

November 23, 2020

Governor Laura Kelly
Second Floor, Statehouse
300 SW 10th Ave
Topeka, KS 66612-1590

Dear Governor Kelly:

Pursuant to provisions of K.S.A. 21-4725, the Secretary of Corrections has informed the Kansas Sentencing Commission that the number of KDOC inmates as of October 31, 2020, represented 83% of the overall capacity within the Kansas correctional system. On that date, there were 8,607 inmates compared to a total capacity of 10,368 - including 10,121 beds in KDOC facilities and 247 placements available to the Department in facilities operated by other agencies. Of the total inmate population, 7,853 were male and 754 were female. Total correctional system capacity for housing males is 9,420; for females, the capacity is 948. The October 31, 2020, inmate population represented 83% of capacity for males and 80% for females.

The Commission publishes annual adult prison population projections each year for KDOC. The projections indicate that prison admissions will outpace releases for the next 10-year forecast period, adding **395** new inmates over the FY 2020 population. This represents a **4.3%** increase in the adult prison population through FY 2030.

It is the Sentencing Commission's statutory responsibility to identify and analyze options to reduce Kansas prison populations, in the hope of also reducing the need to build more prisons. More specifically, K.S.A. 74-9101(b) states as follows:

- (2) consult with and advise the legislature with reference to the implementation, management, monitoring, maintenance and operations of the sentencing guidelines system;
- (3) direct implementation of the sentencing guidelines system;
- ...
- (6) advise and consult with the secretary of corrections and members of the legislature in developing a mechanism to link guidelines sentence practices with correctional resources and policies, including, but not limited to, the capacities of local and state correctional facilities. Such linkage shall include a review and determination of the impact of the sentencing guidelines on the state's prison population, review of corrections programs and a study of ways to more effectively utilize correction dollars and to reduce prison population; [and]
- ...
- (11) analyze problems in criminal justice, identify alternative solutions and make recommendations for improvements in criminal law, prosecution, community and correctional placement, programs, release procedures and related matters including study and recommendations concerning the statutory

definition of crimes and criminal penalties and review of proposed criminal law changes[.]

As required by K.S.A. 74-9101, the Kansas Sentencing Commission has analyzed policy options that would reduce prison beds currently in the system. Our obligation is clearly to provide you with alternatives to opening or building additional prison beds. We believe these options are data driven and the most rational approaches to public safety to maintain space requirements for the most serious offenders while seeking alternative methods to curb admissions. Below is a table of those alternatives established by the Commission to accomplish this statutory charge, directly and indirectly. The table lists the priorities in order by first year bed savings.

The state prison system has been at capacity for many years now and KDOC has recently contracted with an out-of-state vendor to house some of its inmates. The Commission considered 22 proposals at its September and October 2020 meetings. It is acknowledged that some of these proposals will have fiscal notes and may affect SB 123 and jail populations. While these dynamics need to be considered, state corrections in Kansas is expensive and expanding extra bed capacity will come at even more substantial cost to the taxpayer. The following 15 options with explanation below the attached table were approved for consideration:

Kansas Sentencing Commission Prison Bed Reduction Options		Bed Savings (1st Year)	Bed Savings (10th Year)
1.	Expand presumptive probation and border boxes on drug grid	295	452
2.	Allowing earned discharge credit while on probation – incentivize offenders to complete probation early with judicial hearing required after 50% service of probation term and seven days credit for each 30-day compliance period	89, 147, or 196	150, 225, or 300
3.	Allowing earned discharge credit while in prison– current 15%-20% credit for ongrid offenses would be increased to 25% for person felonies and 40% for nonperson felonies. Program credit increased from 120 days to 150 days	86	564
4.	Offender registration act - remove drug crimes from the Kansas Offender Registration Act and amend all payment violations of K.S.A. 22-4903(c)(3) to be punishable as a misdemeanor	75	129
5.	Reducing the length of sentence of drug severity level 5 possession crimes to be proportional with nondrug severity level 8 crimes	20	143
6.	Unlawful tampering with electronic monitoring equipment – amend K.S.A. 21-6322 from severity level 6 felony to a severity level 8 to be proportional with current escape from custody penalty	9	10
7.	Increase felony loss threshold to \$1,500 for 11 property crimes to be consistent with the current felony theft threshold	2	2
8.	SB 123 program extended to diversion – allows for state funding of substance abuse treatment to incentivize offenders and lower costs to law enforcement, prosecutors and the courts	unknown	unknown
9.	Post-sentencing transfer of jurisdiction for 2003 SB 123-eligible cases – all parties must agree to transfer of jurisdiction to offender’s current place of residence	unknown	unknown
10.	Compassionate release policy – amend K.S.A. 22-3729(a)(1) to allow release of an inmate with a terminal illness likely to cause death within 120 days rather than the current 30 days	unknown	unknown

