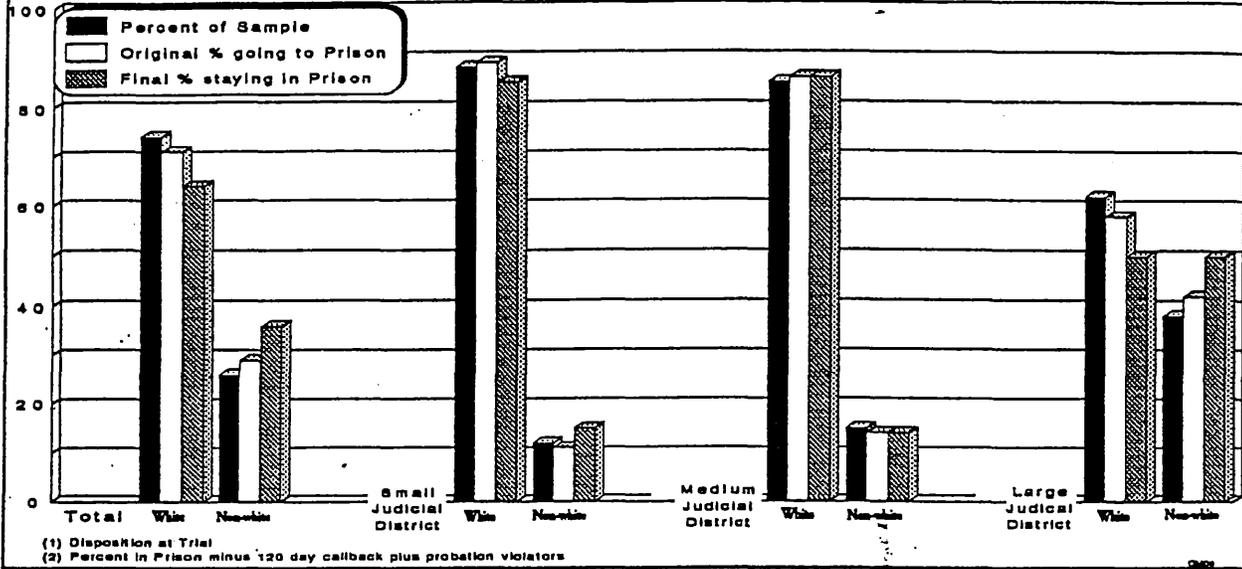
Burglary

Chart 5 provides an overview of what occurred at sentencing. Overall, slightly more non-whites were originally sentenced (expected 26%, actual 29%), however by the final disposition this variance had grown to a 10 percentage point gap (26% expected, 36% actual). The results were again heavily influenced by the large judicial districts. In fact, at original sentencing, small and medium judicial districts sentenced almost exactly in line with the expected ratio. The large judicial districts accounted for most of the discrepancy. By time of final disposition, small districts exhibited a 3 point margin for non-whites (12% expected, 15% actual) and large districts had a 12 point margin (38% expected, 50% actual). Medium sized judicial districts experienced only one percentage point variance (15% expected, 14% actual).

Minimum sentences are not significantly different, nor were they for the 1,700 persons paroled in FY 1989.

Chart 5

White And Non-white Imprisonment Percentage Compared To Percent White And Non-white In The Total Sample By Original Disposition(1) And Final Outcome(2) By Size Of Judicial District - Burglary

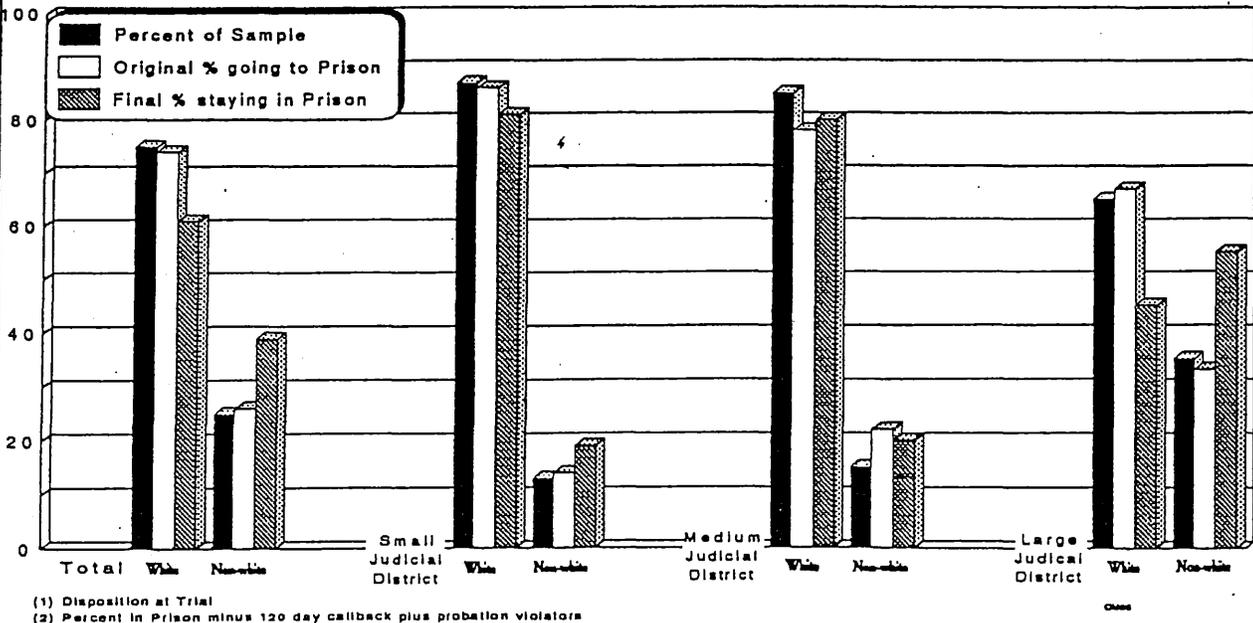


This pattern holds true when the same factors are analyzed for persons sentenced who have no previous adult felony convictions (Chart 6). The disparity increased to 14 percentage points for the final overall disposition. (25% expected, 39% actual). Again the overall original decision was within one percent of the expected value. Medium and large jurisdictions vary by seven and two percent respectively at original dispositions and by five and 20 percent by final disposition.

Again, there were no differences noted in minimum sentences by racial group for this sample or the group of persons paroled in FY 1989.

Chart 6

White And Non-white Imprisonment Percentage Compared To Percent White And Non-white In The Total Sample By Original Disposition(1) And Final Outcome(2) By Size Of Judicial District - Burglary - No Previous Felonies

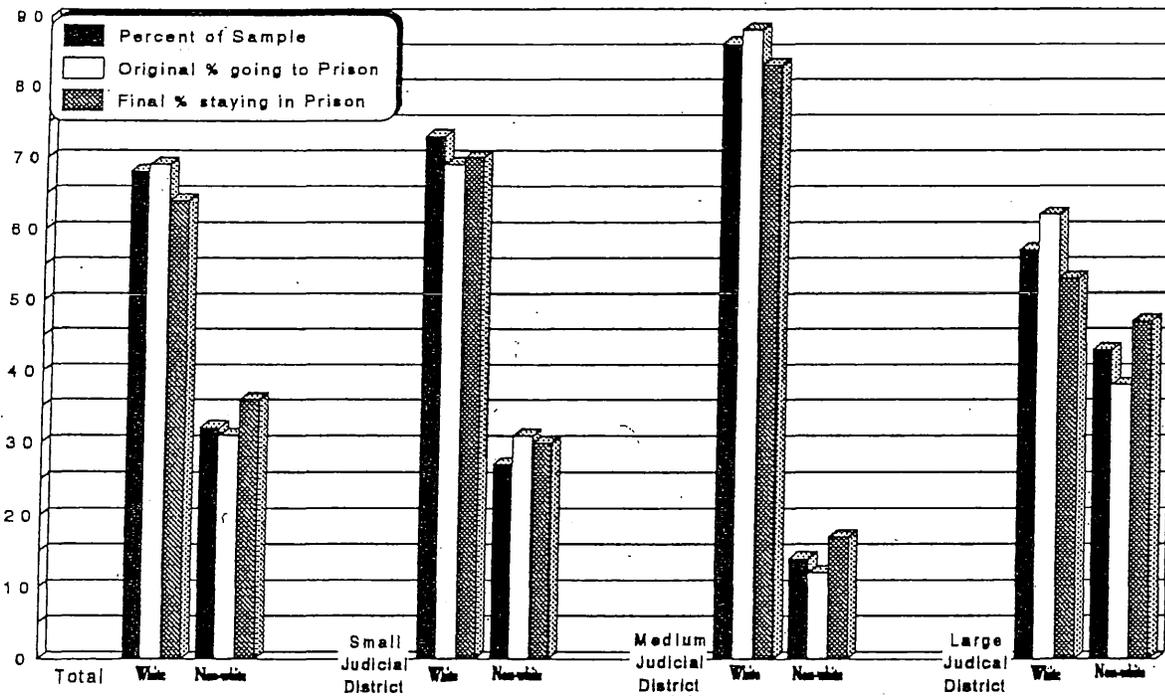


Drug Crimes

Dispositions for drug crimes are displayed in Chart 7. This analysis indicates that disparity is minimal overall. In fact, the expected outcomes and actual outcomes are within one percentage point at original sentencing. The final disposition represents a four percentage point disadvantage for non-whites (32% expected, 36% actual). The original decision found non-whites with a five point advantage in large judicial districts. However the final outcome reveals a reversal. The five point advantage (43% expected, 38% actual) became a four point disadvantage (43% expected, 47% actual). A similar pattern occurred in the medium judicial districts. Only in small jurisdictions, did non-whites suffer a disadvantage at both decision points.

Chart 7

White and Non-white Imprisonment percentage compared to percent White and Non-white in the Total Sample by Original Disposition(1) and Final Outcome(2) by size of Judicial District - Drug Crimes



(1) Disposition at Trial
 (2) Percent in Prison miss 120 day callback plus probation violators

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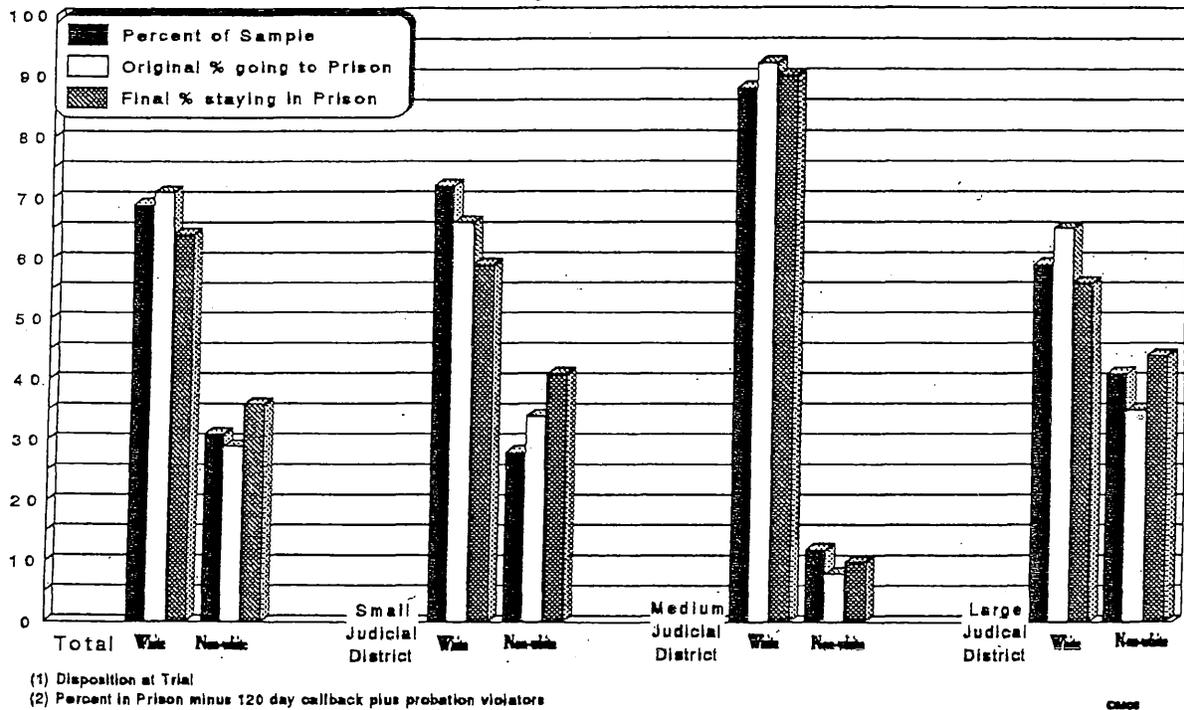
A review of minimum sentences for these crimes indicates a slightly higher average sentence for non-whites (2.7 years vs. 2.5 years), this difference is not statistically significant. However, significant differences were found for the sample of 1,700 person released on parole in FY 1989 (white 2.5 years, non-whites 3.0 years).

Chart 8 displays the findings for drug crime dispositions where the sentenced offender had no previous adult felony offenses. This reveals little, if any, overall variation. The original disposition

favors non-whites (31% expected, 29% actual); however, these gains are gone by the final disposition and non-whites experience a five point disadvantage. This pattern was heavily influenced by the large judicial districts where an initial six point difference in favor of non-whites ends up as a two point disadvantage. Non-whites in small districts had an expected imprisonment rate of 28 percent but the final outcome resulted in 41 percent of the prison pool being non-white.

Chart 8

White And Non-white Imprisonment Percentage Compared To Percent White And Non-white In The Total Sample By Original Disposition(1) And Final Outcome(2) By Size Of Judicial District - Drug Crimes - No Previous Felonies



Average minimum imposed sentences for whites from this sample were not significantly different from those of non-whites. However the average sentence for the 1,700 cases paroled in 1989 revealed significant differences. (white 2.5 years, non-white 3.1 years).

Summary of Findings by Crime Type

This overall and crime by crime analysis clearly indicates that non-whites are at a significant disadvantage. This disadvantage is particularly acute for the crimes of burglary and theft.

Large judicial districts account for most of the variance, in all cases, non-whites experienced negative outcomes. Small judicial districts accounted for some variance. Medium sized judicial districts slightly favored non-whites.

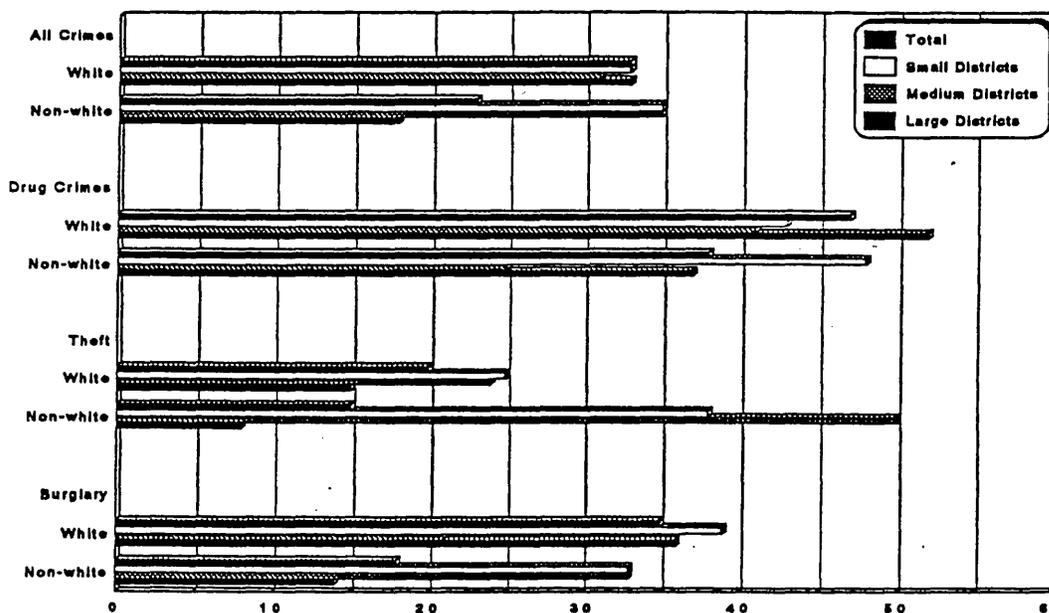
The minimum sentences passed out in this sample, as well as those studied in the sample of 1,700 cases released in FY 1989 indicate that non-whites experience a substantial overall disadvantage. They receive significantly longer average minimum sentences for the total sample all crimes category. The same pattern holds for that subset of the sample that have no previous adult felony convictions.

120 Day Call Backs

Chart 9 provides an overview of the relative frequency of being called back from a prison sentence and placed on probation. This represents a crucial decision point. It has the effect of returning someone to the community and placing them in a more desirable liberty status. All things equal, one would expect a like percentage of whites and non-whites to be called back within the 120 day sentence modification period.

Non-whites are clearly at a disadvantage in this category, one in three whites are called back, (33%), compared to less than one in four non-whites (23%). This disparity is accounted for by large judicial districts. They call back 33 percent of whites and only 18 percent non-whites, a ratio of almost two to one. In fact, small and medium districts call back a slightly higher than proportional percentage of non-whites.

Chart 9
Percent Of Offenders Sentenced To Prison Called Back Within 120 Days, By Race, By Size Of Judicial District For Total And Selected Crimes



The same patterns hold true for drug crimes, theft and burglary. In all these categories a larger overall share of whites are called back than non-whites. Also, the greatest call back disparity exists for large judicial districts:

- 1) Overall (whites 33%, non-whites 18%)
- 2) Drug crimes (whites 52%, non-whites 37%)
- 3) Theft (whites 15%, non-whites 8%)
- 4) Burglary (whites 36%, non-whites 14%).

Small and medium districts exhibit a somewhat different pattern. Small sized districts call back a higher percentage of non-whites than whites for drug crimes and theft, but not for burglary. Medium sized districts call back a larger percentage of non-whites than whites for theft and burglary, but not for drugs.

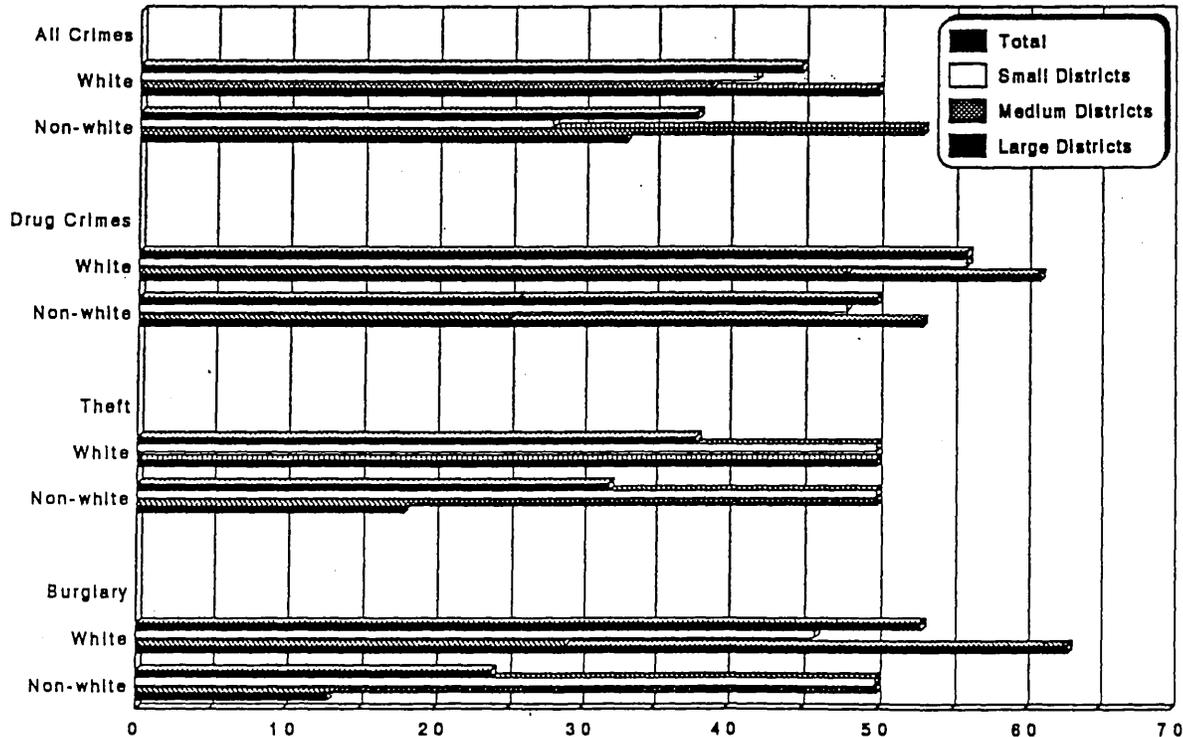
Chart 10 provides the same information except the data is for persons with no previous adult felony convictions. Again the differences are the same. The disparity in the large districts is more pronounced:

- 1) Overall (whites 50%, non-whites 33%); 33%
- 2) Drugs (whites 61%, non-whites 53%)
- 3) Theft (whites 50%, non-whites 18%)
- 4) Burglary (whites 63%, non-whites 13%)

Thus, there seems to be little doubt that non-whites are not called back as often as whites. This disparity provides a partial explanation of why a lower percentage of non-whites who receive an initial sentence to prison remain there. Many times, call backs are a function of socio-demographic variables rather than criminal history. Non-whites, studied in the sample were at a distinct disadvantage in most of the basic categories:

Chart 10

Percent Of Offenders Sentenced To Prison With No Previous Felony Offenses Called Back Within 120 Days, By Race, By Size Of Judicial District For Total And Selected Crimes

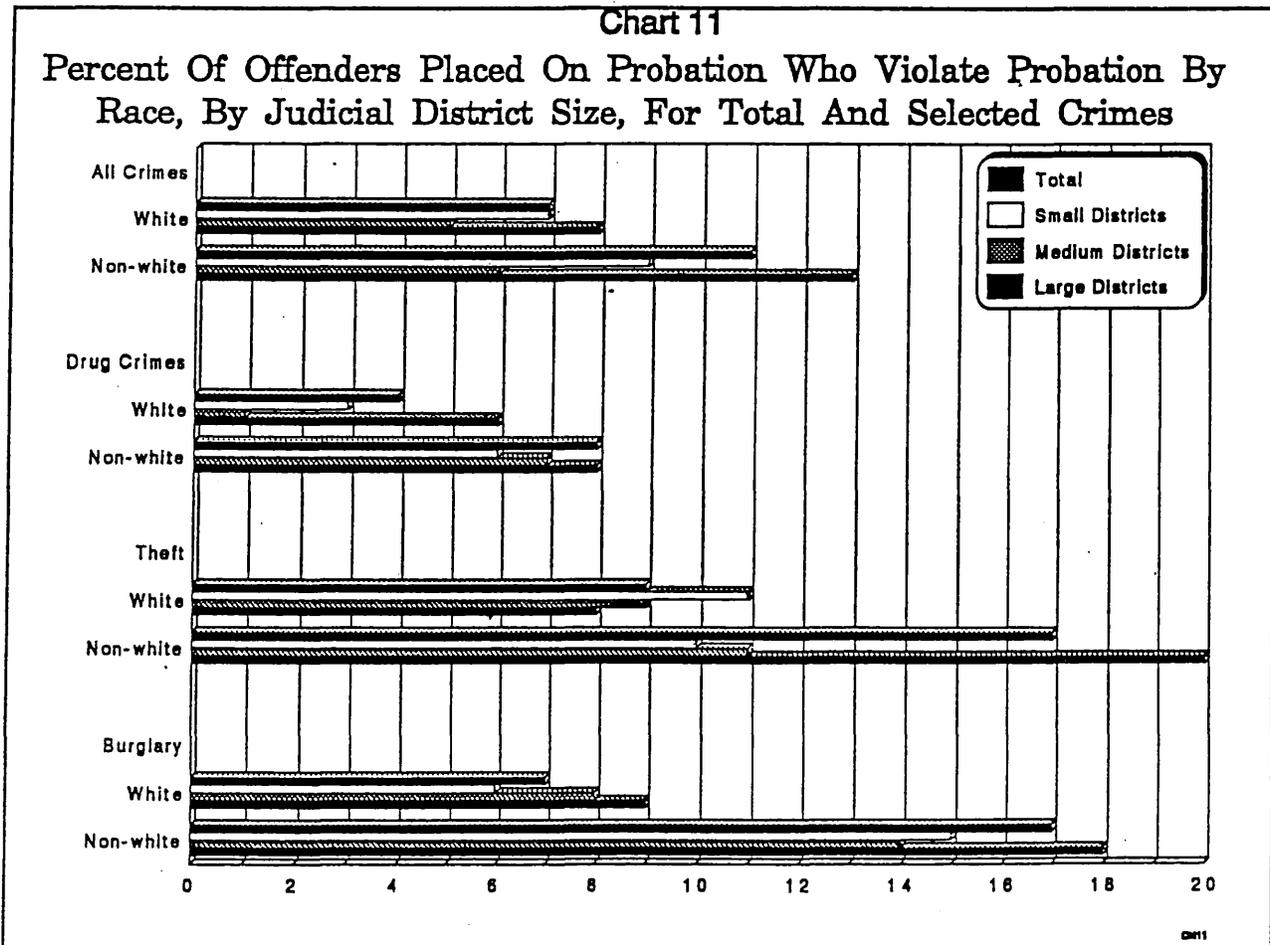


- 1) they had lower marriage rates;
- 2) they had higher school dropout rates;
- 3) they had higher unemployment rates.

Therefore, when socio-demographic factors come into play, non-whites are going to be at a significant disadvantage. The basic policy question to be answered is: Should persons be incarcerated as a result of their offense and criminal history; or should the final decision be a function of social characteristics? If socio-demographic characteristics are legitimate considerations, non-whites are at a considerable disadvantage.

Probation Violations

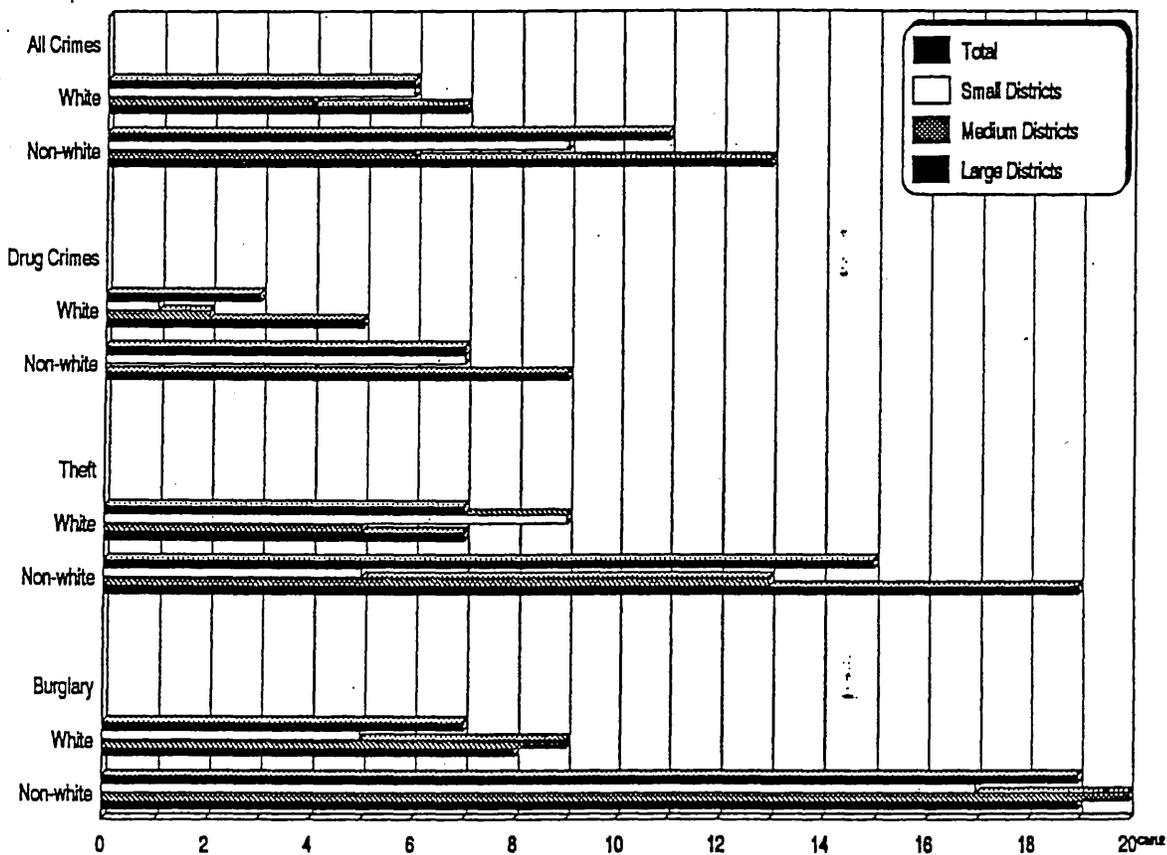
Chart 11 provides a review of the percent of persons placed on probation in FY 1989, who were revoked during FY 1989, and sent to prison. This decision, like call backs, is a crucial variable; it ultimately decides who will remain at liberty and who will be incarcerated. It also is one of the variables that influence the final outcome of who ultimately ends up in prison. Non-whites experience a higher revocation rate than whites in all crime categories covered and in all sizes of judicial districts, except for theft in small districts.



Large jurisdictions have higher revocation percentages for all categories: white and non-white. However, non-whites suffer the largest disadvantages for theft (whites 9%, non-whites 20%), and burglary (whites 9%, non-whites 18%).

Chart 12 displays the same data for those persons who have no previous adult felony convictions. The outcomes are almost identical except whites experience higher revocation rates for thefts in small districts and for drug crimes in medium districts. This category may also be impacted by socio-demographic variables, a poor work record, a lack of family ties, and a lack of a high school diploma may bode poorly for re-instatement on probation.

Chart 12
Percent Of Offenders Without Previous Felony Convictions Who Violate Probation By Race, By Size Of Judicial District For Total And Selected Crimes



Time Served

This analysis is reflected in Chart 13. The sample analyzed is made up of 1,700 persons who were paroled in FY 1989. There are two categories presented: the total sample (1,700), and a subset that had no prior adult felony convictions (813). The two variables studied were average minimum sentence and average number of months served. The average minimum sentence controls parole eligibility. Overall non-whites got longer average sentences and they also served longer before being released. Both of these differences are statistically significant. The same pattern exists for most of the crimes studied. The exception being that whites served slightly more time for thefts than non-whites.