11.	Clarifying prior convictions for special sentencing rules – amends KSA 21-6805(e) and (f)(1) to require the use prior convictions rather than convictions in the same case to apply special sentencing rules 12 and 26	unknown	unknown
12.	Resolve conflict of mandatory or discretionary consecutive sentences for new crimes while on felony bond in KSA 21-6604(f)(4) and KSA 21-6606(d)	unknown	unknown
13.	Codify “absconds from supervision” definition in statute to assist probation and parole	unknown	unknown
14.	Modification of care and treatment for mentally ill persons law – allow for courts to prohibit firearm possession at temporary custody hearing	0	0
15.	Designate certain legislative members for KSSC membership amending K.S.A. 74-9102	0	0
16.	Total time on probation capped at twice the term	unknown	unknown
17.	Expanding SB 123 drug treatment to nondrug offenders -severity level 7-10 nonperson	unknown	unknown

1. **Expand presumptive probation and border boxes on drug grid** – This initiative expands presumptive probation to 3H-I, 4G-I, and 5A-D and expands border box to 3G on the drug grid. This modification more accurately reflects downward departure decisions that are already happening statewide. It is also supported by **Council for State Governments Justice Center** that is assisting the Kansas Criminal Justice Reform Commission.
2. **Early discharge from probation** – Revocations are a large percentage of admissions to prison in Kansas. To better monitor probationers, the KSSC proposes to modify the current early probation discharge provision with one that would incentivize offenders to complete probation early with a judicial hearing required after 50% service of probation term. At sentencing, the court would set a judicial review hearing after service of 50% of their probation term to allow for termination of supervision if the offender is in substantial compliance with the conditions of such supervision. The district court would have the discretion to remove the offender from the review docket if the offender has been sanctioned for a violation of probation or is in the custody of another jurisdiction. Probationers can also earn credit to reduce their probation term at a rate of seven days for each full calendar month of substantial compliance with the conditions of their supervision. This proposal is a joint recommendation of the **Kansas Criminal Justice Reform Commission** and was previously introduced as [2019 HB 2052](#).
3. **Allowing earned discharge credit while in prison**– Current 15%-20% credit for ongrid offenses would be increased to 25% for person felonies and 40% for nonperson felonies. Program credit would be increased from 120 days to 150 days. The KSSC proposal incentivizes inmates to maintain good behavior while incarcerated and in exchange be eligible for up to 40% credit for their sentence. This would also promote staff and inmate safety; and seek to reserve prison bed space for more violent offenders. This proposal is similar to [2020 HB 2484](#), that was passed out of House Corrections last year.
4. **Offender Registration Act** – This proposal removes drug crimes from the Kansas Offender Registration Act and amends all payment violations of [K.S.A. 22-4903\(c\)\(3\)](#) to be punishable as a misdemeanor. Registering of sex offenders is the only requirement of federal law. Kansas is one of only a handful of states that has chosen by statute to add registration requirements to

those crimes defined as violent offenders and select drug crimes. The KSSC has found no studies or research available to indicate that registering drug offenders has any effect on deterrence or reducing recidivism. As such, the KSSC recommends amending this portion of the act to delete drug offenders. Failure to pay a \$20 registration fee is currently a severity level 9 felony if an offender fails to pay two or more full payments. This proposal would make all payment violations a misdemeanor. This initiative was previously in House Corrections as [2019 HB 2051](#). The KSSC also supports the Judicial Council's extensive work on offender registration and plans to provide proponent testimony to recommend a bill similar to [2020 HB 2474](#) that they introduced last year.