Chart 13

Average Minimum Sentence And Average Months Served For 1700 Inmates Released In Fiscal Year 1989 By Total Crime, Selected Crimes And By Race

	All Crimes		Statistically Significant	No Previous Felony Convictions		Statistically Significant
	White	Non-white		White	Non-white	
Total Crimes						
Ave Min Sent (years)	2.3	2.8	YES	2.3	3.0	YES
Ave Mos Served	34.0	41.8	YES	32.5	41.6	YES
Drug Crimes						
Ave Min Sent (years)	2.5	3.0	YES	2.5	3.1	YES
Ave Mos Served	28.3	38.3	YES	27.3	38.1	YES
Theft						
Ave Min Sent (years)	1.5	1.3	NO	1.2	1.2	NO
Ave Mos Served	26.3	25.4	NO	20.8	21.0	NO
Burglary						
Ave Min Sent (years)	1.9	1.9	NO	1.5	1.4	NO
Ave Mos Served	29.7	35.2	YES	23.4	27.2	NO

Again, like other categories, non-whites suffer a significant disadvantage, when one receives a longer minimum sentence it adversely affects the parole eligibility date.

GEOGRAPHICAL DISPARITY

As displayed in the previous sections, there was considerable variance in imprisonment rates between the various sizes of judicial districts. The major variance is caused by the large judicial districts. The following analysis provides an overview of these differences.

Small districts make up 30 percent of the sample, but only 27 percent of the prison bound population. Medium sized districts account for 18 percent of the sample, but only 14 percent of the prison bound population. Large districts account for 52 percent of the sample and 59 percent of the prison bound population. The difference between the three jurisdictions is statistically significant ($P = .0001$). When medium and small jurisdictions are compared, they are not significantly different. However, large districts are statistically significantly different from both small and medium sized districts ($P = .0001$). The same differences occur when only individuals with no previous felony convictions are considered ($P = .02$). Therefore, the argument that large districts send a larger percentage to prison due to a more criminally sophisticated population does not seem to be a factor.

The other potential explanation is that large jurisdictions experience different types of crimes than small and medium sized districts. A review of crimes by class of felony indicates that:

- 1) for "C" felonies, medium sized judicial districts incarcerate 64 percent, compared to 54 percent for small and large districts;
- 2) for "D" felonies, large districts incarcerate 44 percent, while small and medium sized districts incarcerate 42 percent and 39 percent respectively;
- 3) for "E" felonies, large districts incarcerate 35 percent, while small and medium sized districts incarcerate 24 percent and 20 percent respectively.

Clearly the large judicial district's largest overall share is not the result of serious person crimes, but is caused by incarcerating larger percentages of "D" and "E" felonies.

SUMMARY

The analysis indicates that racial and geographical bias exist. Non-whites experience a systemic disadvantage at every decision point, particularly in the large judicial districts. Overall non-whites:

- (1) are incarcerated at a higher rate when the initial decision is made to imprison or place on probation;
- (2) experience lower call back rates;
- (3) experience higher probation revocation rates;
- (4) experience a higher final incarceration rate due to the factors covered in (1), (2), and (3) above;
- (5) get longer minimum sentences;
- (6) serve longer periods of time once incarcerated.

These findings hold for the total sample and the sub-sample of persons with no previous adult felony convictions. With a few exceptions, these differences occur for all crimes, drug crimes, theft and burglary. In terms of size of judicial districts, the differences are most pronounced in large districts and least pronounced in medium ones.

Large districts imprison a greater share of their cases than do small and medium ones. The difference is statistically significant ($P = .001$) and holds true for both the full sample and the sub-sample.

This difference in incarceration rates is primarily a function of imprisoning a larger than proportional share of "D" and "E" felons, as well as, higher probation revocation rates.

These findings reflect the results of using socio-economic variables in the decision making process. When these variables are used, non-whites will be at a disadvantage. General societal inequities unintentionally spill over into the sentencing process. Non-whites, both in and outside the criminal justice system, experience higher levels of unemployment, higher high school dropout rates, and higher levels of family instability. These three socio-economic factors were highly correlated with the findings reported above. In fact, they were extremely powerful predictors of who would ultimately end up in prison. Thus, it appears that much of the sentencing bias can be attributed to these general societal conditions.

It would be simple to try and isolate some actor or group of actors who are responsible for the disparity found in the survey of 1989 sentencings. However, no one appears to be at fault. In fact, current Kansas law directs decision makers to consider these and other socio-economic factors. When criminal justice system actors conscientiously use these time honored variables to decide who will be placed on probation, who will be called back from the Department of Corrections on a 120 day call back, or who will be reinstated on probation, non-whites will be disadvantaged. Thus it becomes apparent that the system used to make decisions must be changed so that these overall societal disparities do not influence the sentencing system.

COMMENTARY

The Commission reviewed findings from other guideline states and testimony presented before the U.S. Congress on this subject. Geographical, gender and racial differences in sentences were noted in pre-guideline studies done in California, Minnesota, Washington, and Oregon. There were also similar findings for federal sentencing practices. In fact, these differences were powerful motivators in the passage of sentencing guidelines in these locations.

Post-guideline results have been encouraging. A 1988 Rand Corporation study indicates that sentencing guidelines have eliminated these biases in California. Minnesota and Washington report substantial improvements. Oregon and the U.S. Sentencing Commission have not reported yet, both are due in early 1991.

The Kansas findings seem to indicate a systemic bias. No specific segment of the system is at fault. In fact, a great deal of the variance in incarceration rates reflect differences in socio-economic variables: education, employment status, family stability. These variables have wide acceptance throughout the entire criminal justice system. They are cornerstones of the rehabilitation philosophy that has dominated the field for the past 20 plus years. This philosophy is reflected in Kansas statutes. K.S.A. 21-4601, which provides a thesis for sentencing (Article 46), states in part "This article shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs and potentialities as revealed by case studies . . ." In line with this philosophy, K.S.A. 21-4604(2)(c) instructs the Court Services Office to gather information on the offender's criminal record, social history, and present condition.

Thus, it is no wonder that socio-economic factors influence outcomes, they are part of the fabric of the current sentencing system.

Persons who are lacking in these socio-economic factors tend to receive probation less frequently. These factors are also important in the Reception and Diagnostic Center recommendations to sentencing courts. An individual without employment, stable family ties or a high school diploma, may not present a favorable prospect for probation.

Non-whites in the sample of cases read were disadvantaged in all of these socio-economic factors. Thus, following long established practices and current statutory intent may well send a disproportionate share of non-whites to prison. These same factors will influence the decision to recommend call backs and probation re-instatement.

This information led the Commission to review the current decision making process and its assumptions. The process leads to systemic bias and unless changed this bias may well continue. It would be simple to point a finger at some segment of the system and assess blame. However, no segment seems blameworthy, in fact actors appear to be conscientiously following the system spelled out by tradition and statute. The solution to this dilemma lies in changing the system used to make these decisions.

The Commission supports such a change. They endorse a decision making process that only deals with the gravity of the present offense and the convicted persons prior criminal history. The Commission believes that the inclusion of social or demographic factors will continue to disadvantage non-whites. If prison is punishment, it does not seem equitable to punish persons based on socio-economic variables. Thus, the old system must be discarded in favor of one that places all convicted offenders on a "level playing field" regardless of race, gender, location, or socio-economic status.

CHAPTER 3

THE CRIME SERIOUSNESS SCALE

GUIDELINES ASSUMPTIONS

The proposed system assumes that a presumptive sentence will be applied in all normal cases. The presumptive sentence will be based on two factors; the severity of the current offense, and the extent of the offender's prior criminal history.

The presumptive sentence is assumed to be appropriate for all "typical" cases. The sentencing grid assigns a range for each combination of crime severity and prior criminal history. If the court feels that there are substantial and compelling reasons why the case is not "typical", then the judge may depart and pronounce a different sentence. If a departure is made, the court must specify on the record substantial and compelling reasons for the departure. This departure is appealable by the prosecution or the defendant.

Crime severity is tied to the current crime of conviction. The level of severity is defined by the level of harm done. Criminal history is defined by the number of convictions resulting from prior criminal events.

GENERAL CRIME RANKINGS

Senate Bill 50 authorized the Commission to "...develop a sentencing guideline model or grid based on fairness and equity... [and],...guidelines shall specify the circumstances under which imprisonment of an offender is appropriate and a presumed sentence for offenders for whom imprisonment is appropriate, based on each appropriate combination of reasonable offense and offender characteristics." Moreover, the Commission's own enacted Mission and Goals Statement pronounced a just deserts - oriented sentencing philosophy which emphasized the following tenets directly applicable to the crimes - seriousness ranking task:

- Incarceration should be reserved for serious offenders;
- The primary purposes of a prison sentence are incapacitation and punishment;
- Development of a set of guidelines that promote public safety by incarcerating violent offenders.

Pursuant to the above considerations, the Commission recognized that in a presumptive sentencing system, offense seriousness is the primary factor that determines sentence severity. Thus, the Commission perceived its basic purpose as one that sought to assure that eventual guideline punishments would be proportional to the seriousness of the offenders' crimes. To achieve that proportionality, it was clearly necessary for the Commission to rank crimes in the order of their seriousness.

The Scale is described in general terms in the following proposed statute. The commentary to this proposed statute provides a more detailed explanation of just deserts principles used to develop the Scale.

CRIME SERIOUSNESS SCALE

- (1) The Crime Seriousness Scale consists of ten categories of crimes. Each crime category represents crimes of relatively equal importance. A category of one is the most severe crime level and a category of ten is the least severe.
- (2) When the statutory definition of an offense includes a broad range of criminal conduct, the offense may be subclassified factually in more than one crime category to capture the full range of criminal conduct covered by the statutory offense.

COMMENTARY

During its meeting of January 12, 1990, the Crime Seriousness Subcommittee drafted a set of working principles for use in its crime-severity ranking process. The principles were articulated to the full Commission on January 26, 1990 and approved without dissent. The expressed principles were:

- 1) The primary determinant of crime severity is the harm or threat of harm produced by the criminal conduct. Harm is defined as the actual damage or threat of damage to the societal interest protected by the criminal statute.
- 2) Factors indicating the culpability of the offender should be considered primarily when assessing aggravating and mitigating circumstances.
- 3) Different societal interests have different weights with respect to assessing crime severity.
 - a) Society's greatest interest is to protect the individual from physical and emotional injury.
 - b) The second most important societal interest is to protect private and public property rights.
 - c) The third set of societal interests is to protect/preserve the integrity of governmental institutions, public peace and public morals.

The working principles were based on a just-deserts orientation; the seriousness of the crime varies according to the gravity of the offense and gravity is determined by the harm caused, directly or as a consequence, by the crime. Thus the Subcommittee consistently emphasized the "harm" component of criminal conduct in its evaluative efforts. In other words, severity rankings were derived from the Subcommittee's appraisal of the harm - either threatened or impacted - upon a statutorily protected interest. In terms of a severity hierarchy, crimes against persons were ranked more seriously than property or institutional crimes.

The Subcommittee's first working principle emphasized that the essential factor in ranking crime seriousness is the harm, or threat of harm, to societal interests the Legislature intended to protect by making the particular conduct a crime. The group's third principle classified the societal interests in order of importance. The Subcommittee's second principle concluded - except where specific intent is a statutory element of the offense - that specific facts indicating the offender's personal blameworthiness in an individual case should only be considered to determine whether aggravating or mitigating circumstances for a departure sentence exist. In other words, an offender's intent to commit an offense was not included as a crime seriousness determinant.

The Subcommittee also concluded that a proper ranking of Kansas felonies for sentencing guidelines purposes requires a more refined classification system than is currently provided by statute (Class A, B, C, D or E felonies). When it was developing the crime seriousness categories, the Subcommittee carefully studied the guidelines systems of Minnesota, Washington and Oregon, and the federal sentencing guidelines. As a result of this analysis, the Subcommittee recommended a Crime Seriousness Scale with ten categories with severity level one being the most severe and severity level 10 the least severe. Each category represents a different seriousness ranking for sentencing purposes. In addition, the Subcommittee decided that the proper classification and comparison of felonies also required the subclassification of some offenses which are broadly defined by statute.

SPECIAL CRIME SERIOUSNESS RANKING RULES

Unranked Offenses

Some offenses are not ranked on the Crime Seriousness Scale. These offenses are either rarely prosecuted or possess sentencing subsections within their statutory definition. The following proposed statute states the procedure to be followed by the sentencing judge to classify unranked offenses. When considering an unranked offense in relation to the Crime Seriousness Scale, the sentencing judge should refer to comparable offenses on the Crime Seriousness Scale and the ranking principles described in the Scale's commentary.

Other unranked offenses

When a person is convicted of any other felony crime or crime punishable by state imprisonment which is omitted from the Crime Seriousness Scale, the sentence shall be in accordance with the sentence specified in the statute that defines the crime. If no sentence is provided in the statute, the court is to impose a determinate sentence which may include not more than one year of confinement or not more than three years of any other authorized disposition as provided by statute whenever any person has been found guilty of a crime. Sentences involving greater than one year of confinement or other dispositions exceeding a three year duration are departure sentences and must be justified on the record.

Off-Grid Crimes

The existing sentences for "A" felonies in Kansas are already determinate in nature. Because the legislature has clearly established specific sentencing provisions for First Degree Murder, Aircraft Piracy and Treason, the Crime Seriousness Subcommittee did not rank these offenses on the Crime

Seriousness Scale. However, the Subcommittee did decide to rank the "A" felony crime of Aggravated Kidnapping on the Scale at a most severe rating of level one. The Subcommittee concluded that this crime is charged more often than other "A" felonies and the frequency of its use warranted a lower severity rating than off-grid placement.

Anticipatory Offenses

Subcommittee members reviewed rules for conspiracy, attempt and solicitation in other guideline states. In Washington, for persons convicted of criminal attempt, solicitation or conspiracy, the standard sentencing range for the underlying crime is determined and then multiplied by 75 percent. Oregon ranks attempts and solicitations on the crime seriousness scale at two crime categories below the appropriate category for the completed crime. This general rule does not apply to conspiracies. An Oregon conspiracy conviction is treated as an unranked offense and the offender is sentenced pursuant to Oregon's rule for unclassified felonies. For persons convicted of attempted offenses or conspiracies in Minnesota, the presumptive durational sentence for the completed crime is determined and then divided by two. No explicit rule was discovered for Minnesota's treatment of solicitations. In addition to the above, Subcommittee members reviewed existing statutes describing Kansas anticipatory offenses and proposed the following principles:

- A) A conviction for an attempt to commit an offense shall be ranked on the Crime Seriousness Scale at two crime categories below the appropriate category for the underlying or completed crime. A conviction for attempted First Degree murder shall be ranked at a severity level of one on the Seriousness Scale. In all cases, the lowest severity level for an attempt to commit a felony offense shall be ten.
- B) A conviction for conspiracy to commit the off-grid crimes of First Degree Murder, Treason; and Aircraft Piracy shall be ranked on the Crime Seriousness Scale at a severity level of two. A conviction for conspiracy to commit any other felony crime shall be ranked on the Scale at two crime categories below the appropriate category for the underlying or completed crime.
- C) A conviction for soliciting the off-grid crimes of First Degree Murder, Treason, and Aircraft Piracy shall be ranked on the Crime Seriousness Scale at a severity level of three. A conviction for soliciting any other felony crime shall be ranked on the Scale at three crime categories below the appropriate category for the completed crime.

Drug Crimes

The following statutory citations represent current felony drug crimes involving either the possession or sale of controlled substances:

65-4127a (a) - Possession and distribution of opiates, opiums or narcotic drugs.

3rd conviction = A felony

2nd conviction = B felony

1st conviction = C felony

65-4127a (c) - Manufacture, possession, disposition or sale of depressant, stimulant or hallucinogenic drugs; = B felony, if within 1,000 feet of a school.

65-4127b (a) (1) to (5), second and subsequent possession convictions = D felony

65-4127b (b) (1) to (5) = C felony

65-4127c (c), (child < 18 years) = D felony

65-4127b (e) = B felony, if within 1,000 feet of a school

All of the above statutes are represented on the vertical axis of the proposed drug grid. (see Appendix B). Other criminal statutes which collaterally relate to the controlled substances area are classified in the Crime Seriousness scale (i.e., K.S.A. 65-4153(2)(c)), which is concerned with simulated controlled substances and drug paraphernalia.

In addition, the following rules pertain to anticipatory offenses and the presumptive sentences contained within the recommended drug grid:

- (1) An attempt, conspiracy or solicitation of any of the above felony drug crimes will reduce the offender's presumptive sentence by six months. The standard crime - seriousness reduction rules which apply to the Crime Seriousness Scale will not apply to the separate drug grid. Hence, anticipatory crimes (either charged or bargained for) will not lower an offender's crime severity rating of 1 to 4; they will, however, reduce an offender's presumptive sentence by a requisite six month amount.
- (2) No plea bargaining agreement may be entered into for the purpose of permitting a person charged with a violation of any of the aforementioned felony drug statutes to avoid the presumptive sentences established by the drug grid. This particular rule is significant because the drug grid severity ratings (1 to 4) include prior convictions for either K.S.A. 65-4127a and 65-4127b. The rule also restates a generally mandated guidelines rule that prohibits the bargaining away of an offender's criminal history. Consequently, a plea agreement, for example, that would reduce a level 2 charge of selling cocaine to a level 3 offense would necessarily involve a prohibited cancellation of an offender's prior criminal history or prior verifiable conviction of either K.S.A. 65-4127a or 65-4127b. Such a plea agreement is not allowed for the offenses ranked on the vertical axis of the drug grid. Prosecutors may, of course, continue to dismiss charges or file additional or different charges. Such actions, however, may not involve the deliberate minimization or elimination of an offender's criminal history.
- (3) Level 4 crimes, with up to one prior non-person felony, presume a sentence of probation. Level 3 rankings are bifurcated; possessory offense for Level 3 offenses with no prior felony history receive a presumptive sentence of probation, and sale offenses receive a presumptive prison sentence.

The drug grid also recommends a higher severity ranking for second and third convictions for violations of K.S.A. 65-4127b (b) (1) to (5) either singularly or in conjunction with violations of K.S.A.

65-4127a(a). Presently, convictions for K.S.A. 65-4127b(b)(1) to (5) are ranked as C felonies without regard for number of prior convictions. K.S.A. 65-4127a(a) does presently grade violation on a prior conviction basis from C to an A felony. An offender's criminal history score on the horizontal axis does not include prior convictions for K.S.A. 65-4127a or 65-4127b. Special criminal history scoring rules are included in the Criminal History section of this report.

COMMENTARY

Section (a) describes the sentencing procedure to be followed by the sentencing judge when confronted with unranked offenses. It is not expressly required that the judge numerically rank the severity level of the unclassified crime. It is, however, recommended that the sentencing judge attempt to consider an unranked offense in relation to other comparable offenses on the Scale. It is also recommended that the court should consider fundamental crime seriousness principles when determining a sentence for unranked crimes.

The proposed statute allows a court to impose a determinate sentence of not more than one year of confinement or not more than three years of any other authorized disposition as allowed by statute for conviction of a felony offense. A sentence beyond these proposed limits represents a departure sentence and must be justified on the record by a finding of substantial and compelling circumstances.

Section (b) recognizes that the sentences for First Degree Murder, Aircraft Piracy and Treason are already codified in a determinate manner as life imprisonment. Because the legislature has clearly established special sentencing provisions for these crimes, the Crimes Seriousness Subcommittee purposely did not rank these offenses on the Crime Seriousness Scale.

Section (c) indicates the proposed statutes governing the severity rankings of anticipatory offenses. Current Kansas law classifies an attempted crime one felony classification below the completed crime for A, B, C, and D felonies. An attempt to commit a class E felony is a class A misdemeanor. Presently, a conspiracy to commit a class A felony is a class C felony, and conspiracy to commit a felony other than a class A felony is a class E felony. Criminal solicitation of a class A or B felony is currently a class D felony; criminal solicitation of a felony other than a class A or B felony is a class E felony.

The Crime Seriousness Subcommittee implemented a proposed statutory policy for attempts by ranking conviction for an attempted felony crime at two crime seriousness levels below the completed crime. This difference produces presumptive sentence ranges for a completed felony crime that are generally twice those for an attempt. Similarly, a conviction for a conspiracy to commit a felony crime is ranked on the Scale at two crime categories below the completed crime. This classification produces a difference in presumptive sentence ranges that corresponds proportionately to the different sentence ranges provided for a completed felony crime. The general rule continues for solicitations but with a specific reduction of three crime categories below the appropriate category for the completed crime.

The lowest crime category for any attempt, conspiracy or solicitation felony offense shall be ten. Additional rules in the proposed statutes also describe the application of anticipatory offenses to present A felony, proposed off-grid crimes.

Section (d) represents the Crime Seriousness Subcommittee's response to drug crimes classification, and should be construed in relationship to proposed departure criteria for drug sale offenses, and special rules governing criminal history scoring for drug crimes.

THE SUBCLASSIFICATION ISSUE

In the process of attempting to specifically evaluate crime severity, the Crime Seriousness Subcommittee encountered eleven broadly worded criminal statutes that seemingly encompass different levels of harm or potential seriousness. Following much debate, Subcommittee members proceeded to recommend extra-statutory factors that - in its collective opinion - more precisely describe the severity levels that may exist in situations adverse to statutorily protected interests. The subclassified statutes and their respective factors are:

K.S.A. 21-3414, Aggravated Battery

K.S.A. 21-3415, Aggravated Battery of Law Enforcement Officer

K.S.A. 21-3503, Indecent Liberties with a Child

K.S.A. 21-3504, Aggravated Indecent Liberties with a Child

K.S.A. 21-3719, Aggravated Arson

K.S.A. 21-3603, Aggravated Incest

K.S.A. 21-3604, Abandonment of a Child

K.S.A. 21-3611, Aggravated Juvenile Delinquency

K.S.A. 21-3742, Throwing/Casting Objects from Bridge or Overpass

K.S.A. 21-3810, Aggravated Escape from Custody

K.S.A. 21-3718, Arson

The particular statutory subclassifications in the order of their severity are:

(1) Aggravated Battery/Aggravated Battery of Law Enforcement Officer

- a. victim received permanent and serious injury from defendant's conduct;
- b. victim received serious injury from defendant's conduct;
- c. defendant's conduct could have inflicted serious or permanent injury to the victim (i.e., possibility of aggravated serious and permanent injury).

(2) Aggravated Arson

- a. serious threat to human life;
- b. not a serious threat to human life.

(3) Indecent Liberties/Aggravated Indecent Liberties

(proposed repeal of Aggravated Indecent Liberties with a child or K.S.A. 21-3504, creating one statute to address the following under K.S.A. 21-3503).

- a. sexual intercourse with a child \leq 12 years of age;
- b. sexual intercourse with a child $>$ 12 years of age;
- c. fondling/soliciting a child \leq 12 years of age;
- d. fondling/soliciting a child $>$ 12 years of age.

(4) Aggravated Incest

- a. sexual intercourse;
- b. fondling.

(5) Abandonment of a Child

- a. child placed in immediate physical danger;
- b. child not placed in immediate physical danger.

(6) Aggravated Juvenile Delinquency

- a. burning constituted a serious threat to human life;
- b. committing an aggravated assault or aggravated battery upon any officer, attendant, employee or confined person;
- c. burning did not constitute a serious threat to human life;
- d. running away or escaping for a second time.

(7) Throwing Objects from a Bridge/Overpass

- a. injury to persons;
- b. injury to property.

(8) Aggravated Escape from Custody

- a. escape facilitated by violence;
- b. no violence.

(9) Arson

- a. damage of > \$50,000;
- b. damage of \$25,000 to \$50,000;
- c. damage of < \$25,000.

COMMENTARY

The topic of felony harm subclassification was one of the most difficult issues that the Subcommittee considered. The subject originated from a confrontation of the Subcommittee's basic purpose (specifically classifying harms to protected societal interests) and the existence of several broadly worded criminal statutes that epitomized the heretofore accepted Model Penal Code and an accompanying indeterminate sentencing system.

Arguments for proceeding with subclassification included creating a more distinct definition of harm specificity, and construction of a truly accurate Crime Seriousness Scale. It was argued, too, that precedent for subclassification already exists in the Kansas "property crimes" area. Arguments against subclassification included concerns regarding definitional criteria; perceived loss of judicial discretion; potential confusion to legislative and criminal justice system members; whether subclassification may require extensive statutory amendments, and the impact of subclassification on jury instructions, lesser-included offenses and the prosecution's accusatory information or complaint. It was noted, too, that while the Oregon Sentencing Commission (vested with administrative agency authority) promulgated subclassification or extra-statutory factors, the legislatively-dependent Washington Sentencing Commission did not. In addition, the crime of burglary presented Commission members with an opportunity to distinguish residential from nonresidential burglaries. It was the decided conclusion of the Commission that residential burglaries are more onerous to victims and should be considered more severely within a presumptive sentencing system. Therefore, residential burglaries will be recognized as "person" felonies for criminal history scoring purposes.

CRIME SERIOUSNESS SCALE

Severity Level 1

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
21-3401	Attempted Murder One (21-3301)	B	P
21-3402	Murder Two	B	P
21-3421	Aggravated Kidnapping	A	P

Severity Level 2

21-3502	Rape	B	P
21-3506	Aggravated Criminal Sodomy	B	P

Severity Level 3

21-3403	Voluntary Manslaughter	C	P
21-3415	Aggravated Battery of Law Enforcement Officer (serious and permanent injury)	B	P
21-3420	Kidnapping	B	P
21-3427	Aggravated Robbery	B	P
21-3503	Indecent Liberties with a Child (intercourse with a child age 12 or under)	C	P
21-3719	Aggravated Arson (serious threat to life)	B	P

Severity Level 4

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime N = Non-person Crime</u>
21-3414	Aggravated Battery (serious and permanent injury)	C	P
21-3503	Indecent Liberties with a Child (intercourse with a child age 12 or over)	C	P

Severity Level 5

21-3404	Involuntary Manslaughter	D	P
21-3405	Aggravated Vehicular Homicide	E	P
21-3415	Aggravated Battery on Law Enforcement Officer (serious injury)	B	P
21-3417	Attempted Poisoning	C	P
21-3426	Robbery	C	P
21-3503	Indecent Liberties with a Child (fondling/soliciting a child age 12 and under)	C	P
21-3516	Sexual Exploitation of a Child	D	P
21-3518	Aggravated Sexual Battery	D	P
21-3603	Aggravated Incest (intercourse with a child)	D	P
21-3604	Abandonment of a Child (resulting in immediate physical danger)	E	P
21-3716	Aggravated Burglary	C	P
21-3718	Arson (damage resulting in more than \$50,000 loss)	C	N

Severity Level 6

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
21-3411	Aggravated Assault on Law Enforcement Officer	C	P
21-3414	Aggravated Battery	C	P
21-3415	Aggravated Battery on Law Enforcement Officer (possibility of serious/permanent injury)	B	P
21-3503	Indecent Liberties with a Child (fondling/soliciting a child age 12 or over)	C	P
21-3509	Enticement of a Child	D	P
21-3511	Aggravated Indecent Solicitation of a Child	E	P
21-3514	Habitually Promoting Prostitution	E	P
21-3519	Promoting Sexual Performance by a Minor	E	P
21-3609	Abuse of a Child	E	P
21-3718	Arson (damage of \$25,000 to \$50,000)	C	N
21-3719	Aggravated Arson (no serious threat to life)	B	P
21-3742	Throwing Objects from a Bridge or Overpass (resulting in injury to a person)	D	P
21-3810	Aggravated Escape from Custody (escape facilitated by use or threat of violence)	E	P
21-3826	Distribution of Contraband in a Penal Institution	E	N

Severity Level 6 (continued)

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
21-3829	Aggravated Interference with Conduct of Public Business	D	P
21-3833	Aggravated Intimidation of a Victim or Witness	E	P
21-4215	Obtaining a Prescription-only Drug by Fraudulent Means (for the purpose of resale)	C	N

Severity Level 7

21-3410	Aggravated Assault	D	P
21-3413(a)(2)	Battery of Correctional Officer or Employee	E	P
21-3414	Aggravated Battery (possibility of serious/permanent injury)	C	P
21-3422	Aggravated Interference with Parental Custody	D	P
21-3428	Blackmail	E	N
21-3513	Promoting Prostitution (when prostitute is age 16 or under)	E	P
21-3603	Aggravated Incest	D	P
21-3611	Aggravated Juvenile Delinquency (burning with serious threat to life)	E	P
21-3611	Aggravated Juvenile Delinquency (aggravated assault or aggravated battery)	E	P
21-3701	Theft (loss of \$50,000 or more)	D	N
21-3704	Theft of Services (loss of \$50,000 or more)	D	N

Severity Level 7 (continued)

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
21-3708	Habitually Giving a Worthless Check	E	N
21-3715	Burglary - Residential	D	P
21-3715	Burglary - Nonresidential	D	N
21-3718	Arson (loss of \$25,000 or less)	C	N
21-3720	Criminal Damage to Property (damage resulting in loss of \$50,000 or more)	D	N
21-3726	Aggravated Tampering with a Traffic Signal	E	N
21-3729	Unlawful Use of Financial Card (loss of \$50,000 or more)	D	N
21-3742	Throwing Objects from a Bridge or Overpass (resulting in harm to property)	E	N
21-3753	Grain Embezzlement	C	N
21-3755	Computer Crime, Unlawful Computer Access (resulting in harm to property)	E	N
21-3802	Sedition	D	N
21-3805	Perjury (in felony trial)	D	N
21-3901	Bribery	D	N
21-4401	Racketeering	D	N

Severity Level 8

21-3604	Abandonment of a Child (no immediate physical danger)	E	P
21-3611	Aggravated Juvenile Delinquency (burning without threat to life)	E	P

Severity Level 8 (cont)

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
21-3612	Contributing to a Child's Misconduct or Deprivation (subsections le and lf only)	E	P
21-3707	Giving a Worthless Check (loss of \$50,000 or more)	D	N
21-3710	Forgery	D	N
21-3711	Making a False Writing	D	N
21-3714	Possession of Forgery Devices	E	N
21-3731	Criminal Use of Explosives	E	P
21-3807	Compounding a Felony Crime	E	N
21-3810	Aggravated Escape from Custody (no violence used)	E	N
21-3811	Aiding an Escape	E	N
21-3812	Aiding a Felon	E	N
21-3904	Presenting a False Claim (claim of \$50 or more)	E	N
21-3905	Permitting a False Claim (claim of \$50 or more)	E	N
21-3910	Misuse of Public Funds	D	N
21-4105	Incitement to Riot	D	P
21-4301a	Promoting Obscenity to Minors (second or subsequent offense)	D	P
21-4304	Commercial Gambling	E	N
21-4306	Dealing in Gambling Devices	E	N

Severity Level 8 (cont)

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
21-4308	Installing Communication Facilities for Gamblers	E	N

21-4405	Commercial Bribery	E	N
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Severity Level 9

21-3406	Assisting Suicide	E	P
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21-3407	Criminal Abortion	D	P
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21-3419	Terroristic Threats	E	P
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21-3610	Furnishing Alcohol to a Minor for Illicit Purposes	E	P
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21-3611	Aggravated Juvenile Delinquency (escape/running away for a second or subsequent time)	E	N
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21-3701	Theft (loss of \$500 to \$50,000)	E	N
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21-3704	Theft of Services (loss of \$500 to \$50,000)	E	N
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21-3712	Destroying a Written Instrument	E	N
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21-3713	Altering a Legislative Document	E	N
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21-3715	Burglary (entrance into a motor vehicle)	D	N
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21-3717	Possession of Burglary Tools	E	N
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21-3720	Criminal Damage to Property (damage resulting in loss of \$500 to \$50,000)	E	N
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21-3729	Unlawful Use of a Financial Card (resulting in a loss of \$500 to \$50,000)	E	N
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Severity Level 9 (continued)

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
21-3756	Adding Dockage or Foreign Material to Grain	E	N
21-3757	Odometers; Unlawful Acts	E	N
21-3803	Practicing Criminal Syndicalism	E	N
21-3805	Perjury (during proceedings other than a felony trial)	E	N
21-3808	Obstructing Legal Proces or Duty (pertaining to a felony case)	E	N
21-3815	Attempting to Influence a Judicial Officer	E	N
21-3817	Corrupt Conduct of a Juror	E	N
21-3825	Aggravated False Impersonation	E	N
21-4115	Desecrating a Cemetery	E	N
21-4201	Unlawful Use of Weapons	E	N
21-4202	Aggravated Weapons Violation	E	N
21-4204	Unlawful Possession of a Firearm (subsection 1b only)	D	N
21-4209a	Unlawful Possession of Explosives	D	P
21-4301	Promoting Obscenity	E	P
21-4406	Sports Bribery	E	N
21-4408	Tampering with a Sports Contest	E	N
8-262	Driving While Suspended	E	N
8-287	Driving While a Habitual Violator	E	N

Severity Level 9 (continued)

<u>K.S.A. Number</u>	<u>Description of Statute</u>	<u>Current Class</u>	<u>P = Person Crime</u> <u>N = Non-person Crime</u>
8-1568	Fleeing or Eluding a Law Enforcement Officer (second or subsequent offense)	E	N

Severity Level 10

21-3601	Bigamy	E	N
21-3602	Incest	E	P
21-3605	Nonsupport of a Child or Spouse	E	N
21-3606	Criminal Desertion	E	P
21-3707	Giving a Worthless Check (resulting in a loss of \$500 to \$50,000)	E	N
21-3734	Impairing of a Security Interest (resulting in a loss of \$150 or more)	E	N
21-3735	Fraudulent Release of a Security Agreement	E	N
21-3736	Warehouse Receipt Fraud	E	N
21-3745	Theft of Telecommunications Services (second or subsequent offense, loss of \$150 or more)	E	N
21-3748	Piracy of Sound Recordings	E	N
21-3754	False Warehouse Records or Receipts	D	N
21-3814	Aggravated Failure to Appear	E	N
21-3830	Dealing in False Identification Documents	E	N
21-4214	Obtaining a Prescription by Fraud (second or subsequent offense)	D	N
21-4315(b)	Dog fighting	E	N

A complete listing with proposed penalties can be found in Appendix C.

CHAPTER 4

THE CRIMINAL HISTORY SCALE

The purpose of Criminal History in the Kansas Sentencing Guidelines is to serve as an indicator of increased or decreased culpability.

QUESTIONS TO BE ANSWERED

In categorizing offenders based on their prior criminal histories, several issues had to be studied. Among the key issues considered were:

- What factors generally should be measured in scoring criminal history?
- Are there factors that should not be included in the scoring process?
- Should prior criminal records be based on arrests, convictions or incarcerations?
- Should misdemeanors be considered?
- Should all prior misdemeanors and felonies be considered, or should they be "forgiven" after a period of time? If they are "forgiven", should all offenses have the same time period?
- Should prior juvenile adjudications be considered? If so, should all adjudications be considered or just those that would have been felonies if committed by an adult? Should there be a time limit on how long these juvenile adjudications will continue to be considered?
- Should all prior convictions have equal weight, or should there be a differential built in based upon the seriousness of the current offense compared to the seriousness of prior offenses?
- Should the legal status of the offender at the time of conviction be considered? Should a distinction be made if someone is already on probation or parole from another conviction?
- What other issues should be considered?

To provide guidance in resolving these and other questions, the Subcommittee on Criminal History held public hearings during December of 1989, in Pittsburg, Wichita, Hays, Garden City and Topeka. In addition, the subcommittee invited individuals who could not attend the hearings to provide written responses. The subcommittee considered this information, as well as, information on how these issues were resolved in other jurisdictions. Based on these considerations, the subcommittee developed a criminal history scale similar to Oregon's system. This system classifies an offender's criminal history on both a "qualitative" and "quantitative" basis. The criminal history categories are based on both the number of prior convictions and the seriousness of those offenses. The subcommittee

felt that all person crimes should be weighted more heavily than non-person crimes; therefore, any prior conviction for a person offense will always result in a higher criminal history classification than a prior conviction for a non-person offense. This decision follows the Commission's assumption that incarceration should be reserved for serious offenders.

CRIMINAL HISTORY CATEGORIES

The Criminal History Scale is represented in abbreviated form on the horizontal axis of the Sentencing Guidelines grid. The relative seriousness of each Criminal History Category decreases from left to right on the grid. Criminal History Category A is the most serious classification with three or more prior convictions or juvenile adjudications for person felonies. Criminal History Category I is the least serious classification with no criminal record or one prior misdemeanor record. The criminal history categories in the Criminal History Scale are:

**Criminal
History
Category**

Descriptive Criminal History

- A The offender's criminal history includes three or more person felonies in any combination of adult convictions or juvenile adjudications.
- B The offender's criminal history includes two person felonies in any combination of adult convictions or juvenile adjudications.
- C The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult conviction or juvenile adjudication for a non-person felony.
- D The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudications for a non-person felony.
- E The offender's criminal history includes three or more adult convictions or juvenile adjudications for non-person 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 non-person 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 non-person felony, but no adult conviction or juvenile adjudication for a person felony.
- H The offender's criminal history includes two or more non-person adult misdemeanor convictions or non-person juvenile misdemeanor adjudications, or two person adult misdemeanor convictions or person juvenile misdemeanor adjudications, but no adult conviction or juvenile adjudications for a person or non-person felony.
- I The offender's criminal history includes no prior record; or, one adult conviction or juvenile adjudication for a person or non-person misdemeanor, but no adult conviction or juvenile adjudication for a person or non-person felony.

CRIMINAL HISTORY CLASSIFICATIONS: GENERAL RULES

An offender's criminal history classification is based on ten types of prior convictions: person felony adult convictions, non-person felony adult convictions, person felony juvenile adjudications, non-person felony juvenile adjudications, person Class A misdemeanor adult convictions, non-person Class A misdemeanor adult convictions, person Class A misdemeanor juvenile adjudications, non-person Class A misdemeanor juvenile adjudications, person Class B misdemeanor adult convictions and person Class B misdemeanor juvenile adjudications. These categories have different levels of significance for classification purposes. For example, a prior conviction for a violent person offense will always result in a higher criminal history classification than a prior conviction for a non-person offense.

General Rules

- 1) Only verified convictions will be considered and scored.
- 2) All prior adult felony convictions will be considered and scored including expungements.
- 3) There will be no decay (forgiveness) period for adult convictions.
- 4) Juvenile adjudications, which would have been a D or E felony or a misdemeanor if committed by an adult, that occurred between the ages of 13 and 18 will decay (be forgiven) when the offender reaches age 25.
- 5) Juvenile adjudications which would constitute an A, B or C felony if committed by an adult will not decay. Upon implementation of guidelines, all juvenile adjudications which would constitute a person felony will not decay.
- 6) The seriousness level of the most serious crime will decide the scoring category when multiple offenses are sentenced concurrently or consecutively.
- 7) All Class A misdemeanor convictions will be counted, Class B person misdemeanors will be counted, no Class C misdemeanors will be counted.

SCORING PRIOR CRIMINAL HISTORY

One prior criminal history unit will be awarded for each previous conviction event. A conviction event is defined as:

When one or more convictions occur on the same day, within a single jurisdiction. These convictions may result from multiple counts within a complaint (information), or from more than one complaint (information). Jurisdiction is the court in which the criminal action has been filed.

SCORING PRIOR CRIMINAL HISTORY (continued)

- 1) No distinction will be made between multiple or single prior convictions occurring on the same day in a single jurisdiction, both shall be treated as a single conviction event.
- 2) When two or more convictions occur on the same day, but are in different jurisdictions, then one event will be scored for each jurisdiction. They would constitute different conviction events.
- 3) When convictions occur on different days, then all convictions that occur on a single day will count as one conviction event.
- 4) The most serious crime within the multiple counts making up a prior conviction event will be used to assess the prior history score for the current event.
- 5) In multiple misdemeanor convictions, person misdemeanor convictions will be used to assess the prior history score for the current event.

EXAMPLE: An offender commits three burglaries in Shawnee County within a two-month period. He is arrested and prosecuted for each burglary in a single case. Upon conviction only one of the burglary convictions will be counted for future criminal history purposes. This result would apply even if more than one judge is involved in the criminal proceeding as long as conviction for all charges occur on the same day within the same jurisdiction. Had two burglaries been filed in one case and the third in another case and convictions occurred in both cases on different days, a criminal history score would be applied for each case.

EXAMPLE: An offender commits a burglary in Jackson County, Atchison County and Jefferson County all in one evening. He is arrested and prosecuted for each burglary in each county. Upon conviction, one criminal history unit will be applied for each conviction because the conviction occurred within different jurisdictions.

EXAMPLE: An offender is stopped for speeding by a Topeka city police officer. After approaching the vehicle the officer sees a bag of what appears to be marijuana in the front seat. The officer asks the offender to step out of the vehicle after which a scuffle ensues and the officer is battered. The offender is arrested and prosecuted for Battery on a Law Enforcement Officer in Topeka City Municipal Court and for possession of marijuana in the District Court of Shawnee County. Upon conviction, a criminal history unit will be applied for each misdemeanor conviction because the convictions occurred within different jurisdictions. If both charges were filed in the District Court of Shawnee County and convictions occurred on the same day, only the person misdemeanor, Battery on a Law Enforcement Officer, would be counted for future criminal history purposes.

CRIMINAL HISTORY CLASSIFICATION: SPECIAL RULES

Person Class A Misdemeanor Convictions

Every three prior adult convictions or juvenile adjudications of person Class A and person Class B misdemeanors in the offender's criminal history shall be counted as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes.

The Commission decided that repeat conviction of such misdemeanors warranted special treatment in an offender's criminal history. Consequently, this rule equates three prior adult convictions or juvenile adjudications of person Class A and B misdemeanors with one prior adult person felony conviction for criminal history purposes. These decisions were the result of testimony from victims groups.

EXAMPLE: If an offender's criminal record includes four person Class A or B misdemeanor convictions or adjudications and no other convictions, those convictions count as one adult conviction of a person felony and one person Class A or B misdemeanor conviction (thus classifying the criminal history in Category D on the criminal history scale).

EXAMPLE: If an offender's criminal history includes six prior person Class A or B convictions or juvenile adjudications and no other convictions, those convictions count as two adult person felony convictions (thus classifying the criminal history in Category B on the criminal history scale).

Listing of Class A Person Misdemeanors

<u>K.S.A. Number</u>	<u>Description of Statute</u>
21-3405	Vehicular Homicide
21-3405b	Vehicular Battery
21-3409	Assault on a Law Enforcement Officer (continued)
21-3413	Battery on a Law Enforcement Officer
21-3422	Interference With Parental Custody
21-3424	Unlawful Restraint
21-3425	Mistreatment of a Confined Person

Listing of Class A Person Misdemeanors (continued)

<u>K.S.A. Number</u>	<u>Description of Statute</u>
21-3510	Indecent Solicitation of a Child
21-3517	Sexual Battery
21-3608	Endangering a Child
21-4104	Riot

The Person Misdemeanor rule will apply to offenders convicted under the Attempt statute (K.S.A. 21-3301) for the above offenses.

Listing of Class B Person Misdemeanors

<u>K.S.A. Number</u>	<u>Description of Statute</u>
21-3412	Battery
21-3416	Unlawful Interference with a Firefighter
21-3610	Furnishing Intoxicants to a Minor
21-3610a	Furnishing Beer to a Minor
21-3832	Intimidation of a Witness or Victim

Select Misdemeanors

Unlawful Use of Weapons (K.S.A. 21-4201(1)(a)-(1)(f)) and Unlawful Possession of Firearms (K.S.A. 21-4204(1)(a)) will be scored as a non-person Class B Misdemeanor and will not be capable of being converted to person felony units.

DUI Convictions

If the current crime of conviction is for Aggravated Vehicular Homicide, 21-3405a(1) and (3), specifically, while committing a violation of 8-1567 (driving with a blood alcohol concentration of .10 or more while under the influence of alcohol or drugs), each prior adult conviction or juvenile adjudication for Driving Under the Influence of Alcohol and/or Drugs shall be counted as one person felony for criminal history purposes.

Because of the seriousness of Driving Under the Influence of Alcohol and/or Drugs convictions, the Commission decided that repeated DUI convictions warranted special treatment, when the current crime of conviction is for Aggravated Vehicular Homicide. This decision was the result of testimony received during public hearings.

Prior Burglary Convictions

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

- (a) as a prior person felony if the prior conviction was classified as a "residential" burglary.
- (b) as a prior non-person felony if the prior conviction was classified as a "non-residential" burglary.

The facts required to classify prior burglary adult convictions and juvenile adjudications must be established by the state by a preponderance of the evidence (see Chapter 5 - Proof of Criminal History section).

Prior Out-of-State Convictions and Juvenile Adjudications

Out-of-state convictions and juvenile adjudications will be used in classifying the offender's criminal history. Out-of-state convictions include the federal system, fifty state systems, the District of Columbia, foreign, tribal, and military courts. The status of the conviction or adjudication from the out-of-state disposition shall be applied to the appropriate "person - non-person" classification under Kansas law.

EXAMPLE: An offender has been convicted of felony theft in a state other than Kansas. The amount taken is \$200 which constitutes a felony in the state of conviction. This conviction would be scored on the Kansas criminal history scale as a felony even though in Kansas \$200 would constitute a misdemeanor. This felony conviction would then be applied to the Kansas "person - non-person" classification and be scored as a felony non-person conviction.

EXAMPLE: An offender has been convicted of unlawful restraint in a state other than Kansas. This charge is a misdemeanor in the state of conviction. The conviction is applied to the Kansas "person - non-person" classification and is scored as a misdemeanor person conviction.

Juvenile adjudications will be applied in the same manner as adult convictions.

EXAMPLE: A juvenile offender is adjudicated for the offense of battery in a state other than Kansas. This offense is a misdemeanor, if committed by an adult in the state of adjudication. The offense is applied to the Kansas "person - non-person" classification and is scored as a juvenile misdemeanor person adjudication.

EXAMPLE: The age of majority is 17 in this example state. A 17 year old offender is convicted as an adult of felony theft. This conviction would be scored as an adult felony non-person conviction even though the age of majority is 18 in Kansas. The decay rule would not apply.

The facts required to classify out-of-state adult convictions and juvenile adjudications must be established by the state by a preponderance of the evidence (see Chapter 5 - Proof of Criminal History section).

DRUG SENTENCING GRID

Criminal History Classification in Drug Cases

The rules for calculating an offender's criminal history score are generally applicable to the Drug Sentencing Grid. However, there is a difference between the special Drug Grid and the Sentencing Guidelines Grid for non-drug felony convictions. The grid for non-drug offenses does not include prior convictions within its crime seriousness scale. All of an offender's prior convictions are contained within an offender's criminal history ranking (A to I) on the non-drug offense grid, and do not become a part of the crime seriousness rating (vertical axis) for a particular offense. In contrast, drug crime severity rankings One, Two and Three are based upon prior drug sale convictions, e.g., prior violations of either K.S.A. 65-4127a(a) or K.S.A. 65-4127b(b). Thus, prior drug-sale convictions are not considered when computing an offender's Drug Grid criminal history score. The convictions are not "double-counted" by further inclusion in the Drug Grid's horizontal (criminal history) axis.

EXAMPLE: X is arrested and charged with a violation of K.S.A. 65-4127a(a). Before filing an Information, the prosecutor examines X's criminal record and notes a prior conviction for K.S.A. 65-4127b(b). Thereafter the prosecutor does not discover any other past convictions. X would be correctly charged with a Level Two offense for a second drug sale charge. The definition of a Level Two offense also embodies X's prior drug sale conviction. If X were convicted of the second sale, his criminal history ranking would be letter I or "no record" which contains a presumptive prison sentence of 54 months. His prior sale conviction would not be double-counted in his criminal history score.

There are, however, notable exceptions to the general rule of excluding an offender's prior drug-crime convictions from his or her criminal history score. The exceptions are as follows:

- All prior misdemeanor drug-crime convictions are included in an offender's criminal history score. However, Level IV felony drug possession charges are presumed to include a prior misdemeanor drug possession conviction. Such a prior conviction is included in the Severity ranking of a Level IV drug offense unless the offender is charged with a felony drug offense not involving possession
- All prior felony drug-possession convictions are included in an offender's criminal history score.
- If an offender is charged with a drug sale offense in either Seriousness Levels One or Two but is later convicted only of a Level Four possessory offense, his or her prior drug sale conviction will be included in computing the offender's criminal history score. It is noted that a Level Four offense is not defined by a prior conviction of either K.S.A.65-4127a(a) or 65-4127b(b). Hence, the inclusion of the prior drug sale conviction must be considered in the offender's criminal history determination.

EXAMPLE: Offender Y is arrested and charged with a third violation of K.S.A. 65-4127a(a). His criminal record reveals a single, prior conviction of K.S.A. 65-4127b(b) and a single prior conviction of K.S.A. 65-4127a(a). Y possesses no other past convictions.

Y is accurately charged with a Severity Level One drug offense. If he were convicted of this offense, his presumptive prison sentence would be 162 months for a criminal history letter rating of "T" or "no record." His prior convictions are embodied in his crime seriousness ranking and are not double counted for purposes of determining his criminal history score.

If, however, Y is charged with a Level One drug offense but is eventually convicted of a Level Four, possessory crime, his presumptive prison sentence would be 21 months. His two prior sale-convictions are not embodied in the definition of a Level Four crimes and are therefore included in his criminal history score as two prior non-person convictions.

COMMENTARY

Every sentencing guidelines effort has developed sentencing standards that are based on the offender's current offense and the extent of his/her prior criminal record. A Criminal History subcommittee was formed to categorize offenders based on their prior criminal histories. The Criminal History Subcommittee adopted the above statement of purpose on February 9, 1990. The subcommittee discussed at length the theoretical issues of the use of criminal history as a "predictor of risk of future criminal behavior" and "the indication of increased culpability due to prior involvement with the justice system". Because the Commission's mission and goals statement is based on a notion of just desert, it was determined that criminal history would be used to reflect increased culpability and not as a risk predictor.

CHAPTER 5

LEGAL ISSUES AND PROCEDURES

INTRODUCTION

In general, many of the procedures used to sentence an offender under the current indeterminate sentencing system are retained for use in the guidelines system. However, modifications have been made to the sentencing process to make it more compatible with a presumptive guidelines system. This section describes the procedural and substantive aspects of presumptive sentencing under a proposed guidelines system.

To review legal procedures and requisite statutes, a Legal Issues Subcommittee was created on June 25, 1990. Johnson County District Attorney Paul Morrison served as Chairman. The other members were: Representative Martha Jenkins, Harvey County District Court Judge Richard B. Walker, Sedgwick County Public Defender Jillian Waesche and Kansas Sentencing Commission Staff Counsel Mike Warner. The subcommittee was directed to recommend substantive rules and procedural policies for a presumptive sentencing or guidelines system. The subcommittee convened on several occasions throughout the summer of 1990 and ultimately submitted recommendations on the following list of topics:

- (1) The nature of the accusatory instrument assuming crime-severity subclassification;
- (2) Proof of departure factors;
- (3) Discovery rules;
- (4) Plea bargaining rules;
- (5) Proof of criminal history;
- (6) Procedural nature of sentencing hearings;
- (7) A recommendation for mandatory presentence investigations in every felony case;
- (8) A recommendation for Mentally Disordered Offender procedure to either circumvent the release of an imprisoned, dangerous, mentally-ill inmate or to require mental health treatment as a condition of parole;
- (9) Fines.

RECOMMENDATIONS

The Subcommittee's efforts produced the following specific recommendations:

Section (1) The Nature of the Accusatory Instrument:

The Subcommittee proposed a slight amendment to K.S.A. 22-3201, (The Charge) to include the following language: "When pertinent, the information, complaint or indictment shall also allege facts sufficient to constitute a crime or a specific subcategory of a crime in the Crime Seriousness Scale."

Section (2) Proof of Departure Factors: The subcommittee agreed that in determining aggravation or mitigation, the court shall consider:

- (a) Any evidence received during the proceeding;
- (b) The presentence report; and,
- (c) Any other evidence relevant to aggravation or mitigation that the court finds trust worthy and reliable.

Section (3) Discovery: The group proposed the following, added subsection to the K.S.A. 22-3212 discovery statute:

The prosecuting attorney shall provide all prior convictions of the defendant known to the state that would affect the determination of the defendant's criminal history for sentencing under a presumptive sentencing-guidelines system.

Section (4) Plea Bargaining Rules: The following statute was proposed:

The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea to a charged offense or to a lesser or related offense, the prosecutor may do any of the following:

- (a) Move for dismissal of other charges or counts;
- (b) Recommend a particular sentence within the sentence range applicable to the offense or offense to which the offender pled guilty;
- (c) Recommend a particular sentence outside of the sentence range only when departure factors exist and are made a part of the record;
- (d) Agree to file a particular charge or count;
- (e) Agree not to file charges or counts; or
- (f) Make any other promise to the defendant, except that in no instance may the prosecutor agree not to allege prior convictions.

Section (5) Proof of Criminal History: Similarly, the subcommittee recommended the following potential statute:

- (a) The offender's criminal history shall be admitted in open court by the offender or determined by a preponderance of the evidence at the sentencing hearing by the sentencing judge.
- (b) Except to the extent disputed in accordance with section (c), the summary of the offender's criminal history prepared for the court by the state shall satisfy the state's burden of proof as to an offender's criminal history.
- (c) Upon receipt of the criminal history summary prepared for the court, the offender shall immediately notify the district attorney and the court with written notice of any error in the proposed criminal history summary. The state shall have the burden of producing further evidence to satisfy its burden of proof as to any disputed part, or parts, of the criminal history and the sentencing judge shall allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence.

Section (6) Sentencing Hearings (Procedure): Upon review of comparable statutes in Washington, Minnesota and Oregon, the subcommittee selected the Minnesota statute as most applicable to anticipated proceedings in Kansas. The proposed statute is:

Sentencing hearing: deviation from guidelines

Subdivision 1. Sentencing hearing. Whenever a person is convicted of a felony, the court upon motion of either the defendant or the state, shall hold a sentencing hearing to consider imposition of a departure sentence. The hearing shall be scheduled so that the parties have adequate time to prepare and present arguments regarding the issues of departure sentencing. The parties may submit written arguments to the court prior to the date of the hearing and may make oral arguments before the court at the sentencing hearing. Prior to the hearing, the court shall transmit to the defendant or the defendant's attorney and the prosecuting attorney copies of the presentence investigation report.

At the conclusion of the sentencing hearing or within 20 days thereafter, the court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties, and shall enter an appropriate order.

Subdivision 2. Deviation from guidelines. Whether or not a sentencing hearing is requested pursuant to subdivision 2, the district court shall make findings of fact as to the reasons for departure from the sentencing guidelines in each case in which the court imposes a sentence that deviates from the sentencing guidelines applicable to the case.

Section (7) Presentence Reports: The Subcommittee recommended mandatory pre-sentence reports in all felony cases.

Section (8) Mentally Disordered Offenders; Identifiable Release Procedures: K.S.A. 75-5207, Transfer of inmates for observation and diagnosis or treatment; costs; correspondence by inmates, provides in pertinent part:

"...If the inmate shall be in need of continued treatment for mental illness at the expiration of the inmate's term of confinement, an application to obtain such treatment for the inmate shall be filed pursuant to the treatment act for mentally ill persons."

In short, the above statute recommends a petition for involuntary care and treatment if an inmate is considered mentally ill at the expiration of his or her sentence. Within the corrections system, it is the unit team and the mental health staff's responsibility to identify inmates requiring such treatment.

At present, such involuntary petition filings are not numerous because the number of inmates released on conditional release is not large. For inmates released on parole, this specific issue is addressed either by a condition of parole mandating treatment or by a decision not to parole an individual.

Assuming the implementation of sentencing guidelines without a traditional parole board function, two conclusions or recommendations may be posited.

- 1) Current statutory authority (K.S.A. 75-5207 and K.S.A. 59-2901 et. seq.) can be utilized for a mentally disordered offender procedure in lieu of drafting new or particularized legislation.
- 2) Unit teams and mental health personnel within the correctional system will bear greater responsibility for monitoring or identifying mentally ill offenders. Expressed directly, a guidelines system will present more definite release dates for inmates than are currently experienced in an indeterminate system. Greater release-date certainly coupled with the possibility of shorter durational sentences (incapable of extension via parole denial), will require more decision-making by correctional personnel regarding the mental health conditions of inmates.

Section (9) Fines; Presently, K.S.A. 21-4503 reads as follows:

Sec. 3, K.S.A. 21-4503 now reads as follows:

- (1) except as provided in subsection (2), a person who has been convicted of a felony may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:
 - (a) For a class B or C felony, a sum not exceeding \$15,000.
 - (b) For a class D or E felony, a sum not exceeding \$10,000.

(2) A person who has been convicted of a felony violation of or any attempt or conspiracy to commit a felony violation of any provision of the uniform controlled substances act may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(a) For a class A felony, a sum not exceeding \$500,000.

(b) For a class B or C felony, a sum not exceeding \$300,00.

(c) For a class D or E felony, a sum not exceeding \$100,000.

(3) A person who has been convicted of a misdemeanor may, in addition to or instead of the confinement authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(a) For a class A misdemeanor, a sum not exceeding \$2,500.

(b) For a class B misdemeanor, a sum not exceeding \$1,000.

(c) For a class C misdemeanor, a sum not exceeding \$500.

(d) For an unclassified misdemeanor, any sum authorized by the statute that defines the crime; if no penalty is provided in such law, the fine shall not exceed the fine provided herein for a class C misdemeanor.

(4) 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.

(5) A person who has been convicted of a traffic infraction may be sentenced to pay a fine which shall be fixed by the court not exceeding \$500.

The following recommendations to subsection (1) were proposed by the Subcommittee assuming an implementation of guidelines, and accompanying crime severity ratings:

21-4503. Fines.

(1) A person who has been convicted of a felony may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(a) For any off-grid felony crime including Murder in the First Degree, Treason, Aircraft Piracy, and for any third conviction for sales of illegal controlled substances pursuant to K.S.A. 65-4127a and K.S.A. 65-4127b, a sum not exceeding \$500,000.

- (b) For felony crimes ranked in seriousness levels 1 to 5, a sum not exceeding \$300,000.
 - (c) For felony crimes ranked in seriousness levels 6 to 10, a sum not exceeding \$100,000.
- (2) A person who has been convicted of a misdemeanor may, in addition to or instead of the confinement authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:
- (a) For a class A misdemeanor, a sum not exceeding \$2,500.
 - (b) For a class B misdemeanor, a sum not exceeding \$1,000.
 - (c) For a class C misdemeanor, a sum not exceeding \$500.
 - (d) For an unclassified misdemeanor, any sum authorized by the statute that defines the crime; if no penalty is provided in such law, the fine shall not exceed the fine provided herein for a class C misdemeanor.
- (3) 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.
- (4) A person who has been convicted of a traffic infraction may be sentenced to pay a fine which shall be fixed by the court not exceeding \$500.

COMMENTARY

Section (1). All accusatory instruments filed for crimes to be sentenced under the guidelines system must allege facts sufficient to classify the offense on the Crime Seriousness Scale of the guidelines grid. If a felony crime is subclassified on the scale, the accusatory instrument should include facts sufficient to establish the most serious criminal conduct for which the offender may be sentenced. If such facts are not included in the accusatory complaint or information, the defendant should be allowed to argue successfully that the complaint or information was insufficient to establish anything but the lowest crime seriousness subclassification of the offense. Consequently, the prosecuting attorney should always include the appropriate subclassification facts in the complaint or information.

Section (2) describes the evidentiary sources a court may consider and utilize for purposes of determining an exceptional sentence. It is the intent of this particular rule to allow a sentencing court much latitude in terms of noticing or receiving evidentiary material pertinent to the issues of aggravation and mitigation.

The state's discovery responsibilities have been expanded with respect to the guidelines system as noted in Section (3).

The defendant's criminal history record is a very important factor under the guidelines system. The state's preliminary assessment of the defendant's criminal history classification is critical to the defendant's ability to prepare for his or her case. It puts the defendant on notice with respect to the state's anticipated evaluation of the defendant's criminal record and provides the defendant with an opportunity to challenge the state's evaluation.

In many cases, the new discovery requirement will facilitate plea negotiations by establishing early in the process what prior convictions may exist or be subject to dispute. During such plea negotiations, however, the parties should remember that any plea agreement presented to the sentencing judge under the guidelines system must include a complete and accurate representation of the offender's criminal history record. Subsequent rules describing plea bargain negotiations expressly exclude the deliberate deletion of an offender's prior convictions for plea bargain purposes.

Section (4) denotes the rules applicable to plea bargaining practices in a presumptive sentencing context.

Subsection (a) allows the state prosecutor to dismiss any charge or counts pursuant to a plea bargain. Subsection (e) allows the state to engage in plea discussions by agreeing to file (or not to file) specific charges.

Subsection (b) permits the parties to 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.

Subsection (c) allows the parties to stipulate to a sentence outside of an offender's grid-block range only when departure factors exist and are recognized and made a part of the record by the sentencing court.

Subsection (f) recognizes that the state may make additional promises or agreements with defense counsel not expressly described in the other subsections. It also restates the inviolable rule prohibiting the use of an offender's criminal history as an instrument or subject for constructing plea agreements.

It must be noted that while plea agreements and sentence stipulations may be presented to the sentencing court, they do not compel a court to impose the recommended sentence. A sentencing judge may accept or reject a plea and sentence recommendation, and impose either a sentence within the offender's grid block or an exceptional sentence if departure factors are found to exist. This section describing plea bargaining rules should be read in conjunction with the Appellate Review chapter elsewhere in the text.