5. **Reducing the length of sentence of drug severity level 5 possession crimes to be proportional with nondrug severity level 8 crimes** - The Commission addresses proportionality in this proposal. Drug possession crimes are compared to similar punishment on the nondrug grid at severity level 8 crimes. However, criminal history classifications 5G, 5H and 5I remain at 11, 12 and 13 months out of concern for the time required to effectively administer substance abuse treatment programs. This initiative was previously in House Corrections as [2019 HB 2047](#).
6. **Unlawful tampering with electronic monitoring equipment** – This recommendation amends [K.S.A. 21-6322](#) from severity level 6 felony to a severity level 8 to be proportional with current escape from custody penalty. The Commission again addresses proportionality in this proposal. The different levels recommended are like those found in [K.S.A. 21-5911\(b\)](#), aggravated escape from custody. As proposed, unlawfully tampering with electronic monitoring equipment would be a:
 - a. severity level 8, nonperson felony when electronic monitoring equipment is used pursuant to court-ordered supervision or as a condition of postrelease supervision or parole for any **felony**; and
 - b. class A nonperson misdemeanor in the cases of electronic monitoring equipment used pursuant to court-ordered supervision or as a condition of postrelease supervision or parole for any **misdemeanor** or used pursuant to court-ordered supervision in any **civil** case.

Under current law, it is possible to receive a greater sentence by cutting off an electronic monitoring device than the underlying crime. Even violations while on misdemeanor supervision currently subject an offender to a severity level 6 felony. Making the crime tiered to the severity of the underlying crime will make violations more proportional with the underlying offenses. The current severity level 6 designation places this crime with offenses such as aggravated battery, aggravated assault and indecent solicitation of a child that are normally associated with greater harm to the community.

Finally, because this crime will occur while on some type of supervision, offenders are automatically subject to Special Sentencing Rules #9 and #10 found in [K.S.A. 21-6604\(f\)\(1\) and \(f\)\(4\)](#), which require the court to impose consecutive sentences with the underlying offense. The court may also order a presumptive prison sanction even if the offender falls in a probation range on the sentencing grid. This proposal is similar to [2020 HB 2494](#), as passed

out by House Corrections last year and is a joint recommendation of the **Kansas Criminal Justice Reform Commission**.

7. **Increase felony loss threshold to \$1,500 for 11 property crimes to be consistent with the current felony theft threshold** - K.S.A. 21-5802, 5813, 5821, 5825, 5828, 5830, 5927, 6002, 6004, 6005, and 6205 are affected. The present felony threshold for these crimes is \$1,000. Raising the amount to \$1,500 would make these property crimes proportional with simple theft in 2016 legislation that amended K.S.A. 21-5801. Mistreatment of a dependent adult or elder person was also raised to \$1,500 in 2018. A recent study from the Pew Charitable Trusts indicates there is no increase in recidivism with theft or other property crimes when raising felony loss thresholds. The KSSC introduced a similar bill in [2020 HB 2485](#), that was passed out by House Corrections last year. It is also a joint recommendation of the **Kansas Criminal Justice Reform Commission**.
8. **SB 123 program extended to diversion** – This proposal allows for state funding of substance abuse treatment to incentivize offenders, which will lower costs to law enforcement, prosecutors and the courts. The KSSC proposes to reintroduce [2020 HB 2708](#), that passed out of the House 125-0. It would provide SB 123-like substance abuse treatment for individuals granted diversion for possession of controlled substances. The program is discretionary with the prosecutors and their diversion program. Funding this proposal would provide incentives to prosecutors to more fully develop a diversion program for possession offenses. It would also incentivize an offender by providing an opportunity for state-paid drug treatment to increase their likelihood of success and preclude a felony conviction, which ultimately could substantially decrease their opportunities for employment and housing. The infrastructure of the KSSC’s SB 123 program would be leveraged to administer the program. This is a joint recommendation of the **Kansas Criminal Justice Reform Commission**.
9. **Post-sentencing transfer of jurisdiction for 2003 SB 123-eligible cases** –Many SB 123 cases occur in jurisdictions that are not the residence of the offender. If a violation of supervision occurs, offender and possibly their locally-assigned community corrections officer must travel to the original court of sentencing to attend a revocation hearing. This proposal seeks to allow for full transfers of SB 123 cases to the offender’s place of residence, upon the approval of the sending and receiving jurisdictions.
10. **Compassionate release policy** – This proposal amends [K.S.A. 22-3729\(a\)\(1\)](#) to allow KDOC release of an inmate with a terminal illness likely to cause death within 120 days rather than the current 30 days. The current statute provides that KDOC may release an inmate with a terminal illness likely to cause death within 30 days. A review of this practice in KDOC disclosed only a few inmates were ever released. This was mainly due to processing of the inmates from time of recommendation to release was an estimated 30 days. A survey of states by Families Against Mandatory Minimums found that, “Kansas is one of the most extreme examples” in studying strict terminal release policies nationwide. KSSC data indicates that as offenders age, they are less likely to commit new offenses. Increasing the time period from 30 to 120 days will allow for greater use by the KDOC, with a view to save costs associated with end of life events and provide families with humane treatment of their loved ones in their last days. This recommendation is similar to [2020 HB 2469](#), which was passed out of the House as amended 120-5.