Section (5). The importance of the offender's criminal history record will greatly increase under the guidelines system. Consequently, several new provisions relating to the proof of criminal history have been recommended. As noted earlier in this chapter, the discovery requirements in criminal cases have been expanded to include a criminal history evaluation.

The new discovery requirement serves as a first step in the process used to establish an offender's classification on the Criminal History Scale of the Sentencing Guidelines Grid. Once this information is made available, the parties can begin the plea agreement process. If they can reach a proper plea agreement as described in Section Four of this chapter, the parties shall describe the offender's criminal history record as accurately as possible to the sentencing court and the issue is resolved. If, however, a plea agreement cannot be negotiated or if the plea agreement is rejected by the sentencing judge, further proof of the offender's criminal history must be established.

The offender's criminal history record must be established by a preponderance of the evidence or by the offender's admission. Except to the extent disputed by the defendant, the defendant's criminal history record can be established by a preliminary report to the court. This report may be prepared by the District Attorney or be made as part of the PSI report in the case.

When such a report is presented to the court by either the state or the Court Services Officer, the defendant must notify the court immediately if he or she disputes any portion of the criminal history summary. When the criminal history summary is challenged, the state must be given reasonable time to produce the evidence needed to prove the defendant's record. Most often a certified copy of the conviction judgment is adequate proof of a prior conviction. Other forms of evidence, however, may also satisfy the state's burden of proof as determined by the sentencing judge. The standard of proof in such situations remains a preponderance of the evidence test.

The proof requirements related to criminal history are recommended to be described by statute. The statute, however, includes some important considerations. First, the sentencing judge may correct any errors in the PSI report's summary of the offender's criminal history record. Because of the increased significance given prior convictions under the guidelines, the accurate reporting of the offender's criminal record is crucial to the proper application of the guidelines system.

The proposed statute and additional appellate rule provisions also provide that the court's determination of the offender's criminal history record is not subject to appeal except as provided by the appellate review provisions. This provision of the statute limits appellate review of the court's criminal history determination to an appeal based on a claim that the court "erred . . . in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes."

This limitation on appellate review precludes a challenge to the court's determination as to what prior convictions and juvenile adjudications are included in the offender's criminal history. It does not, however, prohibit either party from challenging the court's classification of a prior conviction. For example, the sentencing court may conclude that the offender's criminal history record includes two prior non-person felony convictions and one juvenile adjudication of a person felony. The state may not argue on appeal that the court failed to include an additional prior adult conviction. It may, however, claim that one of prior non-person convictions should have been classified as a person felony conviction.

Section (7) states a subcommittee recommendation for a mandatory presentence report in every felony crime case. (See chapter on Criminal History). Such a recommendation was derived from the Subcommittee's recognition of the importance of accurate and complete verification of an offender's prior criminal history.

Section (8) describes an existing statutory procedure for preventing the release of a mentally ill, dangerous offender without care and treatment at the expiration of his or her presumptive sentence. A predictable limitation of a presumptive sentencing system in lieu of a discretionary parole board function is the elimination of a "checking mechanism" to review the release of an offender in relationship to public safety. Section (8) describes a presently codified method for circumventing the blatant release of an offender when he or she has been recognized and adjudged as dangerous either to oneself or to others.

Section (9) recommends an amplification of fine amounts in relation to Crime Seriousness ratings and a presumptive sentencing system. Greater and extended discretion is allowed the sentencing court in contrast to the present version of K.S.A. 21-4503.

CHAPTER 6

PRESENTENCE INVESTIGATIONS

INTRODUCTION

The presentence report is a major part of the sentencing process. Currently, this report provides the sentencing judge up to date information concerning the offense, prior criminal history, and social history. K.S.A. 21-4604 requires a presentence report in all felony cases, "unless the court finds that adequate and current information is available in a previous presentence investigation report or from other sources."

The inclusion of social history in the report may introduce bias. In fact, several guideline states felt so strongly about this potential for bias that they created statutory prohibitions against the use of social history information.

Several jurisdictions waive a large number of presentence reports. This waiver assigns the criminal history portion to the defense and the prosecution. Guidelines require an accurate, independent review of criminal history. Therefore, presentence information becomes crucial. Based upon this realization, the Kansas Sentencing Commission has established that a presentence investigation report shall be required in all felony cases (including all unclassified felonies).

COMMENTARY

The Commission reached this decision to provide independent, complete criminal history scoring that under a guideline system is vital to the sentencing process. This rule reflects the Commission's judgement that Criminal History is not an element for negotiation in plea agreements. In addition, because an offender's criminal history assumes a far more carefully defined and formal role in sentencing than under the prior indeterminate sentencing system, it is imperative that the offender's complete criminal history and classification be accurately represented to the sentencing judge. To achieve an accurate reporting and to avoid any misrepresentation, the Commission concluded that a presentence report, to be conducted by an independent agent (the Court Services Officer), would be necessary in every felony case.

Presentence Investigation Report Requirements

Each presentence report prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1992 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 do so, the presentence report shall contain a summary of the defendant's version of the offense.

- 3) When there is an identifiable victim, the report writer shall submit a victim report to the victim and request that the information be returned to be submitted as part of the presentence investigation. To the extent possible, this shall include a complete listing of restitution for damages suffered by the victim.
- 4) There shall be an appropriate classification of each crime of conviction on the Crime Seriousness Scale.
- 5) There shall be a listing of prior adult felony, class A person and non-person misdemeanor and class B person misdemeanor convictions and all prior juvenile adjudications comparable to the above which comply with the decay rule. There shall be an assessment of the appropriate classification of the criminal history on the Criminal History Scale.
- 6) There shall be 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 above the dispositional line, the presentence report shall state the presumptive prison term range and the presumptive duration of post-prison supervision as it relates to the Crime Seriousness Scale. The presentence report format will be the same with the exclusion of recommendations for conditions of probation.
- 8) If the proposed grid block classification is a grid block below the dispositional line, the presentence report shall state the presumptive prison term range and the presumptive duration of probation as it relates to the Crime Seriousness Scale and the Court Services Officer's professional assessment as to recommendations for conditions of probation.

OTHER DECISIONS REACHED:

- 1) The presentence report will become part of the court record and, therefore, accessible to the public and defendant, except the victim(s) statement, any psychological reports (evaluations and assessments), and drug and alcohol reports (evaluations and assessments). These portions of the presentence report are to be confidential.
- 2) The Criminal History "worksheet" (see appendix D) will not satisfy as a presentence report in a non-disputed case.
- 3) The presentence report will not include optional report components, which would be subject to the discretion of the sentencing court in each district, except psychological reports/evaluations and drug and alcohol reports/evaluations.

- 4) The presentence report will not include other mandatory topics except current offense, defendant's version, victim(s) statement/restitution, grid information, criminal history, and conditions of probation for a presumptive probation candidate.
- 5) The Court Services Officer will not be required to make recommendations for disposition in any case within the grid or for aggravating or mitigating factors for departure.
- 6) The presentence report will take on a uniform format to be used state-wide as set out above. (See appendix D)
- 7) The presentence report requirements will be mandated by statute.
- 8) The court can take judicial notice of a prior presentence report (criminal history worksheet), regardless of age, to reclassify a criminal history classification in a current case.

COMMENTARY

A subcommittee was formed to study the role of the presentence report in a guideline system. The Office of Judicial Administration was asked to select court personnel to serve on the subcommittee. The subcommittee was comprised of Chief Court Services Officers from the 3rd, 5th, 10th, and 18th Judicial Districts, and a Court Administrator from the 20th Judicial District. The subcommittee noted that most of the investigative procedures, report format, and sentencing rules currently used by probation officers are changed as a result of guideline sentencing. The presentence report format was changed to convey the necessary facts to support guideline applications. Under guidelines, the role of the presentence investigation report has been changed. The current system, provides certain types of information critical to the sentencing decision: information about the offender's criminal history, relevant social factors, and subjective judgments about the defendant's amenability to supervision. This information, combined with the dispositional recommendation of the investigating agent, has a significant influence on the sentencing court. Under guidelines, the severity of the present crime and the offender's criminal history become primary, and considerations of "social factors" become irrelevant. Moreover, the Commission's survey of felony convictions for fiscal year 1989, analysis shows that racial and geographical bias appear to exist in the current system. One possible explanation is the current system's reliance on socio-economic and demographic factors to influence the probation/prison decisions. These factors are mandatory elements of the current presentence report. Thus, it was the subcommittee's recommendation, and ultimately the full Commission's decision to eliminate all "social factors" from the presentence report. This information must be collected by the Court Services Officer for supervision purposes in presumptive probation cases. However, it will be retained as supervision information but will not be used for sentencing decisions.

Under the current system, the presentence report writer's recommendation as to disposition, the offender's amenability to supervision, play an important role in the sentencing process. Under guidelines, the subcommittee recognized that any guideline system will change the probation officer's role in investigation findings. As stated in an April 2, 1990 Federal Courts Study Committee's report,

"although district judges have great confidence in the federal probation service, there is a growing concern among judges, prosecutors and defense lawyers that the new sentencing regime imposes on these officers responsibilities as independent investigators and fact-finders -- recommending decisions and legal judgments as to the application of rules to factual situations -- for which they may not be particularly well trained or well suited. ... The probation officer, in developing recommendations for the judge about proposed findings, is thus thrust into the middle of a highly contentious situation -- and sometimes must testify at the sentencing hearing itself, in these circumstances, the district judge may be forced to pass formal judgment on the credibility and judgment of professionals who, we believe, should enjoy a close and confidential working relationship with the district judges. Challenges to the officers' factual findings and the evidentiary hearings held to resolve them reportedly have prompted some judges to advise probation officers to secure counsel."

Based upon this information, and after much discussion, the subcommittee recommended that Court Services Officers not be required to make recommendations for disposition in any case within the grid or for aggravating or mitigating factors for departure. It was felt that recommending decisions for the duration of sentences or legal judgments as to the application of rules to factual situations for departure should be left to the judge, the prosecutor, and the defendant's attorney. These subcommittee recommendations were adopted by the full Commission.

CHAPTER 7

PRESUMPTIVE SENTENCES

INTRODUCTION

The Sentencing Commission's major task involved the development of a sentencing matrix that incorporates the seriousness of the current offense and prior criminal history. This matrix must structure discretion by providing a fixed range of punishment for specific crimes. These punishments are presumed to be appropriate for all "typical offenses." Only those offenses that are truly exceptional should go outside the range.

The grid or matrix serves as a level playing field for all persons. It provides a fair, proportional sentence for all who commit like crimes and have like criminal histories. Sentences should not be impacted by racial, geographical, or socio-economic factors.

The Commission wanted to develop a sentencing system that:

- 1) incarcerates violent offenders;
- 2) reduces or eliminates racial, geographical or other biases;
- 3) is proportional to the seriousness of the offense and the degree of injury to the victims;
- 4) is readily understood by everyone;
- 5) does not negatively impact current prison resources.

These objectives have been accomplished by other states that have adopted a guidelines system. They have been able to reduce disparity and accurately forecast prison and local resource needs. These systems demand some trade-offs. The amount of discretion afforded sentencing judges is structured. Community alternatives have to be developed to accommodate persons who were previously sent to prison. Local jails see increases in the numbers of persons sent there as a condition of probation. Prison admissions change and they see a "harder" population because minor felony offenders are kept in the community.

THE COMMISSION'S DECISION

The Commission adopted a structured sentencing matrix, that relies upon two factors: the seriousness of the current offense and the number and type of prior criminal convictions. This system creates a level playing field whereby offenders with similar crimes and similar criminal histories will receive similar sentences.

The sentencing system is bifurcated into a sentencing grid that deals with all felony crimes except those drug offenses covered under K.S.A. 65-4127a and K.S.A. 65-4127b, and another that only deals with drug offenses covered under K.S.A. 65-4127a and 65-4127b. In order to use the grid, one must know the current offense of conviction and the number and types of prior felony and misdemeanor convictions. Once these facts are ascertained, the crime seriousness level of the current conviction is located on the crime seriousness axis and the prior criminal history score is located on the criminal history axis. The intersection of these two points equals the presumed sentence. The templates for the non-drug and drug matrixes are depicted in Charts 14 and 15. The proposed system assumes a presumptive sentence for each individual based upon their prior criminal history and the current conviction. Judges are free to go outside of the range or type of sentence presumed by the grid. However, if such a departure occurs, the sentencing judge must specify on the record why they departed. This departure is appealable by the prosecutor or the defense.

The numbers located in each cell depict the number of months the person will serve in prison. However, those grid-blocks within the shaded enclosed portion (lower right corner) bounded by the heavy dark line have a presumptive sentence of probation. The numbers included in the grid-block indicate the prison sentence to be served in the event the sentencing judge departs from the presumptive sentence or the person violates probation and is sent to prison. The number that appears in the grid-block is the presumptive sentence, however in reality this sentence is expressed as a range (plus or minus 5 percent). (See Appendix B and Appendix C for complete details). Any sentence outside this range will require a written appealable departure. A sentence that changes a presumed probation to a prison sentence or vice versa will also require a written appealable departure.

EXAMPLE ONE: (Non-drug grid)

There is a conviction for aggravated robbery (Severity Level III), the person has one prior conviction for burglary (a non-person crime) and a prior conviction for aggravated assault (a person crime). In order to figure the sentence you would go to the non-drug offense grid and locate severity level III on the vertical axis and the category labeled person + one non-person on the horizontal axis. The intersection of these two lines yield a prison sentence of between 89 and 99 months. A sentence of probation or any sentence outside the range of months provided would require a written departure and would be appealable.

EXAMPLE TWO: (Non-drug grid)

There is a conviction for theft (Severity Level IX), the person has two prior class A misdemeanor convictions (one person and one non-person). In order to figure the sentence you would go to the non-drug grid and locate severity level IX on the severity axis and 2+ misdemeanors on the criminal history scale. The intersection of these two points indicate that it falls within the presumptive probation range and the person should be placed on probation. A prison sentence would require a written appealable departure. If the person violates their probation they could receive a prison sentence of six to eight months.

Chart 14

Sentencing Range - Drug Offenses

A B C D E F G H I

Severity Level	3+Person	2 Person	1 Person + 1 Non-person	1 Person	3 + Non-person	2 Non-Person	1 Non-Person	2 + Mis-demeanor	No Record
I	227 216 205	218 207 196	208 198 188	199 189 179	189 180 171	185 176 167	180 171 162	176 167 158	171 162 153
II	92 87 82	86 81 76	80 76 72	75 71 67	69 65 61	66 62 58	63 60 57	60 57 54	57 54 51
III	57 54 51	52 49 46	47 44 41	40 38 36	35 33 31	29 27 25	26 24 22	21/20/19 21/20/19 21/20/19	18/17/16 18/17/16 18/17/16
IV	47 44 41	40 38 36	35 33 31	29 27 25	24 22 20	20 19 18	18 17 16	15 14 13	13 12 11

SNTRGDG2

Legend

-  Presumptive Incarceration
-  Presumptive Probation

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Legend

-  Presumptive Incarceration
-  Presumptive Probation

Chart 15
Sentencing Range - Non Drug Offenses

Severity Level	A 3+ Person	B 2 Person	C 1 Person + 1 Non-person	D 1 Person	E 3 + Non-person	F 2 Non- Person	G 1 Non- Person	H 2 + Mis- demeanor	I No Record
I	227 216 205	214 203 192	199 189 179	185 176 167	171 162 153	157 149 141	142 135 128	129 122 115	114 108 102
II	171 162 153	160 152 144	150 142 134	139 132 125	128 121 114	117 111 105	107 101 95	96 91 85	86 81 75
III	114 108 102	105 100 95	99 94 89	92 87 82	86 81 76	77 73 69	71 67 63	65 61 57	57 54 51
IV	95 90 85	90 85 80	83 79 75	77 73 69	71 67 63	66 62 58	58 55 52	53 50 47	48 45 42
V	76 72 68	71 67 63	67 63 59	61 58 55	57 54 51	52 49 46	48 45 42	42 40 38	38 36 34
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

KANSAS SENTENCING COMMISSION

EXAMPLE THREE: (Drug Grid)

Someone is convicted of selling cocaine (Severity Level III). The person has one prior misdemeanor conviction (non-person). In order to figure the sentence you would go to the drug grid and locate level III on the severity level axis, and no record on the criminal history axis. The intersection of these two points yields a prison sentence of 16 to 18 months. Any other sentence would require a written appealable departure.

EXAMPLE FOUR: (Drug Grid)

Someone is convicted of attempted sale of cocaine (Severity Level III), and has two previous aggravated robbery convictions (two person offenses). This computation requires the application of the special rule for attempts, conspiracies and solicitations that only applies to drug crimes. This rule states that any prison sentence located in the appropriate grid-block will be reduced by six months. Therefore when you intersect Severity Level III and 2 person prior felonies it yields a sentence of 46 to 52 months. When the reduction rule is applied the appropriate sentence is between 40 and 46 months. A sentence outside this range or a sentence of probation would require a written appealable departure.

PRESUMPTIVE PROBATION SENTENCES

If an offense is classified in a grid-block below the dispositional line, the presumptive disposition is probation. The sentencing court has discretion to sentence at any place within the range. The sentencing judge should select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure. The Commission voted to eliminate the practice of suspending imposition of sentence in probation cases. At the time of sentencing, the court will state the term of imprisonment and, thereafter, suspend execution of sentence by placing the defendant on probation.

DURATION OF PROBATION

The recommended duration of probation shall be determined by the crime seriousness category of the most serious current crime of conviction.

Non-Drug Grid

Thirty-six months for Crime Categories 1-5

Twenty-four months for Crime Categories 6-10.

Drug Grid

Thirty-six months for Crime Categories 1-3

Twenty-four months for Crime Category 4.

The above recommended duration of probation has been established to help eliminate sentencing disparity. However, sentencing judges may set the duration of probation at their discretion up to a maximum of five years. The total period of probation in all cases shall not exceed five years, or the maximum period of the prison sentence that could be imposed which ever is longer. If the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. The court may extend or modify the offenders probation. The extensions may only be ordered at such intervals pursuant to a probation-modification hearing and a judicial finding of necessity, e.g., unfulfilled probationary conditions or other circumstances warranting probation extension. Such extensions shall be made for a maximum period of five years or the maximum period of the prison sentence that could be imposed inclusive of the original probation term. Probation may be terminated by the court at any time.

The Commission voted to maintain existing statutes and not limit the court's discretion to impose conditions of probation, jail time as a condition of probation, or revocation of probation.

WHAT KINDS OF CHANGES WILL OCCUR

The type of persons sent to prison clearly changes. Chart 16 provides an overview of sentencing practices found during the review of 3,285 cases sentenced in FY 1989. These nine crimes account of 74.4 percent of all felony crimes sentenced. It is clear that the guidelines will significantly increase the incarceration rates for persons who commit violent acts against children and adults, and who sell or possess drugs. It will also decrease the number of property offenders incarcerated. It will more than double the percent going to prison for persons who commit sexual acts with children and will presume a prison sentence for anyone who sells drugs. It makes similar changes in the categories of aggravated robbery and aggravated battery. It will decrease by more than one-half the number of people sent to prison for property crimes. This group makes up at least one half of the current population.

Chart 16
Comparison Of Percent Sent To Prison
Under Current System Vs. Proposed Guidelines
For Selected Crimes(1)

	Current	Proposed
Second Degree Murder	100	100
Aggravated Robbery	71	100
Indecent Liberties With a Child	42	90
Aggravated Battery	55	90
Possession/Sale of Drugs (2)	27	58
Burglary	32	15
Forgery	37	14
Theft	31	13
Worthless Checks	22	12

(1) Included crimes comprise 74.4% of all cases reviewed.
(2) All sales are presumed incarceration, but possessions are presumed probation

Chart 17 provides an overview of the same data arrayed by type of offense. Drug crime imprisonment rate will more than double (27% to 58%), and crimes against people will almost double (43% to 80%). Property crimes will be halved (32% to 15%). The overall percent of persons incarcerated in prison will be reduced (32% to 28%). Charts 18 and 19 provide an overview of

Chart 17
Percent Of Sample Incarcerated By Type Of Crime -
Current System Vs. Proposed Guidelines

	Current System ^{(1),(2)}	Proposed Guidelines
Drug Crimes	27 %	58 %
Crimes Against People	43 %	80 %
Property Crimes	32 %	15 %
Overall	32 %	28 %

(1) - Current system represents a sample of 3285 cases sentenced in Fiscal Year 1989
(2) - Number represents percent left after 120 day callbacks

imprisonment percentages comparing the two systems using the current felony classifications (Chart 18) and using the expanded severity levels (Chart 19). Both present similar pictures. In Chart 18, Drug crime "C" and "D" felonies and non-drug "B" and "C" felonies result in substantially higher

Chart 18
Percent Sent To Prison By Class Of Felony Under The Current
Sentencing System Vs. The Proposed Guidelines

Base—Fiscal Year 1989

Class of Felony	Current System ^{(1),(2)}	Proposed Guidelines
Drug Crimes		
C	31 %	70 %
D	25 %	48 %
E	20 %	10 %
Non_Drug Crimes		
A	100 %	100 %
B	88 % ⁽³⁾	100 %
C	53 %	87 %
D	36 %	19 %
E	29 %	13 %

(1) Current system represents a sample of 3285 cases sentenced in Fiscal Year 1989
(2) Number represents percent left after 120 day callbacks
(3) Number represents only 33 people, may not be representative

incarceration rates. Lesser felonies show significant reductions. Chart 19 displays basically the same pattern, there are large increases in percentages going to prison in levels II through V and corresponding reductions in levels VI through X.

**Chart 19
Comparison Of Percent Sent To Prison
Under The Current System Vs. The
Proposed Guidelines**

Severity Level ⁽¹⁾	Current System	Proposed Guidelines
Non-Drug Offense I	100	100
II	67	100
III	47	100
IV	51	96
V	47	90
VI	47	32
VII	36	15
VIII	36	14
IX	26	13
X	26	12
All Drug Offenses ⁽²⁾	27	58

(1) Level I = most serious/Level X=least serious
 (2) Includes sale and possession of all substances covered under KSA 85-4127

BRUNDTAL

Chart 20 provides an overview of how the sample of 3,285 cases sentenced in FY 1989 would fall on the non-drug offense grid. Chart 21 provides the same data for the drug grid. Both of these grids have been adjusted for departures and potential probation violations. They also have had the criminal history axis numbers adjusted from misdemeanor offenses and prior juvenile felonies.

Chart 22 provides an overview of how the sample would impact the prison population. It provides a comparison of what would have occurred had the guidelines been applied to the sample of 3,285 cases sentenced in FY 1989. The estimates include adjustments for departures (8%) and probation violations (15%). The sample also has been adjusted for call backs. Each call back has been treated as 25 percent of a person, therefore, the current system may be slightly understated. The analysis indicates that the guidelines would have reduced the number of persons sent to prison by 13.5 percent, a reduction of 174 persons.

The average length of time persons remain once sentenced has been increased for serious violent offenders, and has been decreased for drug offenses and property offenders. The trade off for drug offenders involves certainty of punishment versus length of stay. The Commission decided to

Chart 20
Sentencing Grid - Non Drug Offenses
 Fiscal Year 1989

Severity Level	3+ Person	2 Person	1 Person + 1 Non-person	1 Person	3+ Non-person	2 Non-Person	1 Non-Person	2+ Mis-demeanor	No Record
I	0	0	0	0	0	0	0	0	2
II	0	0	1	1	0	1	2	0	4
III	2	4	4	1	9	5	21	8	64
IV	2	1	2	6	4	3	13	5	48
V	2	4	7	7	3	7	33	10	74
VI	1	0	4	4	5	7	13	3	20
VII	2	5	15	20	29	22	88	39	111
VIII	1	4	8	7	14	15	61	18	42
IX	7	11	15	16	55	51	177	65	112
X	1	2	4	4	9	10	38	13	92

Departure Legend:
 (1) - Probation indicated, prison given or probation violators
 [] - Prison indicated, probation given

SNTGPHO

shorten the average sentence, but increase the number who go to prison. These trade-offs result in changes in how long offenders will stay. In order to compare this impact, the average sentence for each grid-block was multiplied by the number of persons in the cell. This yields person months of

Chart 21
Sentencing Grid - Drug Offenses
 Fiscal Year 1989

Severity Level	3+ Person	2 Person	1 Person + 1 Non-person	1 Person	3+ Non-person	2 Non-Person	1 Non-Person	2+ Mis-demeanor	No Record
I									
II							4		
III	2	2	4	11	19	17	135	35	198
IV	2	2	2	9	15	11	63	23	130

imprisonment. Chart 22 indicates a growth in person months for drug offenders, due to increased numbers of persons sentenced. It also indicates a reduction in the non-drug offenses category, due to shorter sentences for property offenders and a significant reduction in the number of people sentenced to prison. The end results indicate a 9.3 percent reduction in person months.

Chart 22
Comparison Of Number Of Persons Sent To Prison And
Total Person-Months Of Imprisonment For
Current System Vs. Proposed Guidelines

Number sent to prison	Current System ⁽¹⁾	Proposed Guidelines ⁽²⁾
Drug Offenses	298	468
Non-Drug Offenses	995	651
Total ⁽¹⁾	1293	1119
Person Months of Imprisonment		
Drug Offenses	8959	11297
Non-Drug Offenses	28750	23869
Total ⁽²⁾	37709	35166

(1) Represents a 13.5% reduction

(2) Represents a 9.3% reduction

(3) Includes an adjustment for probation violation and 120 day callbacks

(4) Includes an adjustment for probation violation

PRB/ST/MS

Thus, both the number of people sentenced to prison and the number of person months to be served are reduced by the application of the guidelines.

CHAPTER 8

CONCURRENT AND CONSECUTIVE SENTENCES

CONSECUTIVE SENTENCES: GENERAL RULES

- 1) Sentencing judges will have the discretion to impose concurrent or consecutive sentences for multiple convictions.
- 2) The execution of concurrent sentences will remain unchanged under the guidelines system.
- 3) When the sentencing judge imposes multiple sentences consecutively, the consecutive sentences shall consist of an incarceration term and a supervision term. The post release supervision term will be keyed to the primary offense.
- 4) The sentencing judge must establish a base sentence for the primary offense. The primary offense is the offense with the highest crime seriousness ranking. If more than one crime of conviction is classified in the same crime category, the sentencing judge must designate which offense will serve as the primary offense.
- 5) The base sentence is set using the total criminal history score assigned.
- 6) The total sentence assigned for all charges cannot exceed twice the base sentence. The post release supervision term will reflect only the primary offense. Supervision periods will not be doubled.
- 7) Non-base sentences will not have criminal history scores applied (calculated in the Criminal History I column of the grid), but base sentences will have the full criminal history score assigned. This will allow criminal history to impact the total sentence, since the base score is doubled to set the parameters for the total sentence. This process for calculating incarceration terms permits an appropriate consideration of the offender's criminal history record without distorting the just desserts orientation of the guidelines. The offender's criminal history record is properly reflected in the incarceration term associated with the primary offense. The significance of the offender's criminal history, however, is not multiplied for each additional offense because it is already reflected in the presumptive sentence for the primary offense.

EXAMPLE: An offender classified in Criminal History Category F (two non person felonies) is convicted of three counts of Burglary (Crime Category 7). The sentencing judge selects one of the Burglary convictions to serve as the most serious crime of conviction. For that primary offense, the sentencing judge imposes the maximum

presumptive incarceration term of twenty-two months of grid block 7-F. The base sentence for the other two offenses is eleven to thirteen months. The sentencing judge, however, is limited to a total incarceration term of no more than forty-four months (twice the maximum term of the primary sentence of twenty-two months). Consequently, the sentencing judge may only impose a portion of the incarceration term of the base sentence. The sentencing judge may comply with the limitation in two ways. The judge may impose the maximum incarceration term of the full base sentence for one of the remaining Burglary convictions (13 months) and a reduced base sentence (nine months for the remaining conviction). Alternatively, the sentencing judge may impose a reduced base sentence for both remaining Burglary convictions (11 months + 11 months).

- 8) If the incarceration term for the primary offense is a prison term, the entire incarceration term of the consecutive sentences will be served in prison.
- 9) If the incarceration term for the consecutive sentences is a prison term, the supervision term is a term of post-prison supervision as established for the primary offense.
- 10) If the sentence for the primary offense is a probationary sentence, the consecutive sentences shall be served as multiple probationary terms. In this situation, a probationary term will be imposed for each crime conviction. All probationary terms associated with consecutive sentences will be served concurrently.

EXAMPLE: In the example above, the primary offense was a Crime Category 7 conviction. The offender's criminal history classification was Category F. The presumptive sentence for the primary offense is probation. Each count is a duration of probation for a period of two years; therefore, the total duration of probation is two years.

EXAMPLE: If the primary offense is a Crime Category 4 and the offender's criminal history classification is Category E, the presumptive sentence for the primary offense is a prison term; therefore, the supervision part of the consecutive sentences is a single term of post-prison supervision. The post-prison supervision term for the primary offense is two years.

- 11) The Commission voted to retain the existing statute K.S.A. 21-4608(3), (4) and (5) concerning offenders convicted and sentenced for a crime committed while on probation, assigned to a community correctional services program, on parole or on conditional release for a felony. If the offender meets one of these tests, the new sentence will run consecutively to the old one. The court is free to require the offender to serve the original and the new sentence in prison. There is no mandate that if the new sentence falls within the presumptive probation range that the court impose probation. The court is free to make both sentences prison, both probation, or some combination. Any of these options will not require a departure.

COMMENTARY

The Subcommittee on Criminal History observed other guidelines states in determining how to score prior criminal history. The primary concern was that the process for calculating incarceration terms permit an appropriate consideration of the offender's criminal history record without distorting the just desserts orientation of the guidelines. The Subcommittee also studied the current Kansas Habitual Offender logic and based their decisions in a similar fashion. The current Kansas Habitual Offender Act:

(1) Does not distinguish between consecutive and concurrent offenses and only considers felony convictions. A conviction is defined using the following three rules:

- A) Same day rule (State v. Lohrbach) - when two or more convictions occurring on the same day result from two or more counts in the same information or from counts in two or more information, only one of them may be used as a prior conviction to enhance punishment under the provisions of K.S.A. 21-4504(1) and (2) (Habitual Offender Act).
- B) Temporal Order Rule - prior convictions need not be sentenced in order to count. However, both the commission, and the conviction (but not the sentencing) of a previous felony must occur before the conviction of a subsequent felony if the first felony is to be used as an enhancement - (State v. Holmes).
- C) Degree of Sanction Rule - prior convictions are the trigger not the level of sanction. That is, a prior felony conviction resulting in probation still serves as an enhancer for future requests to invoke the habitual offender provision (State v. Robinson).

With the inclusion of principles similar to the Habitual Offender Act and considering an offender's criminal history is being applied to the sentencing grid to enhance punishment, the Commission voted to repeal the Kansas Habitual Offender Act.

One of the most difficult decisions the Subcommittee on Criminal History dealt with was limitations for consecutive sentences. The Subcommittee and the full Commission did not want to limit the court's discretion to impose consecutive sentences. However, of equal concern was the wide disparity in cases with multiple counts and departure sentencing without a limitation or "cap." The Subcommittee felt that in many cases there may be a situation where sentences in property crimes would totally exceed what could be imposed for a person crime. The Subcommittee also discussed the impact of consecutive sentencing on resource management. The Subcommittee felt that the court should be able to impose consecutive sentences, however, to limit disparity the Subcommittee thought consecutive sentences should be restricted to no more than twice the base sentence. This limitation on the incarceration term of consecutive sentences may be exceeded pursuant to the special departure rule.

The Commission developed a strategy to convert existing indeterminate sentences to fixed terms for persons who violate their parole by committing a new felony. This issue will arise when someone on parole from an indeterminate sentence is convicted of a new felony post-guidelines offense. K.S.A. 21-4608 mandates that the new sentence be served consecutively. The question is consecutive to what: the entire term?, some new parole date?, the conditional release date?

In order to simplify this issue the Commission voted to convert the remainder of the old sentence to a fixed period: one year for "C", "D", and "E" felonies, and three years for "A" and "B" felonies. This new period cannot extend beyond the conditional release date. Therefore, the sentence will be whichever is less, the extended period or the conditional release date on the old offense. This will allow the person to "finish" their old sentence and begin their new one.

CHAPTER 9

DEPARTURE SENTENCES

INTRODUCTION

The standard sentence range is presumed to be appropriate in all but the most unusual cases. When a case represents a truly unique set of circumstances, the sentencing judge is permitted to impose a sentence other than the presumptive sentence. Such a sentence represents an "exceptional sentence" or a departure from the standard sentence range. The court may impose an exceptional sentence for an offense if it finds that there are "substantial and compelling reasons" justifying a departure from the presumptive sentence. Departure sentences may be either durational (length of sentence) or dispositional (incarceration or probation).

If the court imposes a sentence outside of a standard range, it must state on the record at the time of sentencing its findings of fact and conclusions of law. In short, the court must state on the record at the time of sentencing the substantial and compelling reasons for its departure or exceptional sentence.

The following proposed statutes provide the Commission's definition of departure sentences and a list of illustrative factors the court may consider in deciding whether to impose a departure sentence. The mitigating and aggravating circumstances for exceptional sentences are provided as examples to the court and are not intended to be exclusive reasons for departures.

DEPARTURE SENTENCES; DEFINITION: The sentencing judge shall impose the presumptive sentence provided by the guidelines unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.

COMMENTARY

This principle reiterates the general rule that presumptive sentences should be applied in most cases. It also introduces the authority of sentencing judges to depart from the guidelines sentence in exceptional cases. Judicial discretion to depart is authorized by the Minnesota, Washington and Oregon sentencing guidelines systems, and this rule recognizes the important role of the sentencing court in addressing unusual facts in individual cases. Presumptive sentencing guidelines provide a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences. While it does not deny the need for individualization, it determines the basis upon which that individualization may occur and requires that its use be justified. When a judge finds that substantial and compelling circumstances exist which justify an exceptional sentence, the judge must set forth the reasons for its decision on the record. Those reasons and the sentence they support are then subject to substantive appellate review, at the request of either the defendant or the prosecution.

In the guidelines system, the seriousness of criminal conduct is determined by the crime of conviction. Consequently, a departure sentence is not appropriate for elements of alleged offender behavior not within the definition of the offense of conviction. If the conviction is pursuant to a plea agreement as to the crime of conviction, a departure cannot be based on facts that would, if proven, establish a higher offense subclassification for the crime or result in a more serious crime of conviction.

For example, if an offender is convicted of robbery, the sentence should not be aggravated beyond the upper limit of the presumptive sentence range because the offender was actually armed with a dangerous weapon at the time of the robbery. This is not an aspect of the crime of conviction since it is clearly an element of aggravated robbery and not robbery. Since this aspect of the crime was not captured in the conviction, it should not later be used to impose an aggravated sentence for the conviction of the lesser offense.

DEPARTURE FACTORS; MITIGATING AND AGGRAVATING

DEPARTURE FACTORS: (1) Subject to the provisions of section (2), the following nonexclusive list of mitigating and aggravating factors may be considered in determining whether substantial and compelling reasons for a departure exist:

Mitigating factors:

- (1) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.
- (2) The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion (not sufficient as a complete defense).
- (3) 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.
- (4) 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.
- (5) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

Aggravating factors:

- (1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.
- (2) 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.

- (3) The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim.
- (4) If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the Crime Seriousness Scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor 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.

COMMENTARY

To provide an initial definition of the “substantial and compelling reasons,” the Commission first determined that the principle involved a description of “aggravating” or “mitigating” factors. To identify the specific factual circumstances that may constitute substantial and compelling reasons for departure, the Commission examined departure criteria of the Minnesota, Washington and Oregon guidelines, and other states. After reviewing the aggravating and mitigating factors used in these other systems, the Commission adopted the nonexclusive factors set forth in this proposed statute. Sentencing judges may cite a factor not listed in this proposed statute as grounds for a departure if that fact makes the case exceptional for sentencing purposes. It is anticipated that substantive appellate review of departure sentences will generate a “common law of sentencing” heretofore rarely applied to sentencing. While there are exceptions, the application of appellate review to indeterminate sentencing systems based on the individualized model or the “rehabilitative ideal” has not produced either greater sentencing consistency or a common law of sentencing. Although appellate review of indeterminate sentences based on an “abuse of discretion” standard of review does work to correct clearly aberrational sentences, it has not resulted in less sentencing disparity or in the development of a body of principled decisions to guide sentencing judges in future cases.

Mitigating factors:

Subsection (a) lists a number of factual circumstances which may be properly used as mitigating factors. Generally, the mitigating factors are applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. The mitigating factors recognize that there will be situations in which a particular affirmative defense is not fully established, but where the circumstances that led to the crime justify distinguishing the conduct for sentencing purposes from that involved where those circumstances were not present.

In a non-presumptive, indeterminate sentencing system, sentencing judges are not typically required to state reasons for the distinctions they make as they individualize punishment from case to case. Moreover, while judges may be imposing indeterminate sentences within proper statutory limits, they are not providing any basis for appellate review that will develop a common law of sentencing. In such a sentencing system, the trier of fact is required to make absolute decisions regarding the existence of a defense. Either the defense existed or it did not. If it was found to exist, it operated as a total defense to conviction, and hence to any punishment. If it was found not to exist, the convicted defendant possessed no right to have the “failed defense” considered. Judges, of course, may consider failed defenses in imposing punishment, but under a non-presumptive, indeterminate sentencing system a defendant has no right to require such consideration and no right to know whether, or to what

extent, the failed defense had been considered. The fact that failed defenses are not required to be considered by sentencing judges, and when considered are not subject to appellate review, may mean that they are considered disparately.

As the purposes of sentencing guidelines indicate, fundamental fairness requires that the punishment imposed in each case be proportionate to the seriousness of the defendant's conduct, and also that the punishment each defendant receives be commensurate with that imposed in similar cases.

Conduct which includes some, but not all of the necessary elements of a defense is arguably less culpable than conduct which includes none of these characteristics. A presumptive sentencing guidelines system provides a mechanism for the development of principles for determining where a particular case fits in reference to the existing excusing or mitigating factors. The mechanism is that of the common law; the determination of issues by judges who articulate the basis for their decisions, subject to appellate review and revision.

Hence, in all departure situations the Court's determination is whether the particular conduct truly distinguishes the instant case from all others of the category. If it does, the departure is justified, but if not, reversal follows. It may be emphasized, too, that the issue at sentencing is not whether a defendant should be held responsible, but now that responsibility has been determined, what punishment is deserved.

(1) The victim was aggressor or willing participant. This guidelines factor is recognized by the Washington, Minnesota and Oregon guidelines systems. This factor recognizes that there is an obvious distinction in blameworthiness between a defendant whose actions were without provocation at all and a defendant who actually believed that his or her actions were justified, even though that belief was later determined to be unreasonable and thus not the basis for a defense of self-defense. Recognizing the existence of this circumstance as a mitigating factor recognizes this difference in blameworthiness and authorizes sentencing judges to impose less severe than normal sentences where it is present.

The inclusion of the term "willing participant" makes this factor also applicable in situations where both the defendant and the victim engaged in the conduct which caused the crime to occur.

EXAMPLE: In a case of aggravated vehicular homicide, both the defendant and the victim engaged in the conduct which caused the crime to occur. Either both the victim-passenger and the defendant-driver were drinking together before the fatal incident occurred, or they were simultaneously engaged in reckless behavior, such as racing. Both situations are distinguishable from the typical incident of aggravated vehicular homicide where the victim is totally innocent of any conduct which contributed to the incident.

(2) The offender played a minor or passive role in the crime. This factor is recognized by the Minnesota, Washington and Oregon systems. It recognizes that all participants in a crime are not always equally blameworthy. While the fact that participants in a crime play different roles does not absolutely support the conclusion that they are not equally blameworthy, in some circumstances distinctions are appropriate and totally consistent with the goals of a presumptive sentencing system.

Presently, the law draws no distinction in culpability between principals and those offenders convicted of aiding and abetting; both are included as principals. It may be proffered that such is not due to a belief that distinctions in culpability do not exist or are too narrow to warrant consideration; rather, it results from the broad reliance on the broad discretion present in an indeterminate sentencing system which may be used to accommodate distinctions in blameworthiness. When indeterminate sentencing codes were drafted, it was correctly assumed that inevitable differences in culpability would be taken into account in sentencing and result in different punishments. Although this intent can still be realized by the flexibility provided within an applicable presumptive sentence range, there will undoubtedly be circumstances where a greater differentiation is necessary.

EXAMPLE: The Minnesota Supreme Court has relied on the presence of this circumstance to uphold departure sentences, but has also rejected its use where the defendant's conduct, while "arguably . . . less serious" than a codefendant's, was "not . . . sufficiently out of the ordinary for the offenses in question to justify a departure of any sort." State v. Heywood, 338 N.W. 2d 243, 244 (Minn. 1983). In North Carolina, the fact that a defendant acted as a lookout during a robbery in which a murder occurred made it "proper at sentencing to consider the defendant's actual role in the offense as opposed to his legal liability for the acts of others." State v. Benbow, 309 N.C. 538, 308 S.E. 2d 647, 652 (1983).

EXAMPLE: The offender was paid fifty dollars to deliver a package to a third party. The offender believes that the package contained one pound of marijuana and had never before participated in any such activity. In fact, the package contained a pound of heroin, the sentencing court may conclude that the offender's role in the drug distribution scheme was minor and therefore, a mitigated sentence might properly be imposed.

The defense of duress or compulsion is obviously narrow, and hence there will be cases in which a defendant can establish some but not all the requisite elements. For example, in Washington the Court of Appeals held that an escape from a minimum security forestry camp to avoid sexual assault by other inmates was not justified by the defense of necessity, since the escaping inmate made no attempt to return to custody "as soon as the claimed duress had lost its coercive force." State v. Wienczyk, 31 Wash. App. 803, 808, 644 P.2d 759 (1982). While it may be asserted that prompt surrender is a necessary element of the defense, the existence of the initial cause for the escape distinguishes the blameworthiness of these defendants from those whose escape was motivated solely by their desire for freedom. It is this distinction that this aspect of the factor authorizes sentencing judges to draw.

(3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. This factor is recognized by the Minnesota, Washington and Oregon systems. This factor explicitly excludes diminished capacity due to drug or alcohol abuse as a mitigating factor where the offender makes the voluntary decision to consume the substance leading to his or her intoxication.

This factor parallels the insanity defense and the insanity test is typically very rigorous and available only to those who have lost contact with reality so completely that they are beyond any of the influence of the criminal law. With the complete insanity defense limited to a predictably narrow group, there may be nonetheless a significant number of individuals whose mental or physical condition will raise issues of their responsibility but who are not able to meet a strict test for insanity. In such situations, while as a policy decision the Legislature has chosen not to excuse certain behavior, the existence of a mental or physical condition may be appropriately considered as a mitigating factor relevant in determining the punishment deserved.

A distinction, however, is drawn between mental and physical conditions which affect cognitive capacity and those conditions which impair volition or control. It is generally agreed that society will want to excuse or mitigate punishment for individuals who do not "know" either what they are doing or that what they are doing is wrong, regardless of the exact cause of the diminution or absence of that capacity. When the factor is expanded to include impairments of volition or control, the need for limits exists, since there are a variety of "conditions" which arguably affect the ability of a person to control his or her behavior but which have not been accepted as legitimate excuses from criminal responsibility. Such conditions could include repeated criminal or anti-social conduct or the so-called psychopathic personality. It is anticipated that the availability of this factor will be limited by excluding those "conditions" society and the Legislature is not prepared to accept as an excuse from criminal culpability.

(4) 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. Washington recognizes this departure factor in its guidelines system. Similar to the presentation of a battered woman or spouse defense, this factor anticipates cases where the instant offense is directly provoked by a continuous pattern of physical or sexual abuse. Although situations may exist where criminal liability is totally removed by the presence of either a battered spouse or self-defense defense, this factor recognizes an obvious distinction in blameworthiness between a convicted defendant whose actions were without provocation at all and a defendant who believed that his or her actions were justified in response to continuous prolonged physical or sexual abuse, even though that belief was later determined to be untenable, and thus not the basis for an exculpatory defense. Positing the existence of this circumstance as a mitigating factor recognizes this distinction in blameworthiness and allows sentencing judges to impose less severe dispositions than presumptive sentences where it is clearly present.

(5) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense. This factor is recognized by the Oregon guidelines system. This factor allows courts to begin their review of a possible exceptional sentence justified by loss or harm significantly less than typical by comparing the nature of the conduct involved in the particular case with that inherent in all crimes within the statutory definition. The judge must engage in a qualitative or quantitative assessment of what the defendant did in determining if the crime is "significantly less than typical" in harm or loss than the usual crime of that definition. The test will be whether the facts of the case disclose loss or harm significantly less than is normally or usually present in that offense.

EXAMPLE: If an unarmed offender is convicted of aggravated burglary for stealing a bicycle tire from an unlocked garage which is attached to a residence, the offender is classified in a higher crime category than simple burglary because the residence was occupied at the time of the offense. The sentencing judge may determine that the offender's conduct was significantly less serious than the usual aggravated burglary in which the offender breaks into the victim's actual living quarters to steal much more valuable property or to commit a physical assault. In such a case, the sentencing judge could properly depart from the guidelines.

b. Aggravating Factors

Subsection (b) lists a number of factual circumstances which may be properly used as aggravating factors. As stated, a fundamental consideration in departure cases is the need for the judge to articulate a basis for distinguishing between the seriousness of a particular crime and the seriousness inherent in all violations of that defined crime. To warrant an exceptional sentence, the judge's determination is whether the defendant's conduct truly distinguishes the instant case from all others of the same category. Such is the finding of "substantial and compelling circumstances" for departure purposes.

The above principle is particularly applicable to a consideration of aggravation factors. For example, most violent crimes are particularly cruel or brutal and their victims are, at least at the time of the crime, particularly vulnerable. It is necessary to emphasize that the aggravation factors - like the mitigation factors - are not intended to be literally construed. They are exceptional factors not ordinarily associated with the crime in issue. For example, the Minnesota Supreme Court rejected a literal construction of an aggravation factor, which clearly would have created an exception which consumed the rule, and required that the circumstances relied on to justify the departure be "of a kind not usually associated with the commission of the offense in question." State v. Schantzen, 308 N.W. 2d 484, 487 (Minn. 1981). More specifically, the Minnesota Court has held that a 5-foot tall, 95 pound female aggravated robbery victim is not "any more vulnerable in the face of a gun than a larger person because a gun can kill either quite easily." State v. McClay, 310 N.W. 2d 7, 12 (Minn. 1982).

Similarly, the Court reversed a departure justified by the sentencing judge by the finding that "the victims were particularly vulnerable being on a dark street," as "lacking any distinguishing characteristics." State v. Blue, 327 N.W. 2d 7, 12 (Minn. 1982). The Minnesota Court has also recognized that "most rape victims are, at the time they are raped, vulnerable in some way," and that "the legislature, to a great extent, has considered the vulnerability of the victims of rapes in determining the seriousness to attach to rape offenses in general and in distinguishing rape offense by degree." State v. Martinez, 319 N.W. 2d 699, 700 (Minn. 1982). By emphasizing that departure factors exhibit "substantial and compelling" circumstances to allow an exceptional sentence other than the presumptive sentence range precludes both a sweeping interpretation of the factors, and the possible imposition of a departure sentence in every case.

(1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender. This factor is recognized in the Minnesota, Washington and Oregon guidelines systems. It includes the term "particularly," and thus construed, the factor would require that the victim be significantly more vulnerable than other

victims of the same crime and that the vulnerability be due to one of the designated reasons, "extreme youth, advanced age, disability or ill health." Vulnerability not due to one of the enumerated causes could also form the basis for an exceptional sentence, since the guidelines are illustrative, not exclusive - depending on whether the particular vulnerability is common in all victims of that crime or is, in fact, exceptional. Thus reliance on the "particularly vulnerable" aggravating circumstance would be erroneous where the victim was hit head-on by a vehicle driven by a drunk driver who had crossed the center line. It may be recognized that all victims of drunk drivers are vulnerable, but because they are all vulnerable - absent other circumstances - one cannot be considered to be vulnerable in a special or unusual degree to an extent greater than in other cases. In addition, this factor should only be cited as an aggravating factor when the court determines that the offender's knowledge of or disregard for the victim's vulnerability increased the potential harm attributed to the offender's criminal conduct.

EXAMPLE: The offender embezzles \$58,000 from his employer who has been confined to a wheelchair for the last twenty years. The victim's disability should not be cited as an aggravating factor if it did not play a role in the commission of the offense.

(2) 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. Minnesota, Washington and Oregon recognize this factor in their guidelines systems. The Minnesota courts begin their review of an exceptional sentence justified by cruelty to the victim by comparing the nature of the conduct involved in the particular case with that inherent in all crimes with that statutory definition. Brutality "of a kind not usually associated with the commission of the offense in question" [aggravated robbery in which Mace was sprayed on the victims] will justify a departure, while the fact that a crime is "particularly perverse" will not where all such crimes [interfamilial sexual abuse involving penetration of a child] are "particularly perverse." State v. Schanten, 308 N.W. 2d 484, 487 (Minn. 1981), State v. Brusven, 327 N.W. 2d 591, 594 (Minn. 1982).

The court engages in a "qualitative assessment of what the defendant did" in determining if the crime is "more aggravated... than the typical" crime of that definition. State v. Luna, 320 N.W. 2d 87, 89-90 (Minn. 1982).

For example, particularly cruel methods of causing death or injury have been found to justify departing from the presumptive sentence. In Minnesota, where a defendant was convicted of second degree manslaughter for causing the death of a two-year-old child by striking the child in the chest with his fist, causing a complete laceration of the small intestine which led to an infection that caused death, the sentencing court relied on both the "particular cruelty and violence" involved in striking the child and on the "apparent indifference" of the defendant toward the child after the blows were stricken. Without analysis, the Court agreed that "the offense was more serious than the conduct involved in the usual case of second degree manslaughter," and found both the departure and the actual term imposed justified. Causing death by "hitting the victim on the head at least eight times with two different hammers and then stuffing her mouth with paper so that he would not have to listen to her dying sounds" was found without analysis to be a "particularly cruel way," justifying a departure, as was the fact that death was caused by "at least four blows to the skull with the board, causing the victim's skull to literally 'explode.'" State v. Stamm, 312 N.W. 2d 248, 249 (Minn. 1981); State v. Vogelpohl, 326 N.W. 2d, 635, 636 (Minn. 1982); State v. Kirsch, 346 N.W. 2d 130, 133 (Minn. 1984).

By far the most frequent category of crimes of which exceptional sentences have been imposed in Minnesota have been those involving sexual conduct. The Minnesota Court has recognized, for example, that while a defendant's conduct "was not different in kind from that of many rapists," a departure is justified if the conduct is "sufficiently different in degree." State v. Martinez, 319 N.W. 2d 699 (Minn. 1982). However, the Court has required that there in fact be circumstances that distinguish the defendant's conduct from that required to constitute the crime, and has not hesitated to reverse exceptional sentences where such circumstances were not present. State v. Gardner, 328 N.W. 2d 159 (Minn. 1983).

(3) The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim. This factor is recognized in the Oregon guidelines system. It allows departure sentences as a matter of public policy when an offense arises from various forms of bigotry. For purposes of applying this factor it is relevant to distinguish those crimes where the commission of the offense was generated "entirely or in part" from the offender's bigotry from those where the victim's particular characteristics are incidental to the instant offense, and not the motivation for the crime.

EXAMPLE: An offender is convicted of an aggravated battery for an attack on a victim who belongs to a racial minority. The sentencing court determines that the attack was related to the offender's membership in a white supremacist gang. This fact may be cited as an aggravating factor if the attack was motivated by the offender's desire to further the gang's objective of racial bigotry.

RESTRICTIONS ON THE USE OF DEPARTURE FACTORS

Section (2) restricts consideration of "aggravating" or "mitigating" facts as grounds for departure when that consideration would have a duplicating effect on a sentence imposed under these rules. If a given fact is a statutory element of the crime, or if it is used to subclassify the crime on the Crime Seriousness Scale, that fact generally may not be used as an aggravating or mitigating fact for departure purposes. Such a fact may be used to support a departure only if it makes the crime of conviction significantly different from the usual criminal conduct which the presumptive sentence is intended to punish.

EXAMPLE: The defendant is convicted of aggravated burglary ranked at Crime Category 5 because the dwelling was occupied at the time of the burglary. Because the fact of occupancy elevates burglary from Crime Category 7 to aggravated burglary Crime Category 5 the fact of occupancy may not be relied on as an aggravating factor to support a departure sentence.

In very rare cases, facts that constitute an element of the crime, or a basis for subclassifying the offense on the Crime Seriousness Scale, can be used if the actual conduct represented by that aspect of the current crime of conviction is significantly different from the usual criminal conduct represented by that aspect of the crime.

EXAMPLE: An offender is convicted of aggravated battery for the torture and permanent disfigurement of a victim. While serious, permanent physical injury is an element of the offense, the degree of harm actually inflicted in this case far exceeds the usual damage caused by such an offense. The sentencing judge may cite the deliberate nature of the defendant's act and its excessive brutality to impose a departure sentence.

AGGRAVATING FACTORS FOR DRUG-SALE OFFENSES (only applies to crimes covered by drug grid)

(1) The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. Two or more following nonexclusive factors conceded evidence of major, organized drug production, manufacture, 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-generating, 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, cultivation or delivery of controlled substances.

(2) The offender possessed illegal drugs which were possessed with intent to sell, sold or were offered for sale to a person under 18 years of age.

(3) The offender utilized employees or agents under 18 years of age in acts associated with the manufacture, production, cultivation or delivery of controlled substances.

COMMENTARY

The above illustrative departure factors may apply to factual circumstances indicating an illegal drug-sale activity of major size; the sale or intent to sell illegal drugs to persons under 18 years of age, or the utilization of persons under 18 years of age in acts associated with illegal drug activity. Such factors are exceptional considerations that are to be used to differentiate exceptional drug activities from those that do not involve persons under 18 years of age or are not of a major size. The factors represent "substantial and compelling" reasons for sentencing courts to depart from a standard sentence range in a drug-sale case. If they are found to exist in a particular factual situation, the sentencing court is authorized to impose an exceptional sentence that is greater than the presumptive sentence for the specific drug-sale offense. It is presumed that the above departure factors represent exceptional considerations not regularly associated with a typical drug-sale offense.

DEPARTURE OPTIONS

When a departure sentence is appropriate, the sentencing judge may depart from the guidelines in several different respects. This section describes the type of departures which are permitted under the guidelines and what limitations, if any, are placed on these departure options.

Durational Departures: Prison Sentences

The sentencing judge will have the authority to depart from the presumptive duration of a presumptive prison sentence. A change in either the length of the presumptive prison sentence or a transformation of a prison term into probation may be pronounced by a sentencing court. This type of departure will clearly have a significant impact on prison populations. Hence, the sentencing judge is urged to carefully consider the principles and purposes of sentencing guidelines when deciding the appropriate magnitude for the aggravated or mitigated prison term. To this end, the durational departure should be generally proportional to the significance of the aggravating or mitigating factors. Aggravated durational departures which are disproportionate to the aggravating factors actually present will produce departure sentences which are inconsistent with the general philosophy structure of the guidelines system. Aggravated durational departures which are excessive will limit the correctional resources available to punish other serious offenders. To help avoid this result, the Sentencing Commission has established a general rule that no enhanced durational departure should more than double the presumptive sentence for a given offense.

Duration of Departures:

- (1) When a sentencing judge departs in setting the duration of a presumptive term of incarceration, the judge shall consider and apply the enacted purposes and principles of sentencing guidelines to impose a sentence which is proportionate to the seriousness of the crime of conviction and the offender's criminal history.
- (2) A durational departure from a presumptive prison term established by section (1) shall not total more than double the maximum duration of the presumptive incarceration term.

COMMENTARY

Any departure from a presumptive sentence should accord with the sentencing purposes and principles that underlie these rules. More directly, this rule requires the magnitude of the durational departure be commensurate with the seriousness of the crime of conviction and the offender's criminal history. Section (2) states the basic limit on upward durational departures from a presumptive incarceration term: double the maximum duration of the presumptive term. The Sentencing Commission decided that a limitation on upward durational departures from presumptive prison sentences was required: (a) to reduce the potential for significant disparity in departure sentences and (b) to prevent departure sentences from preempting available corrections system capacity which is needed to provide presumptive sentences for other offenders.

EXAMPLE: A defendant's presumptive incarceration term is 81-90 months. The maximum durational departure allowed under this section is 90 months, or a total departure sentence of 180 months.

Dispositional Departures

The sentencing judge may impose a dispositional departure. Such departures permit the sentencing judge to impose a prison term when the presumptive sentence is probation and conversely, to impose a probation term when the presumptive sentence is prison. Both types of departures require the presence of substantial and compelling circumstances. The types of dispositional departures are discussed below.

Probation to Prison

When the sentencing judge finds appropriate grounds for departure, he or she may impose a prison term as a dispositional departure. Such dispositional departures implicitly involve durational departures since an assumed period of probation is patently changed into a prison term. The following proposed statute establishes parameters of dispositional prison-term sentence. It not only includes limitations on the prison term duration but also the term of post-prison supervision.

Dispositional Departure Limitations:

- (1) When a sentencing judge imposes a prison term as a dispositional departure, the judge shall consider and apply the enacted purposes and principles of sentencing guidelines to impose a sentence which is proportionate to the seriousness of the crime of conviction.
- (2) When a sentencing judge imposes a prison term as a dispositional departure, the term of imprisonment shall not exceed the maximum duration of the presumptive incarceration term listed within the offender's grid block. Any sentence inconsistent with the provisions of this rule shall constitute an additional departure and shall require substantial and compelling reasons independent of the reasons given for the dispositional departure.

COMMENTARY

Section (1) restates the principle that a dispositional departure should be made in conjunction with the sentencing purposes and principles that underlie a guidelines system. The length of a probation to prison dispositional departure should be comparable to the severity of the offender's crime of conviction and his or her criminal history subject to the limitations expressed in Section (2).

Section (2) states that a prison term applied when imprisonment is imposed as a dispositional departure from a presumptive sentence of probation shall be no more than double the maximum duration of the presumptive incarceration term listed within the offender's grid block. In addition, this section provides that a dispositional departure sentence of imprisonment which imposes a longer prison term must be justified by substantial and compelling reasons not only in terms of the initial dispositional departure, but also in terms of the greater presumptive sentence.

EXAMPLE: An offender with a Criminal History category of C (one prior non-person felony) is convicted of felony theft for a scheme which defrauded a senile, elderly woman of her accumulated life savings. The sentencing judge may properly impose a dispositional departure after finding that the victim was particularly vulnerable to the offender's fraud scheme because of her age and reduced mental capacity. (Aggravating Factor One). The judge would then determine the appropriate dispositional departure sentence up to a doubling of the term displayed in the offender's specific grid block given the severity ranking for Theft and the offender's particular criminal history category. If the judge also found that the offender's criminal conduct was motivated entirely or in part by the race or ethnicity of the victim (Aggravating Factor Two), he or she could use this finding to extend the offender's term of imprisonment beyond the expressed limit of the presumptive sentence.

Prison to Probation

Dispositional departures may also involve probationary sentences. If the sentencing judge imposes a probationary sentence as a mitigated, dispositional departure from the guidelines, the recommended duration of probation should be established as follows:

Non-Presumptive Probationary Sentences:

- (1) If the sentencing judge imposes a probationary sentence as a dispositional departure from the guidelines, the recommended duration of probation shall be:
 - (a) a presumptive period of thirty-six months for offenses classified in Crime Seriousness Levels of 1 through 5;
 - (b) a presumptive period of twenty-four months for offenses classified in Crime Seriousness Levels of 6 through 10.
- (2) When a sentencing judge imposes a probationary sentence as a dispositional departure, he or she may set the duration of probation at his or her discretion up to a maximum of five years. The total period of probation in all cases shall not

exceed five years, or the maximum period of the prison sentence that could be imposed which ever is longer. If the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. The court may extend or modify the offenders probation. The extensions may only be ordered at such intervals pursuant to a probation-modification hearing and a judicial finding of necessity, e.g., unfulfilled probationary conditions or other circumstances warranting probation extension. Such extensions shall be made for a maximum period of five years or the maximum period of the prison sentence that could be imposed inclusive of the original probation term. Probation may be terminated by the court at any time.

Departure Limitations in Consecutive Sentences

Nothing in the rules of the Kansas Sentencing Commission should be read to limit the court's discretion to impose consecutive or concurrent sentences. Special rules have been established for the computation of consecutive sentences under the guidelines system. The specific rules for establishing consecutive sentences are:

Sentencing judges will have the discretion to impose consecutive sentences. However in instances where consecutive sentences are imposed:

- 1) The court must establish a base sentence. The base sentence is typically the most serious. In cases where all sentences carry equal weight then one count is selected as the base.
- 2) The base sentence is set using the total criminal history score assigned.
- 3) The total sentence assigned for all charges cannot exceed two times the base sentence.
- 4) Non-base sentences will not have criminal history scores applied, but base sentences will have the full criminal history score assigned. This will allow criminal history to impact the total sentence, since the base score is doubled to set the parameters for the total sentence.

The specific rule proposed for an aggravated departure sentence within the context of consecutive sentences is:

- (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 individual offense being sentenced consecutively.
- (2) When a departure sentence is imposed for any individual offense sentenced consecutively, the incarceration term of that departure sentence shall not exceed twice the maximum presumptive incarceration term that may be imposed for that offense.

- (3) The total incarceration term of the consecutive sentences, including the incarceration term for the departure offense, shall not exceed twice the maximum presumptive incarceration term of the departure sentence following aggravation.

COMMENTARY

Section (1) provides that a departure sentence may be imposed for any individual offense being sentenced consecutively.

Section (2) limits the durational departure for an individual offense sentenced consecutively to twice the maximum presumptive incarceration term. This is the typical departure rule for any specific offense.

Section (3) describes the requirements for a departure sentence within a multiple offense, consecutive sentence situations. In addition, it is important to emphasize that the aggregate sum of consecutive nondeparture sentences shall also not exceed twice the maximum presumptive incarceration term of the controlling base sentence. In contrast to departure sentences, such a sentence would not be appealable by either the state or defendant.

EXAMPLE: An offender is convicted of Murder in the Second Degree, Aggravated Burglary and Felony Theft of less than \$50,000. The offender's criminal history classification is F, or 1 prior person felony. If the sentencing judge wishes to include a departure (aggravation) for the Second Degree Murder in conjunction with consecutive sentencing for all three offenses, he or she must combine the rules for establishing consecutive departures with the rule for a single aggravated departure sentence:

- 1) The court establishes a base sentence. In this fact pattern, the most serious offense is the murder conviction with a presumed (hypothetical) maximum sentence of 205 months. It is chosen as the base sentence.
- 2) The two remaining, non-base offenders have maximum presumptive (hypothetical) sentences of 42 and 7 months, respectively. **NOTE:** 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 departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be 2×205 or 410 months. Here, the total additive sum of $205 + 42 + 7$ would be 254 months; a consecutive sentence clearly within the limit of two times the base sentence.
- 3) Assuming that the sentencing judge wishes to depart on the offender's murder conviction because of the presence of an aggravating factor, and that he or she wishes to also run all three sentences consecutively, the court would then make the following computations:

Primary or Base Offense: Murder II Maximum Presumptive Sentence 205 months

Other Offenses: Agg. Burglary and Theft 42, 7 months

The base sentence may be enhanced to a maximum departure length of 410 months or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the principle for consecutive sentencing as defined in Section (3), states that the total imprisonment term of the consecutive sentences-including the departure term - shall not exceed twice the departure of enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed 2×410 or 820 months. Here, the additive sum of $410 + 42 + 9$ or 461 months is well within the limit of 820 months. This sentence would represent a departure sentence within a consecutive sentence context. This so-called "double - double" rule allows a sentencing court much discretion in fashioning a sentence for exceptional cases that warrant both departures and consecutive sentences.

CHAPTER 10

APPELLATE REVIEW

INTRODUCTION

Pursuant to Senate Bill 50, the Kansas Sentencing Commission was given the authority to formulate presumptive sentencing guidelines to supplant an existing indeterminate sentencing system. During the process of constructing guidelines, it became apparent to the Commission that it possessed no formal policing powers to ensure compliance with the guidelines upon implementation. Although the Commission perceived its future role as one of monitoring or collecting information concerning guidelines practices, it quickly realized that appellate review was the only mechanism available to enforce guideline policies and assure adherence to them. The Commission's task thus became one of creating an appellate review procedure whereby the different goals of sentencing proportionality, departure review, correction of sentences, appellate caseload management, and scope of appellate review could be both defined and harmonized. A special Appellate Review Subcommittee was created by the Commission Chairman, and Judge Gary W. Rulon of the Kansas Court of Appeals was selected to direct the Subcommittee's inquiry. The Subcommittee reviewed existing Kansas appellate practices, and carefully studied appellate procedures in the Minnesota, Washington and Oregon guideline system. In addition, the Subcommittee received testimony from Washington Court of Appeals Judge Joseph Coleman (an ongoing member of the Washington Sentencing Commission) concerning sentencing review activities in a guidelines state. Judge Coleman also presented information to members of both the Kansas Court of Appeals and the Kansas Supreme Court upon the request of the Commission and Judge Rulon.

The specific proposals that were derived from the Appellate Review Subcommittee's efforts include a requirement for substantive review of sentences, a process by which a sentencing court may make arithmetic or clerical corrections to a sentence, and the establishment of a formerly nonexistent prosecution or state right to appeal a sentence. The Subcommittee's recommendations also propose an optional, expedited sentencing review process whereby particular sentencing issues may be considered and determined in a relatively short period of time. This latter recommendation is relevant to concerns regarding both appellate court caseloads, and the promptness of review for comparably short guideline sentences.

The following proposed statute defines the scope of review with respect to guidelines sentences, and the limitations of the type of sentences and issues that may be appealed. Overall, the Subcommittee's final statutory recommendations resemble an integration of appellate statutes existing successfully in the Washington and Oregon guidelines systems.

(A). Appellate Review Principles

- (1) A sentence outside the standard range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the Appellate Court in accordance with rules adopted by the Supreme Court.

- (2) Pending review of the sentence, the sentencing court or the appellate court may order the defendant confined or placed on conditional release, including bond.
- (3) On appeal from a judgment or conviction entered for a felony committed on or after (date of implementation), the appellate court shall not review:
 - (a) Any sentence that is within the presumptive sentence for the offense.
 - (b) Any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record.
- (4) In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the sentence grid for an offense, sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure:
 - (a) Are supported by the evidence in the record; and
 - (b) Constitute substantial and compelling reasons for departure.
- (5) In any appeal, the appellate court may review a claim that:
 - (a) The sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence; or
 - (b) The sentencing court erred in either including or excluding recognition of a prior conviction or juvenile adjudication for criminal history scoring purposes.
 - (c) The sentencing court erred in ranking the crime seriousness classification of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.
- (6) 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.
- (7) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed. They may issue a written opinion in any other case when the appellate court believes that a written opinion will provide guidance to sentencing judges and others in implementing the sentencing guidelines adopted by the Kansas Sentencing Commission. The appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal.

- (8) A review under summary disposition shall be made solely upon the record that was before the sentencing court. Written briefs shall not be required and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

COMMENTARY

Subsection (1) defines the scope for appellate review specifically to departure or exceptional sentences under the guidelines system. It also allows an appeal to be taken by either the defendant or the state for any departure sentence.

Subsection (3) precludes appellate review in the following situations:

- a. If the sentencing court imposes a sentence consistent with the presumptive sentence under the guidelines, the sentence imposed may not be appealed.
- b. If the sentence is the result of a plea agreement which was accepted by the sentencing court, the resulting sentence may not be appealed.
- c. No other sentencing issue may be appealed unless expressly permitted by subsection (5)(a) and (b).

Subsection (4) denotes that if the sentence represents a departure from the guidelines, only the following issues may be raised on appeal:

- (1) Are the reasons for the departure supported by the evidence in the record; and
- (2) Do the reasons for the departure constitute “substantial and compelling” reasons for a departure from the guidelines?

Whenever a departure sentence is imposed, the sentencing judge must provide the “substantial and compelling reasons” for the exceptional sentence. The need to identify the reasons for a departure on the record provides a necessary foundation for substantive appellate review. All of the guidelines states reviewed by the Appellate Review Subcommittee maintain a “substantial and compelling test” for sentences that deviate from the presumptive or standard sentence range. Moreover, all of the guidelines states purport an appellate review standard for departure sentences that includes an evidentiary component and a legal component. Consequently, the Subcommittee recommended the following standard for review pursuant to subsection (4) (a) and (b):

- (1) The Evidentiary Test: Are the facts stated by the sentencing judge in justification of the departure supported by the record?
- (2) The Law Test: Are the reasons stated on the record for the departure sufficient to justify a sentence outside the presumptive range (e.g., are they consistent with the expressed purposes of the sentencing guidelines system)?

The Subcommittee observed in its studies and meetings with other guidelines states that appellate cases and subsequent workloads have been neither overwhelming or procedurally difficult since the adoption of a guideline sentencing format. It is anticipated that Kansas appellate processes under a guidelines format will emulate the successful experiences of these precedental states.

Subsection (5) mandates that in all cases the following issues may be raised on appeal:

- a. The sentencing court failed to comply with the requirements of law in imposing or failing to impose a sentence;
- b. The sentencing court erred in either including or excluding a prior conviction for criminal history purposes;
- c. The sentencing court erred in making the proper crime seriousness or criminal history classification.

It is important to emphasize that while a sentencing judge's classification of criminal history (person or non-person offense, etc.) may be appealed pursuant to subsection (5), this provision also applies to the court's decision on issues relating to the determination or proof of a defendant's criminal history. This particular judicial decision is related to the court's recognition or finding of the existence or non-existence of a prior criminal conviction. From this perspective, subsection (5) of the proposed appellate review statute applies not only to a sentencing court's classification of prior convictions (felony, misdemeanor, person, non-person offense) but also to a court's recognition (inclusion or exclusion) of an offender's prior convictions. Similarly, a defendant may contend on appeal that the sentencing court erred in selecting the proper crime seriousness classification.

Subsection (6) states that upon a sentence appeal, the appellate court may only reverse or affirm the sentence. If it determines that the trial court's findings do not support a departure, the appellate court must remand the case for resentencing. This proposed subsection allows the appellate court to remand or affirm; it does not authorize the court to recalculate or modify the sentence on appeal.

Subsection (7) states that if the trial court is reversed, the appellate court must issue a written opinion. If the trial court is not reversed, a written opinion is optional at the discretion of the appellate court. This subsection also provides that appellate courts may establish rules for the summary disposition of cases without merit.

Subsection (8) anticipates the creation of an expedited appellate process for the summary review of solitary sentencing issues, and claims related to relatively short-duration, presumptive prison sentences. The latter durational sentences could conceivably be served prior to the initiation of appellate review.

(B.) Arithmetical and Clerical Errors

The Kansas Legislature has previously created a statute to correct illegal sentences or K.S.A. 22-3504 which provides:

22-3504. Correction of sentence.

- (1) The court may correct an illegal sentence at any time. The defendant shall receive full credit for time spent in custody under the sentence prior to correction. The defendant shall have a right to a hearing, after reasonable notice to be fixed by the court, to be personally present and to have the assistance of counsel in any proceedings for the correction of an illegal sentence.
- (2) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

It is foreseen that a sentencing guidelines system will involve a variety of numerical calculations. It is therefore necessary to retain a mechanism for the corrections of arithmetic or clerical errors without needless appellate court intervention. K.S.A. 22-3504 is predictably applicable to sentencing guidelines; it provides the sentencing court with complete discretion to correct an illegal sentence or other mistake "at any time".

(C.) The State's Right to Appeal a Sentence

Presently, Kansas law defines certain situations where the prosecution possesses a right to appeal a court's decision. (See, for example, K.S.A. 22-3602 and 22-3603). Existing Kansas law, however, does not provide the state with a right to appeal a sentence.

All of the guidelines systems reviewed by the Appellate Review Subcommittee authorize an appeal right for both the defendant and state in situations of a departure sentence. In consideration of exceptional sentences, and the development of sentencing case law, the Subcommittee recommended an amendment to existing Kansas law which would permit the State to appeal a departure sentence.

CHAPTER 11

BEHAVIOR ATTITUDE ADJUSTMENT TIME

INTRODUCTION

The enabling legislation instructed the Sentencing Commission to review the current correctional practice of awarding good time credits and to make recommendations concerning its advisability. Good time credits were initially discussed at several meetings and the public was asked for input during public hearings.

The issue revolved around the concept of truth in sentencing. The Commission adopted truth in sentencing as a major goal in November of 1989. The public was steadfastly against a system that "rewarded" inmates for good behavior. The general feeling was that good behavior was to be expected. Criminal justice professionals were of two minds. One group felt the problem was with the indeterminate sentencing system where no one has a grasp on how much time someone would serve and felt good time added to this confusion. This group opted for a flat sentence that everyone, public, inmates, and criminal justice system actors, could comprehend. The other group, made up of institutional correctional professionals realized the problems of the current system, but felt strongly that they must have a behavior control system in place. Commission staff polled other guideline states and only one state (Pennsylvania) did not award good time. A review of all 50 states found that six do not award good time.

Thus, the Commission faced a dilemma; there were powerful arguments on both sides. The issue really boiled down to "truth in sentencing" versus behavior management. The issue was discussed during a two day Commission retreat in June of 1990. The vote was six to five to eliminate good time and establish a determinate sentence that could not be altered.

This decision was reviewed by several groups and after consultation with corrections officials and legislators, the issue was re-opened. The Secretary of Corrections was asked to offer a plan that addressed the concerns of both sides.

THE SOLUTION

The Commission reviewed the issue over a period of several months. The Commission continued to endorse truth in sentencing as a major goal. Therefore, any system developed could not reduce the base sentence handed down by the court. During the September 17-18, 1990, meeting it was decided to develop a system that would add time to the base sentence for negative behavior. Thus, instead of a system of good time credits, the Commission endorsed a concept labeled Behavior Attitude Adjustment Time.

This in effect creates a system of "bad time," whereby good behavior is the expected norm and negative behavior will be punished. This system will be implemented by the Kansas Department of Corrections, who will be responsible for developing administrative rules and regulations to govern this process. These regulations will dictate how time will be lost, and the due process procedures and protections surrounding this process.

The Commission decided to limit the amount of time that could be added to any sentence to 20 percent of the presumptive sentence.

EXAMPLE: If a judge sentences an inmate to 20 months, the sentence cannot be reduced. However, if the inmate exhibits negative behavior, the sentence could be extended to 24 months. This extension would be limited by statute and administered by the Department of Corrections.

COMMENTARY

This decision represents a major conceptual shift in prison behavior control systems. The focus is on negative behavior; it expects positive behavior as the norm. The statutory provision will establish a sentence that cannot be shortened. It can be lengthened, but to do so will require an overt act by the inmate. Any lengthening of the term will be limited to 20 percent of the sentence, and will be regulated by administrative rules and regulations. Due process safeguards will be developed to ensure that persons affected will have an adequate system of redress.

The implementation of the new procedures will require the development of statutory language that establishes the provision to extend the sentence up to 20 percent based upon the base sentence. Thus, the sentence pronounced at sentencing will be expressed as a mandatory sentence of X months and a potential sentence of X plus 20 percent months.

The Commission saw this system as a way to preserve truth in sentencing by establishing a base sentence that cannot be altered. At the same time, it provides the Department of Corrections with a management tool, that places the onus on the offender. Nothing will effect the base sentence except an overt act by the offender.

CHAPTER 12

120 DAY CALL BACKS

INTRODUCTION

Kansas statutes allow sentencing courts to modify the sentences of persons sent to the Department of Corrections. This modification must occur within 120 days of the date the sentence was imposed. The statute allows the sentencing court to reduce the minimum sentence or to place the person on probation. In FY 1989, there were 2,113 new court commitments to the Department of Corrections. Twenty-five percent (533) of these commitments were recalled within 120 days and placed on probation.

The underlying philosophy involves providing the sentencing court with diagnostic information and recommendations. Convicted felons are sent to a central diagnostic center, where they receive a battery of diagnostic tests and interviews. The results of this process are sent to the sentencing court. This process began in the 1960's when sentencing courts did not have pre-sentence investigations available on a regular basis.

This process has evolved into a method to provide sentencing courts with an opinion in addition to the one provided by the pre-sentence information. It also provides a mechanism to provide courts with a term of shock incarceration. However, over the past several years, short term incarceration has become the major purpose. Assessments are available through court services and local mental health centers.

THE SOLUTION

The Commission decided to recommend the repeal of the 120 day call back statute. The guidelines endorse the setting of a sentence on the severity of the current offense and the offender's prior criminal history. This information is readily available at sentencing via the presentence investigation. The reports developed by the central diagnostic facility focuses on psychological, demographic, and socio-economic variables and are not to be considered when setting a sentence.

Short term incarceration may have some value, but the use of expensive diagnostic beds in an already overcrowded system is not appropriate. Sending an additional 533 persons to prison, who will be returned on probation, has the effect of making between 133 and 177 beds per year unavailable for other inmates.

COMMENTARY

The Commission recognized this practice had a long history, but also felt that the major purpose had shifted from diagnosis to short term incarceration. If the current offense and the prior criminal history are the only legitimate considerations, then the information contained in the diagnostic report should not impact the decision. If short term incarceration is the goal, then less precious resources should be used. This may result in increased usage of the local jails or bootcamps. It also means that these local resources will be taxed and may need to be expanded. Thus, the trade off may well involve the development of local resources instead of more state prison beds.

CHAPTER 13

PAROLE BOARD

INTRODUCTION

The enabling legislation mandated the Sentencing Commission to develop recommendations concerning the future role of the Parole Board. The central issue revolved around how to accommodate a sentencing system that presumes a fixed sentence (sentencing guidelines) with a system that releases persons based upon an array of institutional adjustments, program completions and criminal history factors. There were two central issues that emerged. With a lack of truth in sentencing, no one can predict how long someone would serve on any given sentence. There is a great deal of variance in the length of time served due to the large number of variables that go into making a decision. Secondly, it is virtually impossible to forecast prison space needs unless exit dates are predictable. Other states that have developed a pure guideline system have phased out the parole release function. Some states have developed a modified guideline system and have retained their parole boards. The modified guidelines states suffer the same problems, they do not forecast release dates adequately and there is a great deal of variance in actual release dates.

THE COMMISSION'S DECISION

The Commission discussed the issue during their June 4-5, 1990, meeting. They decided by a vote of 9 to 2 to recommend that persons sentenced under the guideline system not be released by the parole board. They opted for a system that allowed the sentencing judge to fix the sentence either by the presumptive grid sentence or by a departure - once the sentence is in place, no one can alter the fixed term. However, inmates can have time added to the sentence by gaining Behavior Attitude Adjustment Time for negative behavior.

The Commission recommended that the Parole Board continue to release persons with life sentences (i.e, first degree murder). These crimes are not part of the presumptive sentencing grid and will continue to have their minimum terms fixed by statute. There are also 5,500 plus inmates currently in the system, these inmates release dates and revocations will continue to be determined by the Parole Board.

The Parole Board will review community supervision plans and add any special conditions they deem appropriate for persons who have completed the prison portion of their sentences. The Board will also conduct technical and new crime revocation hearings for persons who violate the conditions of their community supervision plan or commit a new offense. Both these duties are similar to current ones, but will require a change in focus. The Board will need rule and regulation authority to develop procedures that govern this process.

These old duties and new duties will mesh, and as the current population leaves and is discharged, they will be replaced by post guideline inmates. The transition will take several years.

COMMENTARY

The Commission's decision to eliminate discretionary releases for persons sentenced under the guidelines represents a major departure from the status quo. The reasons behind the decision include:

- 1) a change in focus of reasons for incarceration from rehabilitation to punishment;
- 2) a strong belief that the general public, the inmate and everyone concerned should know how long the sentence will be;
- 3) a need to be able to accurately forecast resource demands, especially for prison space.

The Commission continues to endorse rehabilitation efforts once the inmate is imprisoned, but does not endorse rehabilitation as the primary reason to incarcerate. Thus, education, work and psychological programming are important and are recognized as vital elements that should be offered to inmates once imprisoned. However, the Commission did not endorse sentence reductions for completion of these programs.

The Commission recognized the importance of having someone review release plans and to set specific conditions based upon need and community input. There also needs to be a process to conduct revocation hearings. This process should be conducted by a neutral body. The Parole Board has carried out that function for several years. They represent a neutral position, they do not represent inmates, nor do the field staff who bring the charges work for the board.

These recommendations are similar to the system adopted by Oregon. It does not eliminate the Parole Board, it changes their duties and makes them a vital part of the transition.

CHAPTER 14

POST RELEASE SUPERVISION

INTRODUCTION

The elimination of indeterminate sentences impacts how persons will be supervised in the community once released from prison. In fact, a strict guideline system could potentially eliminate such a function. Washington State did away with supervision for several years after implementing guidelines, but recently reinstated the practice. The two most frequently cited reasons supporting post release supervision are: 1) public safety and 2) re-integration into the community.

The elimination of supervision leaves the community at greater risk and does not aid the person in their re-entry. These are often related issues. Other guideline states (i. e. Minnesota and Oregon) have kept some form of post release supervision in place.

THE COMMISSION'S DECISION

On June 4, 1990, the Commission voted unanimously to require a period of post release supervision for all persons released from prison. This period would be fixed by statute according to the seriousness of the offense.

The post release period will be considered a part of the sentence, not an addition. Therefore, the pronouncement of the prison portion also fixes the term of the post-release portion. Prison sentences imposed for crimes with a severity level of I through VI will have a mandatory post release period of 24 months. Prison sentences imposed for crimes with a severity level of VII through X will have a mandatory post release period of 12 months. This period is not discretionary and must be added. The sentencing judge must pronounce the prison portion, as well as, the post release portion at the sentencing hearing. However, failure to pronounce the post-release portion will not negate its existence.

In cases of multiple sentences, the severity level of the most serious crime will dictate the post-release period. In cases where consecutive sentences are imposed, only one post-release period will be served. The post-release period will be tied to the highest severity level in the series of sentences.

Time served on post-release supervision will vest, just like prison time, once served it cannot be lost. The Department of Corrections will be responsible for developing an individual release plan for each offender. This plan must include:

- 1) a description of support services and progress;
- 2) conditions of supervision;

- 3) level of supervision;
- 4) public safety concerns;
- 5) restitution amount if any;
- 6) other conditions as deemed necessary.

The Parole Board will add any special conditions they deem appropriate. Failure to approve a plan will not prohibit an inmate from being released. The inmate will be supervised by Department of Corrections field staff during this period.

If a technical violation of the plan occurs or a new crime is committed during the post-release period, field staff will begin revocation procedures. The revocation procedures will be identical to the current parole revocation process. The Parole Board will conduct the revocation hearing and determine if a violation has occurred. The Parole Board must have rule and regulation authority to develop procedures surrounding these hearings.

The penalty for a technical violation cannot exceed a return to prison for 90 days. The 90 day period cannot carry someone beyond the end of their post release period. The penalty for a new criminal offense shall be a return to prison for the remainder of the post-release period.

EXAMPLE (1): Technical Violator If a post-release inmate is found guilty of a technical violation in the third month of their 12 month post release period, they can be returned to prison for up to 90 days.

EXAMPLE (2): Technical Violator - If a post-release inmate is found guilty of a technical violation in the 10th month of a 12 month post-release period, their re-imprisonment penalty cannot exceed the time they have left to do on their sentence.

EXAMPLE (3): New Crime Violator - If a post-release inmate is found guilty of a new crime and is violated, the inmate will serve the balance of their post-release period.

Returns to prison for post-release violations will not generate a new post-release sentence. If a new felony crime is committed, then the new crime conviction will carry its own post-release sanctions.

Once the individual finishes their release period, the Parole Board will issue a discharge certificate and restore civil rights.

COMMENTARY

This process reflects the Commission's concern for public safety and re-integration. The plan mirrors the Oregon model and incorporates the Parole Board into the process. The 90 day limit on prison sentences for technical revocations has two purposes. It limits the punishment a person can receive for an act which would not be a crime if committed by someone not under supervision by the criminal justice system. Secondly, it places limits on the amount of prison space that can be used for this purpose.

The existing Department of Corrections field staff will continue their function. The limits on terms also dictates how long someone will be supervised and how resources will be used. The Commission felt this was an efficient use of resources.

These procedures provide a bridge between the indeterminate and presumptive systems. The Commission believes it preserves the rehabilitation and public safety factor of the current system and provides for the certainty and efficient uses of resources that are hallmarks of the new system.

CHAPTER 15

FUTURE ROLE OF THE COMMISSION

INTRODUCTION

Senate Bill 50 directed the Sentencing Commission to make its final report to the 1991 legislative session. The future of the Commission was not addressed. In states where guidelines have been adopted, Sentencing Commission's have continued to play a vital role. They provide training and technical assistance to courts and prosecutors. They rank new crimes passed by the legislature. They provide estimates of needed resources and associated costs for changes in proposed criminal statutes. They also conduct studies concerning special topics or populations.

Their most important task is to monitor the implementation of the guidelines. They collect sentencing data, compile statistics, and provide the courts and the legislature information on a routine basis. These reports monitor compliance with the guidelines, the rate of departures and crime specific data for the entire state and by judicial district. This data provides valuable information concerning trends of criminal sentencing and the appropriateness of current sanctions.

PROPOSED IMPLEMENTATION DATE

The Commission recommends an implementation date of July 1, 1992. Crimes committed after that would be covered under the guidelines. If the exact date of commission cannot be established, the crime will be treated as a pre-guideline event.

Guidelines will be introduced during the 1991 session. If passed, this will allow adequate time to prepare for implementation. There are a variety of tasks that must be accomplished.

- 1) an implementation manual must be developed;
- 2) comprehensive training sessions must be held for all segments of the criminal justice system;
- 3) a monitoring system must be developed and put in place;
- 4) the Kansas Bureau of Investigation must develop a system to gather misdemeanor information;
- 5) new crimes must be ranked;
- 6) the Judicial Council is scheduled to make its recommendations concerning a revised criminal code in 1991. All existing severity rankings will have to be reviewed.

- 7) the training and technical assistance efforts will surely yield other statutory changes that need to be made before actual implementation.

These tasks will require that the Commission be continued beyond 1991. If continued, there must be provisions that mandate these tasks and establish the Commission as the monitoring agency. It will also require statutory authority to develop rules and regulations, a strategy for appointing members, some definition of their terms they will serve, and how members will be replaced.

FUTURE ROLE BEYOND IMPLEMENTATION (FY 1993-1998)

Once implemented the Commission will continue to:

- 1) provide training and technical assistance;
- 2) monitor the compliance with guidelines;
- 3) place new crimes on the grid;
- 4) provide independent assessments of how changes in sentencing policy will impact the system;
- 5) conduct related studies as directed by the legislature.

CHAPTER 16

OTHER RECOMMENDATIONS

MONITORING SYSTEM

The Commission recommends that a common data base be developed so that all segments of the criminal justice system can communicate. This will allow the Legislature to make rational resource decisions. The current system does not provide adequate information. Each component of the criminal justice system gathers information to meet their own needs.

Representatives from the courts, community corrections, the Department of Corrections, and the Kansas Sentencing Commission held a series of meetings to discuss this problem. These individuals developed an outline for a common database that allows information to be shared between agencies. This is a major accomplishment. Without uniform data, program planning is impossible.

This uniform database will assist in the monitoring process. Courts will have to submit copies of Journal entries, criminal history worksheets, and pre-sentence investigation face sheets. These forms will be sent to the Commission and data will be extracted.

CONSOLIDATION OF FIELD SERVICES STUDY

There has been considerable discussion concerning the possible consolidation of probation, community corrections and parole services. The Commission believes this issue needs further study and recommends that a study be undertaken and recommendations forwarded to the 1992 Legislative session.

The Interim Judiciary Committee reviewed this topic and recommended that it be assigned to the Sentencing Commission for further study. The Interim Committee felt that this issue needed an extensive review by a neutral body. The Sentencing Commission is such a body, they have no long-term investment in the current system, nor do they gain or lose any advantage from any proposed changes. The Commission will work with the courts, local community corrections, and the Department of Corrections to put together a task force. The task force will develop recommendations for the 1992 session.

RETROACTIVITY

The Commission heard testimony requesting that the guidelines sentences be made retroactive. Current sentences cannot be enhanced; however, the penalty for property offenses may decrease significantly. Two other states made their guidelines retroactive. In addition, Kansas has routinely made changes in the good time laws retroactive.

The Commission supports the concept of making the guidelines retroactive, especially in light of the findings of significant racial and geographical disparity.

The Commission recommends that the issue be studied and that the 1992 legislature develop a proposal.

POPULATION LIMITS

The Commission does not favor the passage of legislation which places a cap on prison population that also mandates automatic release options. Instead, the Commission recommends some form of early warning system, whereby the Secretary of Corrections certifies a potential crisis. Once certified, the Commission or some other group, would review the grid and current practices and make recommendations. These recommendations may include adjustments to the current grid and/or proposed facilities expansion.

The Commission recommends that such a policy be developed and presented to the 1992 legislature.

Appendices

Appendices

Appendix A ----- Commission Members

Appendix B ----- Judicial Districts

Appendix C ----- Drug Grid

Appendix D ----- Non-Drug Grid

Appendix E ----- Sentencing Documents

Appendix F ----- Statutes Affected

Appendix G ----- Glossary

Appendix A

THE KANSAS SENTENCING COMMISSION

The Commission was formed during the 1989 Legislative session. The bill that created the Commission named several ex-officio members and gave the Courts, the Governor and the Legislature appointments as well. Legislative appointments were to be non-voting. The appointments were made by mid-August and the first meeting was called by the Chairperson Attorney General Robert T. Stephan on August 19, 1989.

The Commission was made up of the following members:

Attorney General

Robert T. Stephan, Chairperson, Topeka

Chief Justice or Designee

Judge Gary W. Rulon, Kansas Court of Appeals,
Vice-Chairperson, Emporia

Secretary of Corrections or Designee

Steven J. Davies, Ph.D., Secretary of Corrections, Topeka

Parole Board Chairperson or Designee

Carla Stovall, Chairperson, Kansas Parole Board, Topeka

Appointments by the Chief Justice

Judge James M. Macnish, Jr., Third Judicial District, Topeka
Judge Richard B. Walker, Ninth Judicial District, Newton
Gary L. Marsh, Chief Court Services Officer, Emporia

Appointments by the Governor

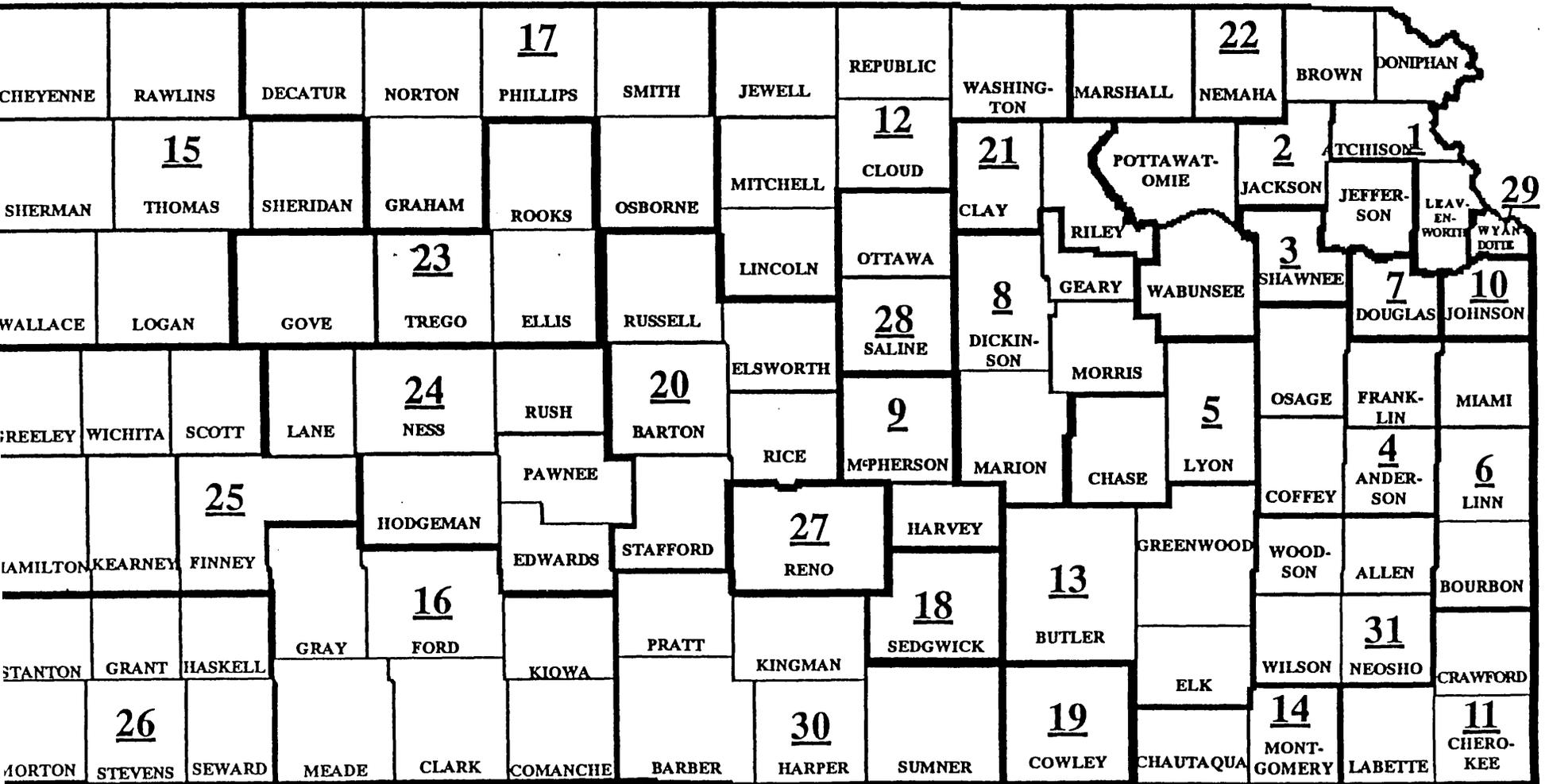
Jillian Waesche, Public Defender, Wichita
Shelley Bloomer, Private Defense Counsel, Osborne
Paul Morrison, Johnson County District Attorney, Olathe
Allen Flowers, Chief of Police, Coffeyville
Dave Meneley, Detective, Topeka Police Department
John Burchill, Community Corrections Program Director, Salina

Appointments by the Senate President and the Minority Leader, and the Speaker of the House and the Minority Leader, serve ex officio, without vote

Senator Jerry Moran, Thirty-seventh District, Hays
Senator Frank Gaines, Sixteenth District, Augusta
Representative Martha Jenkins, Forty-second District, Leavenworth
Representative Kathleen Sebelius, Fifty-sixth District, Topeka

Appendix B

Kansas Judicial Districts



Appendix C

Sentencing Range - Drug Offenses

A B C D E F G H I

Severity Level	3+Person	2 Person	1 Person + 1 Non-person	1 Person	3+ Non-person	2 Non-Person	1 Non-Person	2 + Mis-demeanor	No Record
I	227 216 205	218 207 196	208 198 188	199 189 179	189 180 171	185 176 167	180 171 162	176 167 158	171 162 153
II	92 87 82	86 81 76	80 76 72	75 71 67	69 65 61	66 62 58	63 60 57	60 57 54	57 54 51
III	57 54 51	52 49 46	47 44 41	40 38 36	35 33 31	29 27 25	26 24 22	21/20/19 21/20/19	18/17/16 18/17/16
IV	47 44 41	40 38 36	35 33 31	29 27 25	24 22 20	20 19 18	18 17 16	15 14 13	13 12 11

SNTRGDG2

Legend

- Presumptive Incarceration
- Presumptive Probation

DRUG

SEVERITY LEVEL

1

<u>KSA Number</u>	<u>Description of Statut</u>	<u>Class</u>
65-4127a(a)	Possession and Distribution of: ----- opiates, opium, or narcotic drugs (Three or more total convictions)	A
65-4127b (b) (1),(2),(3),(4),(5)	Manufacture, Possession, Disposition or ----- Sale of: Depressant, Stimulant, Hallucinogenic Drugs or Other Substances (Three or more total convictions)	C

SANCTIONS

3+Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+Non- Person	2 Non- Person	1 Non- Person	2+Msd	No Record
227	218	208	199	189	185	180	176	171
216	207	198	189	180	176	171	167	162
205	196	188	179	171	167	162	158	153
PROBATION PERIOD:.....36 MONTHS				POST-RELEASE SUPERVISION PERIOD:...24 MONTHS				

DRUG

SEVERITY LEVEL

2

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>
65-4127 a (a)	Possession and Distribution of: ----- Opiates, Opium or Narcotic Drugs (Two Total Convictions)	B
65-4127 a (c)	Illegal Substances Involved were Possessed ----- with Intent to Sell, Sold, or Offered for Sale In or On, or Within 1,000 feet of any School Property (Includes First and Subsequent Convictions)	B
65-4127 b (b) (1),(2),(3),(4),(5)	Manufacture, Possession, Disposition or ----- Sale of: Depressant, Stimulant, Hallucinogenic Drugs or Other Substances (Two Total Convictions)	C
65-4127 b (e)	Illegal Substances Involved were Possessed ----- with Intent to Sell, Sold, or Offered for Sale In or On, or Within 1,000 feet of any School Property (Includes First and Subsequent Convictions)	B

DRUG

SEVERITY LEVEL

3

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>
65-4127a(a)	Possession and Distribution of: ----- opiates, opium, or narcotic drugs (First Conviction Only)	C
65-4127b (b) (1),(2),(3),(4),(5)	Manufacture, Possession, Disposition or ----- Sale of: Depressant, Stimulant, Hallucinogenic Drugs or Other Substances (First Conviction Only)	C

SANCTIONS

3+Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+Non- Person	2 Non- Person	1 Non- Person	2+Msd	No Record
57	52	47	40	35	29	26	21	18
54	49	44	38	33	27	24	20	17
51	46	41	36	31	25	22	19	16
PROBATION PERIOD:.....36 MONTHS				POST-RELEASE SUPERVISION PERIOD:...24 MONTHS				

DRUG

SEVERITY LEVEL

4

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>
65-4127 b (a) (1),(2),(3),(4),(5)	Manufacture, Possession, Disposition or Sale of: Depressant, Stimulant, Hallucinogenic Drugs or Other Substances (Second or Subsequent Convictions of Possession)	D
65-4127 b (c)	Illegal Substances Involved were Possessed with Intent to Sell, Sold, or Offered for Sale To a Child Under Eighteen Years of Age (Includes First and Subsequent Convictions)	D

SANCTIONS

3+Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+Non- Person	2 Non- Person	1 Non- Person	2+Msd	No Record
47	40	35	29	24	20	18	15	13
44	38	33	27	22	19	17	14	12
41	36	31	25	20	18	16	13	11
PROBATION PERIOD:.....24 MONTHS				POST-RELEASE SUPERVISION PERIOD:...12 MONTHS				

Appendix D

Legend

-  Presumptive Incarceration
-  Presumptive Probation

Chart 15
Sentencing Range - Non Drug Offenses

Severity Level	A 3+Person	B 2 Person	C 1 Person + 1 Non-person	D 1 Person	E 3 + Non-person	F 2 Non- Person	G 1 Non- Person	H 2 + Mis- demeanor	I No Record
I	227 218 205	214 203 192	199 189 179	185 176 167	171 162 153	157 149 141	142 135 128	129 122 115	114 108 102
II	171 162 153	160 152 144	150 142 134	139 132 125	128 121 114	117 111 105	107 101 95	98 91 85	88 81 75
III	114 108 102	105 100 95	99 94 89	92 87 82	86 81 76	77 73 69	71 67 63	65 61 57	57 54 51
IV	95 90 85	90 85 80	83 79 75	77 73 69	71 67 63	66 62 58	58 55 52	53 50 47	48 45 42
V	76 72 68	71 67 63	67 63 59	61 58 55	57 54 51	52 49 46	48 45 42	42 40 38	38 36 34
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

ENTRANCE

**NON-DRUG
SEVERITY LEVEL**

1

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person</u> <u>N=Nonperson</u>
21-3401	Attempted Murder in the First Degree (21-3301) -----	B	P
21-3402	Murder in the Second Degree -----	B	P
21-3421	Aggravated Kidnapping -----	A	P

SANCTIONS

3+Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+Non- Person	2 Non- Person	1 Non- Person	2+Msd	No Record
227	214	199	185	171	157	142	129	114
216	203	189	176	162	149	135	122	108
205	192	179	167	153	141	128	115	102
PROBATION PERIOD:.....36 MONTHS					POST-RELEASE SUPERVISION PERIOD:.....24 MONTHS			

**NON-DRUG
SEVERITY LEVEL**

2

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3502	Rape -----	B	P
21-3506	Aggravated Criminal Sodomy -----	B	P

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
171	160	150	139	128	117	107	96	86
162	152	142	132	121	111	101	91	81
153	144	134	125	114	105	95	85	75

PROBATION PERIOD:.....36 MONTHS

POST-RELEASE SUPERVISION PERIOD:.....24 MONTHS

**NON-DRUG
SEVERITY LEVEL**

3

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3403	Voluntary Manslaughter -----	C	P
21-3415*	Aggravated Battery on Law Enforcement Officer ----- (serious and/or permanent injury)	B	P
21-3420	Kidnapping -----	B	P
21-3427	Aggravated Robbery -----	B	P
21-3503*	Indecent Liberties with a Child ----- (intercourse with a child age 12 or under)	C	P
21-3719*	Aggravated Arson ----- (serious threat to life)	B	P

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
114	105	99	92	86	77	71	65	57
108	100	94	87	81	73	67	61	54
102	95	89	82	76	69	63	57	51

PROBATION PERIOD:.....36 MONTHS

POST-RELEASE SUPERVISION PERIOD:.....24 MONTHS

* denotes that the particular offense is listed in other severity tables depending upon the amount of harm done.

**NON-DRUG
SEVERITY LEVEL**

4

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person</u> <u>N=Nonperson</u>
21-3414*	Aggravated Battery ----- (serious and permanent injury)	C	P
21-3503*	Indecent Liberties with a Child ----- (intercourse with a child age 12 or over)	C	P

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
95	90	83	77	71	66	58	53	48
90	85	79	73	67	62	55	50	45
85	80	75	69	63	58	52	47	42
PROBATION PERIOD:.....36 MONTHS				POST-RELEASE SUPERVISION PERIOD:.....24 MONTHS				

* denotes that the particular offense is listed in other severity tables depending upon the amount of harm done.

**NON-DRUG
SEVERITY LEVEL**

5

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3404	Involuntary Manslaughter -----	D	P
21-3405a	Aggravated Vehicular Homicide -----	E	P
21-3415*	Aggravated Battery on Law Enforcement Officer (serious injury) -----	B	P
21-3417	Attempted Poisoning -----	C	P
21-3426	Robbery -----	C	P
21-3503*	Indecent Liberties with a Child ----- (fondling/soliciting a child age 12 and under)	C	P
21-3516	Sexual Exploitation of a Child -----	D	P
21-3518	Aggravated Sexual Battery -----	D	P
21-3603*	Aggravated Incest (intercourse with a Child) -----	D	P
21-3604*	Abandonment of a Child ----- (resulting in immediate physical danger)	E	P
21-3716	Aggravated Burglary -----	C	P
21-3718*	Arson (damage resulting in more than \$50,000 loss) -----	C	N

**NON-DRUG
Severity Level 5 Continued**

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
76	71	67	61	57	52	48	42	38
72	67	63	58	54	49	45	40	36
68	63	59	55	51	46	42	38	34
PROBATION PERIOD:.....36 MONTHS				POST-RELEASE SUPERVISION PERIOD:.....24 MONTHS				

* denotes that the particular offense is listed in other severity tables depending upon the amount of harm done.

**NON-DRUG
SEVERITY LEVEL**

6

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3411	Aggravated Assault on Law Enforcement Officer -----	C	P
21-3414*	Aggravated Battery (serious injury) -----	C	P
21-3415*	Aggravated Battery on Law Enforcement Officer ----- (possibility of serious/permanent injury)	B	P
21-3503*	Indecent Liberties with a Child ----- (fondling/soliciting a child age 12 or over)	C	P
21-3509	Enticement of a Child -----	D	P
21-3511	Aggravated Indecent Solicitation of a Child -----	E	P
21-3514	Habitually Promoting Prostitution -----	E	P
21-3519	Promoting Sexual Performance by a Minor -----	E	P
21-3609	Abuse of a Child -----	D	P
21-3718*	Arson (resulting in damage of \$25,000 to \$50,000) -----	C	N
21-3719*	Aggravated Arson (no serious threat to life) -----	B	P

**NON-DRUG
Severity Level 6 Continued**

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3742*	Throwing Objects from a Bridge or Overpass ----- (resulting in injury to a person)	D	P
21-3810*	Aggravated Escape from Custody ----- (escape facilitated by use or threat of violence)	E	P
21-3826	Distribution of Contraband in a Penal Institution -----	E	N
21-3829	Aggravated Interference with Conduct of Public Business -----	D	P
21-3833	Aggravated Intimidation of a Victim or Witness -----	E	P
21-4215	Obtaining a Prescription-only Drug by Fraudulant Means ----- (for the purpose of resale)	C	N

SANCTIONS

3+Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
46	41	38	36	32	29	26	21	19
43	39	36	34	30	27	24	20	18
40	37	34	32	28	25	22	19	17
PROBATION PERIOD:.....24 MONTHS				POST-RELEASE SUPERVISION PERIOD:.....24 MONTHS				

* denotes that the particular offense is listed in other severity tables depending upon the amount of harm done.

**NON-DRUG
SEVERITY LEVEL**

7

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3410	Aggravated Assault -----	D	P
21-3413	Battery on a Correctional Officer -----	D	P
21-3414*	Aggravated Battery ----- (possibility of serious/permanent injury)	C	P
21-3422	Aggravated Interference with Parental Custody -----	D	P
21-3428	Blackmail -----	E	N
21-3513(2)	Promoting Prostitution (age 16 or under) -----	E	P
21-3603*	Aggravated Incest ----- (lewd fondling and touching, no intercourse)	D	P
21-3611*	Aggravated Juvenile Delinquency ----- (burning with serious threat to life)	E	P
21-3611*	Aggravated Juvenile Delinquency ----- (aggravated assault or aggravated battery)	E	P
21-3701*	Theft ----- (loss of \$50,000 or more)	D	N
21-3704*	Theft of Services (loss of \$50,000 or more) -----	D	N

**NON-DRUG
Severity Level 7 Continued**

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3708	Habitually Giving a Worthless Check -----	E	N
21-3715*	Burglary (entrance into a building, etc.) -----	D	N
21-3718*	Arson (loss of \$25,000 or less) -----	C	N
21-3720*	Criminal Damage to Property (loss of \$50,000 or more) -----	D	N
21-3726	Aggravated Tampering with a Traffic Signal -----	E	N
21-3729*	Unlawful Use of a Financial Card (loss of \$50,000 or more) -----	D	N
21-3742*	Throwing Objects from a Bridge or Overpass (harm to property) -----	E	N
21-3753	Grain Embezzlement-----	C	N
21-3755	Computer Crime, Unlawful Computer Access ----- (loss of \$150 or more)	E	N
21-3802	Sedition -----	D	N
21-3805*	Perjury (false statement made in a felony trial) -----	D	N
21-3901	Bribery -----	D	N
21-4401	Racketeering -----	D	N

**NON-DRUG
Severity Level 7 Continued**

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
34	31	29	26	23	19	17	14	13
32	29	27	24	21	18	16	13	12
30	27	25	22	19	17	15	12	11
PROBATION PERIOD:.....24 MONTHS				POST-RELEASE SUPERVISION PERIOD:.....12 MONTHS				

* denotes that the particular offense is listed in other severity tables depending upon the amount of harm done.

NON-DRUG
SEVERITY LEVEL

8

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3604*	Abandonment of a Child (no immediate physical danger) -----	E	P
21-3611*	Aggravated Juvenile Delinquency ----- (burning without threat to life)	E	P
21-3612	Contributing to a Child's Misconduct or Deprivation ----- (subsections 1e and 1f only)	E	P
21-3707*	Giving a Worthless Check (loss of \$50,000 or more) -----	D	N
21-3710	Forgery -----	D	N
21-3711	Making a False Writing -----	D	N
21-3714	Possession of Forgery Devices -----	E	N
21-3731	Criminal Use of Explosives -----	E	P
21-3807	Compounding a Felony Crime -----	E	N
21-3810*	Aggravated Escape from Custody (no violence used) -----	E	N
21-3811	Aiding an Escape -----	E	N
21-3812	Aiding a Felon (subsections a and b) -----	E	N

**NON-DRUG
Severity Level 8 Continued**

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3904	Presenting a False Claim (claim of \$50 or more) -----	E	N
21-3905	Permitting a False Claim (claim of \$50 or more) -----	E	N
21-3910	Misuse of Public Funds -----	D	N
21-4105	Incitement to Riot -----	D	P
21-4301a	Promoting Obscenity to Minors ----- (second or subsequent offense)	D	P
21-4304	Commercial Gambling -----	E	N
21-4306	Dealing in Gambling Devices -----	E	N
21-4308	Installing Communication Facilities for Gamblers -----	E	N
21-4405	Commercial Bribery -----	E	N

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
23	20	19	17	15	13	11	11	9
21	19	18	16	14	12	10	10	8
19	18	17	15	13	11	9	9	7

PROBATION PERIOD:.....24 MONTHS

POST-RELEASE SUPERVISION PERIOD:.....12 MONTHS

NON-DRUG

SEVERITY LEVEL

9

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3406	Assisting Suicide -----	E	P
21-3407	Criminal Abortion -----	D	P
21-3419	Terroristic Threats -----	E	P
21-3610	Furnishing Alcohol to a Minor for Illicit Purposes -----	E	P
21-3611*	Aggravated Juvenile Delinquency ----- (escape/running away for a second or subsequent time)	E	N
21-3701*	Theft (loss of \$500 to \$50,000) -----	E	N
21-3704*	Theft of Services (loss of \$500 to \$50,000) -----	E	N
21-3712	Destroying a Written Instrument-----	E	N
21-3713	Altering a Legislative Document-----	E	N
21-3715*	Burglary (entrance into a motor vehicle) -----	D	N
21-3717	Possession of Burglary Tools -----	E	N
21-3720*	Criminal Damage to Property (loss of \$500 to \$50,000) -----	E	N
21-3729*	Unlawful Use of a Financial Card (\$500 to \$50,000) -----	E	N

NON-DRUG

Severity Level 9 Continued

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person</u> <u>N=Nonperson</u>
21-3756	Adding Dockage or Foreign Material to Grain -----	E	N
21-3757	Odometers; Unlawful Acts -----	E	N
21-3803	Practicing Criminal Syndicalism -----	E	N
21-3805*	Perjury (other than a felony trial) -----	E	N
21-3808	Obstructing Legal Process or Duty ----- (pertaining to a felony case)	E	N
21-3815	Attempting to Influence a Judicial Officer -----	E	N
21-3817	Corrupt Conduct of a Juror -----	E	N
21-3825	Aggravated False Impersonation -----	E	N
21-4115	Desecrating a Cemetery -----	E	N
21-4201	Unlawful Use of Weapons (subsections 1g and 1h only) -----	E	N
21-4202	Aggravated Weapons Violation -----	E	N
21-4204	Unlawful Possession of a Firearm (subsection 1b only) -----	D	N
21-4209a	Unlawful Possession of Explosives -----	D	N
21-4301	Promoting Obscenity (second or subsequent offense) -----	E	P

NON-DRUG

Severity Level 9 Continued

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person</u> <u>N=Nonperson</u>
21-4406	Sports Bribery -----	E	N
21-4408	Tampering with a Sports Contest -----	E	N
65-4115(d)	Representing a Non-controlled Substance as a Controlled Substance -----	E	N
65-4153	Paraphernalia or Simulated Controlled Substance ----- (to a minor)	E	N
8-262	Driving While Suspended -----	E	N
8-287	Driving While a Habitual Violator -----	E	N
8-1568	Fleeing or Eluding a Law Enforcement Officer ----- (second or subsequent offense)	E	P

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
17	15	13	13	11	10	9	8	7
15	13	11	11	9	8	7	6	5
PROBATION PERIOD:.....24 MONTHS				POST-RELEASE SUPERVISION PERIOD:.....12 MONTHS				

* denotes that the particular offense is listed in other severity tables depending upon the amount of harm done.

**NON-DRUG
SEVERITY LEVEL**

10

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3601	Bigamy -----	E	N
21-3602	Incest -----	E	P
21-3605	Nonsupport of a Child or Spouse -----	E	N
21-3606	Criminal Desertion -----	E	P
21-3707*	Giving a Worthless Check (loss of \$500 to \$50,000) -----	E	N
21-3734	Impairing of a Security Interest (loss of \$150 or more) -----	E	N
21-3735	Fraudulent Release of a Security Agreement -----	E	N
21-3736	Warehouse Receipt Fraud -----	E	N
21-3745	Theft of Telecommunications Services ----- (second or subsequent offense, loss of \$150 or more)	E	N
21-3748	Piracy of Sound Recordings -----	E	N

NON-DRUG

Severity Level 10 Continued

<u>KSA Number</u>	<u>Description of Statute</u>	<u>Class</u>	<u>P=Person N=Nonperson</u>
21-3754	False Warehouse Records or Reports -----	D	N
21-3814	Aggravated Fail to Appear -----	E	N
21-3830	Dealing in False Identification Documents -----	E	N
21-4214	Obtaining a Prescription by Fraud ----- (second or subsequent offense)	D	N
21-4315	Dogfighting (subsection b) -----	E	N

SANCTIONS

3+ Prsn	2 Prsn	1 Prsn & 1 NonPrsn	1 Prsn	3+ Non- Person	2 Non- Person	1 Non- Person	2+ Msd	No Record
13	12	11	10	9	8	7	7	7
12	11	10	9	8	7	6	6	6
11	10	9	8	7	6	5	5	5
PROBATION PERIOD:.....24 MONTHS				POST-RELEASE SUPERVISION PERIOD:.....12 MONTHS				

* denotes that the particular offense is listed in other severity tables depending upon the amount of harm done.

Appendix E

MONITORING INSTRUMENTS

The primary purpose of monitoring instruments is to provide the commission with the necessary information to assess the impact of the guidelines on both local and state correctional resources, as well as, impact of proposed revisions to the guidelines. In addition, monitoring information can assist in training and will enable the Commission to answer queries from the legislature, the Department of Corrections, the judiciary, prosecutors, defense attorneys, or the media concerning the operation of the guidelines.

The Commission studied other guideline states and found that compliance has been a problem in incorporating an information system. The Commission felt that the monitoring system should use forms relied upon in the actual sentencing process. Therefore, with little additional effort, or risk of inaccuracy, the same information can be supplied to the Commission. In reviewing other states, the Commission found that compliance has been low due to the addition of another form to an already overburdened system. In contrast however, states like Washington have incorporated all of the information into the existing Journal Entry of Sentencing. This state-wide uniform instrument serves a dual purpose as the court's record and as a guidelines monitoring instrument. The State of Washington has had a very high compliance rate with this type of monitoring system. The Commission decided to incorporate guideline information and applications into a journal entry format.

PRESENTENCE INVESTIGATION REPORTS

On October 8, 1990, the Commission accepted a uniform format for the presentence investigation report in all felony cases. The Commission requests this format be used upon implementation of guidelines to provide consistency state-wide. The Presentence Investigation will include a Face Sheet, Kansas Criminal History Worksheet, and limited topic sections covering the current offense (official version), defendant's version, victim(s) statement/restitution, and the Court Services Officer's professional assessment of conditions of probation.

A copy of the face sheet and criminal history worksheet will be sent to the Sentencing Commission in each felony case for monitoring purposes. The face sheet and criminal history worksheet will provide offender identification information, offense conviction information for each crime of conviction and all prior convictions with criminal history classification.

JOURNAL ENTRY

A journal entry of sentencing and probation revocation will be submitted to the Sentencing Commission for each sentence imposed for felonies committed on or after July 1, 1992. The journal entry of sentencing and probation revocation will provide the commission with court processing information including final disposition. The commission staff will review completed sentencing reports to identify computational errors. Staff will promptly notify the sentencing court in writing when such errors are identified. The information will then provide a database to assess the impact of the guidelines on both local and state correctional resources and the impact of proposed revisions to the guidelines.

PRESENTENCE INVESTIGATION REPORT
FACE SHEET

_____ JUDICIAL DISTRICT
_____ COUNTY

DEFENSE ATTORNEY:

CASE # _____

COURT APPOINTED: _____ YES _____ NO

NAME: _____

PROSECUTING ATTORNEY:

A/K/A: _____

D.O.B.: ____/____/____ AGE: _____

SENTENCING JUDGE:

S.S.N.: ____/____/____ K.B.I.# _____

SEX: M F RACE: W B AI. A

OFFENSES: (List in order from highest seriousness level to least)

ETHNICITY: HISP. _____ NON HISP. _____

K.S.A.: M F _____

ADDRESS: _____

DESCRIPTION:

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

CITIZENSHIP: U.S. NON-U.S.

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

DATE OF GUILTY PLEA OR JUDGEMENT:
____/____/____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

SENTENCING DATE: ____/____/____

K.S.A.: M F _____

DETAINERS OR OTHER CHARGES PENDING?
_____ YES _____ NO

DESCRIPTION:

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

SUBJECT IN CUSTODY? _____ YES _____ NO

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

CREDIT TIME SERVED _____

MORE THAN 3 CHARGES? _____ YES _____ NO

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

CHARGES REDUCED? _____ YES _____ NO

K.S.A.: M F _____

CODEFENDANTS _____

DESCRIPTION:

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESENTENCE INVESTIGATOR: _____

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

____/____/____
DATE SIGNED

____/____/____
DATE SUBMITTED

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

K.S.A.: M F _____

DESCRIPTION: _____

_____	_____	_____
CRIME SERIOUSNESS	CRIMINAL HISTORY	GRID BLOCK SENTENCING RANGE

PRESUMPTIVE PRISON _____ POST SUPERVISION DURATION _____

PRESUMPTIVE PROBATION _____ PROBATION DURATION _____

CURRENT OFFENSE:

1. OFFICIAL VERSION:

2. DEFENDANT'S VERSION:

3. VICTIM'S STATEMENT/INJURY/DAMAGE:

TOTAL RESTITUTION: \$

OWED TO NAME: _____ NAME: _____

ADDRESS: _____ ADDRESS: _____

\$

\$

NAME: _____ NAME: _____

ADDRESS: _____ ADDRESS: _____

\$

\$

STATEMENTS:

4. OFFICER'S ASSESSMENT OF CONDITION OF PROBATION:

- KSA-21-4610
- HOUSE ARREST
- ELECTRONIC MONITORING
- COMMUNITY SERVICE
- ALCOHOL COUNSELING (OUT-PATIENT)
- ALCOHOL EVALUATION (FOLLOW COUNSELING RECOMMENDATIONS)
- DRUG COUNSELING (OUT-PATIENT)
- ALCOHOL TREATMENT (IN-PATIENT)
- BOOT/CONSERVATION CAMP
- MENTAL HEALTH EVALUATION (FOLLOWING COUNSELING RECOMMENDATIONS)
- MENTAL HEALTH COUNSELING (OUT-PATIENT)
- MENTAL HEALTH TREATMENT (IN-PATIENT)
- FINE
- URINALYSIS-TESTING
- EDUCATIONAL PROGRAM - G.E.D./VOCATIONAL/HIGHER EDUCATION
- GAIN/MAINTAIN EMPLOYMENT

K.B.I.#	KANSAS CRIMINAL HISTORY WORKSHEET	DISTRICT COURT CASE #
K.B.I. UPDATE NEEDED <input type="checkbox"/> YES <input type="checkbox"/> NO		JUDICIAL DIST. CO. NAME
NO PRIOR RECORD <input type="checkbox"/>	<input type="checkbox"/> SUPPLEMENT ATTACHED	P.S.I. INVESTIGATOR (LAST, FIRST, MI.)

OFFENDER NAME (LAST, FIRST, MI.)	DATE OF BIRTH	S.S.N.#	WORKSHEET DATE	SENTENCE DATE
	/ /	- -	/ /	/ /

WAS OFFENDER UNDER CUSTODY SUPERVISION AT TIME OF CURRENT OFFENSE? NO YES
 IF YES, TYPE OF SUPERVISION: PROBATION PAROLE SUPERVISED RELEASE CONFINED RELEASED (PENDING SENTENCE) ESCAPE OTHER

K.S.A. & OFFENSE TITLE	FED.	STATE	MILITARY	MUN./CITY	ST.	CO.	DISPOSITION DATE	CASE #	JUVENILE			ADULT					
									FELONY	CLASS A		FELONY	CLASS A				
									PER	NON	PER	NON	PER	NON			
1.																	
2.																	
3.																	
4.																	
5.																	
6.																	
7.																	
8.																	
9.																	
10.																	
11.																	
12.																	
13.																	
14.																	
15.																	
TOTALS																	

*CONVERTED PERSON FEL.

<input style="width: 40px; height: 20px;" type="text"/> +	<input style="width: 40px; height: 20px;" type="text"/> +	<input style="width: 40px; height: 20px;" type="text"/> =	<input style="width: 40px; height: 20px;" type="text"/>	TOTAL PERSON FELONIES
<input style="width: 40px; height: 20px;" type="text"/> +	<input style="width: 40px; height: 20px;" type="text"/> =	<input style="width: 40px; height: 20px;" type="text"/>	TOTAL NON-PERSON FELONIES	
<input style="width: 40px; height: 20px;" type="text"/> +	<input style="width: 40px; height: 20px;" type="text"/> =	<input style="width: 40px; height: 20px;" type="text"/>	TOTAL PERSON MISDEMEANORS	
<input style="width: 40px; height: 20px;" type="text"/> +	<input style="width: 40px; height: 20px;" type="text"/> =	<input style="width: 40px; height: 20px;" type="text"/>	TOTAL NON-PERSON MISDEMEANORS	

Second Most Serious Offense
Count No.: _____ Crime: _____
K.S.A.: _____ Seriousness Ranking: _____
Date of Crime: _____ Attempt Conspiracy Solicitation

Third Most Serious Offense
Count No.: _____ Crime: _____
K.S.A.: _____ Seriousness Ranking: _____
Date of Crime: _____ Attempt Conspiracy Solicitation

Supplement attached to report additional current offenses.

2.4 The Court finds that sufficient probable cause does not exist and dismisses the following counts:

Count No.: _____ Crime: _____
K.S.A.: _____ Seriousness Ranking: _____
Date of Crime: _____ Attempt Conspiracy Solicitation

Count No.: _____ Crime: _____
K.S.A.: _____ Seriousness Ranking: _____
Date of Crime: _____ Attempt Conspiracy Solicitation

Count No.: _____ Crime: _____
K.S.A.: _____ Seriousness Ranking: _____
Date of Crime: _____ Attempt Conspiracy Solicitation

Count No.: _____ Crime: _____
K.S.A.: _____ Seriousness Ranking: _____
Date of Crime: _____ Attempt Conspiracy Solicitation

2.5 The Court finds that sufficient probable cause does not exist and the above-captioned matter is hereby dismissed in its entirety.

2.6 The defendant is bound over for trial and arraignment is set on _____
(Date)

3. ARRAIGNMENT

3.1 An arraignment hearing in the above-captioned action was held before (District)(Magistrate) Judge _____
on _____
(Date)

3.2 Present were:
 Defendant:
 Defendant's Attorney:
 (Assistant)(District)(County) Attorney:
 Other:

3.3 The defendant waives his right to a formal reading of the charges contained within the (original)(amended) (complaint) (information).

The Court reads to the defendant a statement of rights.

The defendant informs the Court that (he)(she) understands his rights as stated to (him)(her) in their entirety.

3.4 The Court then reads to the defendant the following list of charges contained in the (original)(amended) (complaint) (information):

Most Serious Offense (Primary Offense)

Count No.: _____

K.S.A.: _____

Date of Crime: _____

Crime: _____

Seriousness Ranking: _____

Attempt Conspiracy Solicitation

Second Most Serious Offense

Count No.: _____

K.S.A.: _____

Date of Crime: _____

Crime: _____

Seriousness Ranking: _____

Attempt Conspiracy Solicitation

Third Most Serious Offense

Count No.: _____

K.S.A.: _____

Date of Crime: _____

Crime: _____

Seriousness Ranking: _____

Attempt Conspiracy Solicitation

Supplement attached to report additional current offenses.

3.5 The defendant thereafter acknowledges that (he)(she) understands the crimes for which (he)(she) is charged, (his)(her) rights with respect to the charges and following questioning by the Court and the establishment of a factual basis the defendant enters a plea as follows:

Guilty to Counts _____ of the (original)(amended) (complaint)(information).

Not Guilty to Counts _____ of the (original)(amended) (complaint)(information).

Nolo Contendere to Counts _____ of the (original)(amended) (complaint)(information).

3.6 The Court accepts the defendant's plea and finds the defendant Guilty of Counts _____ of the (original)(amended) (complaint)(information).

3.7 The Court sets the matter for (jury)(bench) trial to commence on _____ (Date)

3.8 The following counts of the (original)(amended) (complaint)(information) are DISMISSED (with) (without) prejudice by the State and granted by the Court.

3.9 A pre-sentence report is ordered and a sentencing hearing is set to be heard on _____ (Date)

4. TRIAL

4.1 A (jury)(bench) trial in the above-captioned matter was commenced on _____ and ending on _____ (Date)

4.2 Present were:

Defendant:

Defendant's Attorney

(Assistant)(District)(County) Attorney:

Other:

4.3 The (jury)(court), upon hearing statements by witnesses, argument of counsel and receiving evidence finds the defendant guilty of counts _____ of the (original)(amended) (complaint)(information).

The (jury)(court), upon hearing statements by witnesses, argument of counsel and receiving evidence finds the defendant guilty of the following lesser included offenses:

Most Serious Offense (Primary Offense)

Count No.: _____

K.S.A.: _____

Date of Crime: _____

Crime: _____

Seriousness Ranking: _____

Attempt Conspiracy Solicitation

Second Most Serious Offense

Count No.: _____

K.S.A.: _____

Date of Crime: _____

Crime: _____

Seriousness Ranking _____

Attempt Conspiracy Solicitation

Third Most Serious Offense

Count No.: _____

K.S.A.: _____

Date of Crime: _____

Crime: _____

Seriousness Ranking _____

Attempt Conspiracy Solicitation

Supplement attached to report additional current convictions.

4.4 The (jury)(court), upon hearing statements by witnesses, argument of counsel and receiving evidence finds the defendant not guilty of counts _____ of the (original)(amended) (complaint)(information).

4.5 The Court declares a mistrial.

4.6 On _____, the defendant appears before the court and withdraws (his)(her) plea of Not Guilty and enters a plea of (guilty)(nolo contendere) to count(s) _____ of the (original)(amended) (complaint)(information). count(s) _____ (was)(were) dismissed at the request of the State and granted by the Court.

4.7 Other:

4.8 A pre-sentence report is ordered and a sentencing hearing is set to be heard on _____ (Date).

5. SENTENCING

5.1 A sentencing hearing in the above-captioned matter was held before (District)(Magistrate) Judge _____ on _____ (Date).

5.2 Present were:

Defendant:

Defendant's Attorney:

(Assistant)(District)(County) Attorney:

Other:

5.3 The Defendant was asked if there was any legal cause why judgement should not be pronounced, and none was shown.

6. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the Court finds:

6.1 CURRENT OFFENSE(S): The defendant was found guilty on _____ by (plea)(jury-verdict)(bench trial) of: _____ (Date)

Most Serious Offense (Primary Offense)
Count No.: _____
K.S.A.: _____
Date of Crime: _____

Crime: _____
Seriousness Ranking: _____
 Attempt Conspiracy Solicitation

Second Most Serious Offense
Count No.: _____
K.S.A.: _____
Date of Crime: _____

Crime: _____
Seriousness Ranking: _____
 Attempt Conspiracy Solicitation

Third Most Serious Offense
Count No.: _____
K.S.A.: _____
Date of Crime: _____

Crime: _____
Seriousness Ranking: _____
 Attempt Conspiracy Solicitation

Supplement attached to report additional current convictions.

- 6.2 Parties agree on the Criminal History Classification as established in the Presentence Investigative Report.
- Parties did not agree on the Criminal History Classification as established in the Presentence Investigative Report.
- (State)(Defendant) requests an evidentiary hearing for proof of Criminal History.
- (State)(Defendant) does not request an evidentiary hearing for proof of Criminal History.
- An evidentiary hearing in the above-captioned action was held before District Judge _____ on _____ (Date)

The Court, upon hearing statements by witnesses, argument of counsel and receiving evidence finds that the defendant's Criminal History Classification is as follows:

6.3 CRIMINAL HISTORY CLASSIFICATION (CIRCLE) (Attach criminal history worksheet and amended worksheet):

A B C D E F G H I

6.4 The presumptive guideline sentence for the primary offense is:

- A prison term of _____ to _____ months and a post-prison supervision duration of _____ months.
- A probationary sentence of _____ to _____ months and a probation supervision duration of _____ months.

6.5 Additional current convictions:

PRESUMPTIVE RANGE

BASE RANGE

- Second most serious _____ to _____ months _____ to _____ months
- Third most serious _____ to _____ months _____ to _____ months
- Supplement attached to report additional current convictions.

7. JUDGEMENT AND ORDER

7.1 It is, therefore, by the Court ORDERED, ADJUDGED, AND DECREED that:

The defendant be sentenced to the custody of the Secretary of Corrections of the State of Kansas to serve a sentence of:

- Most serious offense (Primary): _____ months
- Second Most serious offense: _____ months (Concurrent)(Consecutive) to primary sentence
- Third Most Serious offense: _____ months (Concurrent)(Consecutive) to primary sentence

Supplement attached to report additional current convictions.

7.2 Total Term of Imprisonment: _____ months

7.3 This prison term runs (Concurrent)(Consecutive) to prior sentence of _____ months in Case No.: _____ in the District Court of _____ County, Kansas (Other _____) on _____ (Date)

7.4 Credit of _____ days is granted for time spent incarcerated.

7.5 The defendant serve a post-prison supervision duration of _____ months.

7.6 The defendant is hereby placed on probation for a duration of _____ months.

7.7 The defendant, as a condition of probation is ordered to serve a period of _____ (days)(months) in the _____ county jail.

7.8 The defendant, as a condition of probation is ordered to serve a period of _____ (days)(months) at the State Conservation Camp.

7.9 The defendant is ordered to comply with the following conditions of probation:

- 21-4603
- House arrest
- In-patient Alcohol/Drug treatment (Follow recommendations of counselor)
- In-patient Mental Health treatment (Follow recommendations of counselor)
- Out-patient Alcohol/Drug Treatment (Follow recommendations of counselor)
- Out-patient Mental Health treatment (Follow recommendations of counselor)
- Electronic Monitoring
- Random Urinalysis testing at request of C.S.O. at defendant's own expense.
- Notify the C.S.O. of changes in employment, residence and phone number.
- Gain/Maintain employment
- No contact with victim
- _____ Hours of Community Service

Pay the following costs to the Court in (monthly)(weekly)(daily) payments of _____

- Court Costs: _____ due by: _____
- Fines: _____ due by: _____
- Probation Fee: _____ due by: _____
- Attorney Fees: _____ due by: _____
- Alcohol Eval. Fee: _____ due by: _____
- Other: _____ due by: _____

Total amount restitution (with credit for amounts paid by co-defendant(s)) to:

<u>NAME</u>	<u>ADDRESS</u>	<u>AMOUNT</u>
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____

7.10 Substantial and compelling reasons exist which justify a departure sentence imposed for the:

- Most Serious Offense
- Second most Serious Offense
- Third Most Serious Offense

7.11 (State)(Defendant) moves the Court for imposition of a departure sentence.
The Court, without motion, imposes a departure sentence.

7.12 Type of departure sentence:

- Dispositional
- Durational
- Dispositional and Durational

7.13 Factors cited as a basis for departure sentence:

MITIGATING FACTORS

- 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.
- Victim was an aggressor or willing participant.
- Offender played a minor or passive role in the crime.
- Offender, because of physical or mental impairment, lacked substantial capacity for judgement when the offense was committed.
- The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.
- Other _____

AGGRAVATING FACTORS

- Deliberate Excessive Cruelty to Victim.
- Victim Particularly Vulnerable.
- Motivated by Race, Religion or Sexual Orientation of Victim.
- Other _____

IT IS SO ORDERED.

District Judge

APPROVED:

(Assistant)(District)(County) Attorney

Attorney for Defendant

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

STATE OF KANSAS

PLAINTIFF)

VS.

DEFENDANT)

CASE NO.: _____

K.B.I. NO.: _____

JOURNAL ENTRY OF PROBATION REVOCATION

1. HEARING

1.1 A probation revocation hearing in the above-captioned action was held before District Judge _____ on _____ (Date)

1.2 Present were:

- Defendant:
- Defendant's Attorney:
- (Assistant)(District)(County) Attorney:
- Other:

2. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel and case record to date, the court finds:

2.1 That on the _____ day of _____, 19____, the defendant was sentenced to the custody of the Secretary of Corrections as follows:

- Most serious offense (Primary): _____ months.
- Second most serious offense: _____ months (concurrent)(consecutive) to primary sentence.
- Third most serious offense: _____ months (concurrent)(consecutive) to primary sentence.

2.2 Total term of imprisonment: _____ months.

2.3 That the defendant was placed on probation for a duration of _____ months.

2.4 That the defendant was ordered to comply with conditions of probation as set forth by the court.

2.5 That on the _____ day of _____, 19____, a Motion to Revoke the defendant's probation was filed.

2.6 That there is sufficient evidence and grounds for the Court to consider revoking the defendant's probation in that the defendant violated (his)(her) probation as follows:

That the defendant stipulates to violating conditions of probation as follows:

- Conviction for new felony charge, ordered to serve sentence
- Conviction for new felony charge, probation granted
- Convicted of misdemeanor charge
- Convicted of misdemeanor charge more than once
- Failure to notify probation officer of arrest at earliest possible opportunity
- Failure to report immediately upon release from institution
- Failure to report as directed by probation officer
- Left assigned area of supervision without permission
- Failure to keep probation officer informed of current residence
- Failure to keep probation officer informed of employment status
- Falsifying information provided to probation officer
- Absconded - apprehended in state
- Absconded - apprehended out of state

- Firearm - own, possess, purchase, receive, sell, transport
- Illegal knife - own, possess, purchase, receive, sell, transport
- Ammunition - own, possess, purchase, receive, sell, transport
- Explosive device(s) - own, possess, purchase, receive, sell, transport
- Other illegal weapon/instrument - own, possess, purchase, receive, sell, transport
- Assaultive activities against a person
- Threat of violence against a person (face to face contact)
- Threat of violence against a person (written, telephoned, etc.)
- Harassment of another person, unauthorized contact with another person
- Positive UA/breathalyzer - Alcohol to excess
- Positive UA/breathalyzer - Alcohol to excess - more than once
- DUI - once
- DUI - more than once
- Positive UA - THC - once
- Positive UA - THC - more than once
- Positive UA - Cocaine - once
- Positive UA - Cocaine - more than once
- Positive UA - Amphetamines - once
- Positive UA - Amphetamines - more than once
- Positive UA - Opiates - once
- Positive UA - Opiates - more than once
- Positive UA - other drug(s) - once
- Positive UA - other drug(s) - more than once
- Refusal to submit to UA - once
- Refusal to submit to UA - more than once
- Possession, use, trafficking of a controlled substance, narcotics, or other drug(s) not prescribed by a licensed practitioner - once
- Possession, use, trafficking of a controlled substance, narcotics, or other drug(s) not prescribed by a licensed practitioner - more than once
- Associated with individual(s) involved in illegal activity - once
- Associated with individual(s) involved in illegal activity - more than once
- Failed to obtain permission to visit or correspond with inmate(s) - once
- Failed to obtain permission to visit or correspond with inmate(s) - more than once
- Failure to maintain reasonable steady employment
- Failure to participate in mental health counseling as directed
- Failure to participate in or complete mental health counseling as directed - multiple referrals
- Failure to participate in AA/NA as directed
- Failure to participate in AA/NA as directed - multiple referrals
- Failure to participate in sex offender counseling as directed
- Failure to participate in sex offender counseling as directed - multiple referrals
- Failure to participate in in-patient treatment program as directed
- Failure to participate in in-patient treatment program as directed - multiple referrals
- Failure to participate in out-patient treatment program as directed
- Failure to participate in out-patient treatment program as directed - multiple referrals
- Failure to participate in other substance abuse treatment program as directed
- Failure to participate in other substance abuse treatment program as directed - multiple referrals
- Failure to pay restitution as ordered
- Failure to pay court costs as ordered
- Failure to pay transportation costs as ordered
- Failure to pay AID costs as ordered
- Failure to pay fine(s) as ordered
- Failure to obtain employment within specified period of time
- Failure to obtain employment within specified period of time - more than once
- Failure to successfully complete required aftercare program
- Failure to successfully complete required aftercare program - more than once
- Failure to abide by special condition travel restriction
- Failure to abide by special condition travel restriction - more than once
- Failure to abide by special condition victim contact
- Failure to abide by special condition victim contact - more than once
- Failure to abide by special condition contact with children

- Failure to abide by special condition contact with children - more than once
- Failure to abstain from the use of alcohol
- Failure to abstain from the use of alcohol - more than once
- Failure to abide by conditions of probation in other jurisdiction
- Other - Explain:

- 2.7 That there is not sufficient evidence and grounds for the Court to consider revoking the defendant's probation.
- 2.8 That the defendant should remain on probation under the order to comply with the same general and special conditions.
- That the defendant should remain on probation under the following modified conditions:
- That the duration of probation be (extended)(reduced) to _____ months.
 - Other:

- 2.9 That the Court does hereby revoke the defendant's probation and orders that defendant to be turned over to the Secretary of Corrections to begin serving the original sentence(s) imposed on the _____ day of _____, 19____.
- 2.10 For purposes of computing time as provided in K.S.A. 21-4614, the sentence(s) as imposed shall be considered to have begun on the _____ day of _____, 19____, giving the defendant credit for _____ days spent incarcerated.

IT IS SO ORDERED.

District Judge

Approved:

(Assistant)(District)(County) Attorney

Attorney for the Defendant

Appendix F

STATUTORY IMPACT OF SENTENCING GUIDELINES PROPOSAL

Chapter 21

- 21-2501 Fingerprinting of Suspects (definition amendment)
- 21-2501a Maintenance of Records (definition amendment)
- 21-3301 Attempt (definition amendment)
- 21-3302 Conspiracy (definition amendment)
- 21-3303 Criminal solicitation (definition amendment)
- 21-3401 Murder in the First degree (penalty amendment)
- 21-3402 Murder in the Second degree (penalty amendment)
- 21-3403 Voluntary manslaughter (penalty amendment)
- 21-3404 Involuntary manslaughter (penalty amendment)
- 21-3405a Aggravated vehicular homicide (penalty amendment)
- 21-3406 Assisting Suicide (penalty amendment)
- 21-3410 Aggravated assault (penalty amendment)
- 21-3411 Aggravated assault on a law enforcement officer (penalty amendment)
- 21-3413 Battery on a Correctional Officer (penalty amendment)
- 21-3414 Aggravated battery (definition and penalty amendment)
- 21-3417 Attempted poisoning (penalty amendment)
- 21-3419 Terroristic threat (penalty amendment)
- 21-3420 Kidnapping (penalty amendment)
- 21-3421 Aggravated Kidnapping (penalty amendment)
- 21-3422 Interference with parental custody (penalty amendment)
- 21-3422a Aggravated interference with parental custody (penalty amendment)
- 21-3426 Robbery (penalty amendment)
- 21-3428 Blackmail (penalty amendment)
- 21-3433 Aircraft piracy (penalty amendment)
- 21-3502 Rape (penalty amendment)
- 21-3503 Indecent liberties with a child (definition and penalty amendment)
- 21-3504 Aggravated indecent liberties with a child (proposed repeal)
- 21-3506 Aggravated criminal sodomy (penalty amendment)
- 21-3509 Enticement of a child (penalty amendment)
- 21-3511 Aggravated indecent solicitation of a child (penalty amendment)
- 21-3513 Promoting prostitution (penalty amendment)
- 21-3514 Habitually promoting prostitution (penalty amendment)
- 21-3516 Sexual exploitation of a child (penalty amendment)
- 21-3518 Aggravated sexual battery (penalty amendment)
- 21-3519 Promoting sexual performance by a minor (penalty amendment)
- 21-3603 Aggravated incest (definition and penalty amendment)
- 21-3604 Abandonment of a child (definition and penalty amendment)
- 21-3605 Nonsupport of a child or spouse (penalty amendment)
- 21-3606 Criminal desertion (penalty amendment)
- 21-3609 Abuse of a child (penalty amendment)
- 21-3610b Furnishing alcoholic beverages to a minor for illicit purposes (penalty amendment)

- 21-3611 Aggravated juvenile delinquency (definition and penalty amendment)
- 21-3612 Contributing to a child's misconduct or deprivation (penalty amendment)
- 21-3701 Theft (penalty amendment)
- 21-3708 Habitually giving a worthless check (penalty amendment)
- 21-3710 Forgery (penalty amendment)
- 21-3711 Making a False Writing (penalty amendment)
- 21-3712 Destroying a written instrument (penalty amendment)
- 21-3713 Altering a legislative document (penalty amendment)
- 21-3714 Possession of forgery devices (penalty amendment)
- 21-3715 Burglary (penalty amendment)
- 21-3716 Aggravated burglary (penalty amendment)
- 21-3717 Possession of burglary tools (penalty amendment)
- 21-3718 Arson (definition and penalty amendment)
- 21-3719 Aggravated arson (definition and penalty amendment)
- 21-3720 Criminal damage to property (penalty amendment)
- 21-3726 Aggravated tampering with a traffic signal (penalty amendment)
- 21-3729 Unlawful use of a financial card (penalty amendment)
- 21-3731 Criminal use of explosives (penalty amendment)
- 21-3734 Impairing a security interest (penalty amendment)
- 21-3735 Fraudulent release of a security agreement (penalty amendment)
- 21-3736 Warehouse receipt fraud (penalty amendment)
- 21-3742 Throwing or otherwise casting rocks or other objects from a bridge or overpass onto a street, highway or railroad right-of-way (definition and penalty amendment)
- 21-3745 Theft of telecommunication services (penalty amendment)
- 21-3748 Piracy of sound recordings (penalty amendment)
- 21-3753 Grain embezzlement (penalty amendment)
- 21-3754 False warehouse records or reports (penalty amendment)
- 21-3755 Computer crime; unlawful computer access (penalty amendment)
- 21-3756 Adding dockage or foreign material to grain prohibited; adding certain material authorized (penalty amendment)
- 21-3757 Odometers; unlawful acts; penalties; definitions (penalty amendment)
- 21-3801 Treason (penalty amendment)
- 21-3802 Sedition (penalty amendment)
- 21-3803 Practicing criminal syndicalism (penalty amendment)
- 21-3805 Perjury (penalty amendment)
- 21-3807 Compounding a crime (penalty amendment)
- 21-3808 Obstructing legal process or official duty (penalty amendment)
- 21-3810 Aggravated escape from custody (definition and penalty amendment)
- 21-3811 Aiding escape (penalty amendment)
- 21-3812 Aiding a felon or person charged as a felon (penalty amendment)
- 21-3814 Aggravated failure to appear (penalty amendment)
- 21-3815 Attempting to influence a judicial officer (penalty amendment)
- 21-3817 Corrupt conduct by juror (penalty amendment)
- 21-3825 Aggravated false impersonation (penalty amendment)
- 21-3826 Traffic in or unauthorized possession or distribution of contraband in penal institutions (penalty amendment)
- 21-3829 Aggravated interference with conduct of public business (penalty amendment)

- 21-3830 Dealing in false identification documents (penalty amendment)
- 21-3833 Same; crime of aggravated intimidation of a witness or victim (penalty amendment)
- 21-3838 Unlawful disclosure of authorized interception of wire, oral or electronic communication (penalty amendment)
- 21-3901 Bribery (penalty amendment)
- 21-3905 Permitting a false claim (penalty amendment)
- 21-3910 Misuse of public funds (penalty amendment)
- 21-4105 Incitement to riot (penalty amendment)
- 21-4115 Desecrating a cemetery (penalty amendment)
- 21-4201 Unlawful use of weapons (penalty amendment)
- 21-4202 Aggravated weapons violation (penalty amendment)
- 21-4204 Unlawful possession of a firearm (penalty amendment)
- 21-4209a Unlawful possession of explosives (penalty amendment)
- 21-4214 Obtaining a prescription-only drug by fraudulent means (penalty amendment)
- 21-4215 Obtaining a prescription-only drug by fraudulent means for resale (penalty amendment)
- 21-4301 Promoting obscenity (penalty amendment)
- 21-4301a Promoting obscenity to minors (penalty amendment)
- 21-4304 Commercial gambling (penalty amendment)
- 21-4306 Dealing in gambling devices; defense (penalty amendment)
- 21-4308 Installing communication facilities for gamblers (penalty amendment)
- 21-4315 Dog fighting (penalty amendment)
- 21-4401 Racketeering (penalty amendment)
- 21-4405 Commercial bribery (penalty amendment)
- 21-4406 Sports bribery (penalty amendment)
- 21-4408 Tampering with a sports contest (penalty amendment)
- 21-4501 Class of felonies and terms of imprisonment (definition amendment)
- 21-4501a Application of certain penalties; review and reduction of previous sentences (definition amendment)
- 21-4504 Conviction of second and subsequent felonies; exceptions (proposed repeal)
- 21-4601 Construction (proposed repeal)
- 21-4603 Authorized dispositions (definition amendment)
- 21-4603c Authorized dispositions (definition amendment)
- 21-4604 Presentence investigation and report (definition amendment)
- 21-4605 Availability of report to counsel (definition amendment)
- 21-4606 Criteria for fixing minimum terms (proposed repeal)
- 21-4606a Presumptive sentence of probation for certain class D or E felons (proposed repeal)
- 21-4606b Presumptive sentence of assignment to community correctional services program for certain class D or E felons; aggravating circumstances to be considered (proposed repeal)
- 21-4608 Multiple sentences (definition amendment)
- 21-4610 Conditions of probation or suspended sentence (definition amendment)
- 21-4611 Period of suspension of sentence, probation or assignment to community corrections; parole of misdemeanor (definition amendment)
- 21-4618 Mandatory imprisonment for crimes involving firearms (proposed repeal)
- 21-4620 Defendants sentenced to corrections; judgment form; contents; diagnostic reports to accompany defendant (definition amendment)

Chapter 22

- 22-3201 The charge (definition amendment)
- 22-3209 Pleas; effect (definition amendment)
- 22-3210 Plea of guilty or nolo contendere (definition amendment)
- 22-3212 Discovery and inspection (definition amendment)
- 22-3426 Record of judgment (definition amendment)
- 22-3601 Appellate jurisdiction of court of appeals and supreme court in criminal cases (definition amendment)
- 22-3602 Appeals by defendant, when; appeals by prosecution; transfers to supreme court (definition amendment)
- 22-3605 Decision and disposition of case on appeal (definition amendment)
- 22-3707 to 22-3726 Parole Board/Parole Board Statutes (definition amendments)
- 22-4701 Definitions (definition amendment)
- 22-4704 Definitions (definition amendment)
- 22-4705 Definitions (definition amendment)
- 22-4706 Definitions (definition amendment)

Chapter 65

- 65-4101 Definitions (definition amendment)
- 65-4127a Possession and distribution of opiates, opium or narcotic drugs; penalties (definition and penalty amendment)
- 65-4127b Manufacture, possession, disposition or sale of depressant, stimulant or hallucinogenic drugs; penalties (definition and penalty amendment)
- 65-4141 Drug paraphernalia (penalty amendment)
- 65-4153 Same; delivery, possession or manufacture prohibited; penalties (penalty amendment)
- 65-4155 Representation that noncontrolled substance is controlled substance; prohibitions; penalties (penalty amendment)

Appendix G

GLOSSARY OF TERMS

- (1) **Aggravating factors:** The sentencing court may impose a departure sentence outside the standard sentence range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. Standard sentence ranges represent the appropriate sanction for the typical case. Aggravating factors, however, are stated on the record by the court to either increase the duration of the presumptive sentence or change the disposition of the presumptive sentence from probation to prison.
- (2) **Aggregation:** Separate offenses considered together for the purpose of establishing a sentencing event. When scoring an offender's criminal history, aggregation into a sentencing event will result in one prior conviction. If offenses have been aggregated, the date of the earliest offense should be used as the date of the conviction offense. See also **sentencing event**.
- (3) **Behavior attitude adjustment time (BAAT):** A method of behavior control or sanctions utilized by the Department of Corrections. BAAT can result in an increase of up to 20% of the sentence.
- (4) **Commission:** "Commission" means the sentencing guidelines commission.
- (5) **Conviction event:** One or more felony convictions occurring on the same day and within a single court. These convictions may result from multiple counts within an information or form more than one information. The most serious crime within the multiple courts making up a prior conviction event will be used to assess the offender's prior history score for the current event.
- (6) **Criminal history:** An offender's criminal history includes adult felony, class A misdemeanor, class B person (or select) misdemeanor convictions and comparable juvenile adjudications possessed by an offender at the time he or she is sentenced.
- (7) **Criminal history score:** The summation of the convictions described as criminal history that place an offender in one of the nine criminal history score categories listed on the horizontal axis of the sentencing guidelines grid.
- (8) **Decay factor:** Prior convictions that are no longer considered as part of an offender's criminal history score. With the exception of convictions that would be considered as a Class A, B, or C felony if the offender had been charged as an adult, all other juvenile adjudications will decay once the offender is 25 years of age. Upon implementation of the guidelines, only those crimes that would be comparable to adult person felony convictions will not decay. All other juvenile adjudications will decay once the offender becomes 25 years of age.
- (9) **Departure:** "Departure" means a sentence which is inconsistent with the presumptive sentence for an offender.

- (10) **Dispositional departure:** “Dispositional departure” means a sentence which imposes probation when the presumptive sentence is prison or prison when the presumptive sentence is probation.
- (11) **Dispositional line:** “dispositional line” means the solid black line on the Sentencing Guidelines Grid which separates the grid blocks in which the presumptive sentence is a term of imprisonment and post-prison supervision from the grid blocks in which the presumptive sentence is probation which may include local custodial sanctions.
- (12) **Durational departure:** “Durational departure” means a sentence which is inconsistent with the presumptive sentence as to term of incarceration, or term of probation.
- (13) **Grid:** “Grid” means the Sentencing Guidelines Grid set forth in Appendix.
- (14) **Grid block:** “Grid block” means a box on the grid formed by the intersection of the crime seriousness ranking of a current crime of conviction and an offender’s criminal history classification.
- (15) **Mitigating factors:** The sentencing court may impose a sentence outside of the standard sentence range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. Standard sentence ranges represent the appropriate sanction for the typical case. Mitigating factors are stated on the record by the court to reduce the duration of the presumptive sentence or change the disposition of the presumptive sentence from prison to probation.
- (16) **Offense severity:** The offense severity level is determined by the felony crime, or crimes, of conviction. If the offender is convicted of two or more crimes, then the severity level will be determined by the most severe felony crime of conviction. Felony offense severity levels are arranged from Level 1 to Level 10, indicating that the most severe crimes are categorized in Level 1 and the least severe crimes are categorized in Level 10. Offenses listed within each level are considered to be relatively equivalent in severity. When the statutory definition of an offense includes a broad range of criminal conduct, the offense may be subclassified factually in more than one offense severity level. The ten offense severity levels are contained on the vertical axis of the Sentencing Guidelines Grid. Felony drug related offenses are located on a separate grid; and, they are arranged from Level 1 to Level 4, indicating the most severe in Level 1 and the least severe in Level 4.
- (17) **Post-release supervision:** Upon release, felony offenders will be supervised for a determinant amount of time by the Kansas Parole Board. Post-release supervision will be for a period of two years for those convicted of crimes in Severity Levels 1 through 5; post-release supervision will be for a period of one year for those convicted of crimes in Severity Levels 6 through 10.
- (18) **Presumptive sentence:** “Presumptive sentence” means the sentence provided in a grid block for an offender classified in that grid block by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender’s criminal history.
- (19) **Sentence Range:** “Sentence range” means the sentencing court’s discretionary range in imposing a nonappealable sentence.