11. **Clarifying prior convictions for special sentencing rules by amending [KSA 21-6805\(e\)](#) and (f)(1) to require the use prior convictions rather than convictions in the same case to apply special sentencing rules 12 and 26** – The proposal by the KSSC intends to identify and correct outlier provisions in the sentencing guideline act. Current language is inconsistent with other special sentencing rules that require prior convictions instead of the use of any convictions to enhance sentence. Special rules are being applied to cases even when those convictions occur in the same case. The proposal would require them to be prior convictions. The recommendation will amend language to provide prior convictions are required to be eligible for use of Special Rule 12 in KSA 21-6805(e), which currently requires one or more convictions for manufacture of a controlled substance to be eligible for doubling of an offender’s current sentence. It will provide similar amendatory language to clarify that only prior convictions are eligible for use in Special Rule 26 in KSA 21-6805(f)(1), which currently provides an enhancement to presumptive prison for the present conviction if the offender has two or more convictions.

12. **Resolve conflict of mandatory or discretionary consecutive sentences for new crimes while on felony bond in [K.S.A. 21-6604\(f\)\(4\)](#) and [K.S.A. 21-6606\(d\)](#)** - Two sentencing statutes appear to conflict with one another. One mandates consecutive sentences (K.S.A. 21-6606(d)) when a new felony is committed while on bond. The other, K.S.A. 21-6604(f)(4), appears to give the district court discretion to run sentences consecutive or concurrently. In a case that is pending with a petition for review with the Kansas Supreme Court, the Court of Appeals in [State v. Vaughn, 472 P.3d 1139 \(2020\)](#), held that a district court sentencing a defendant for a new felony committed while on felony bond under K.S.A. 2019 Supp. 21-6606(d) may impose a nonprison sanction or a prison sanction, even though the new crime of conviction otherwise presumes a nonprison sentence. If a prison sentence is imposed, that sentence must be consecutive unless the defendant shows manifest injustice. The KSSC proposes that K.S.A. 21-6606(d) be amended to reflect the ability of the court to exercise discretion in ordering concurrent sentences. The timing of the offense due to being on bond and not convicted of any crime precipitated the decision to propose discretionary rather than mandatory consecutive sentencing. This initiative was previously introduced in House Corrections as [2019 HB 2046](#).

13. **Codify “absconds from supervision” definition in statute to assist probation and parole** – This proposal seeks to define absconder in [KSA 22-2202\(a\)](#) to assist probation, parole, and the court when making a determination of a probation or parole violation. The definition of “[k]nowingly avoiding supervision or knowingly making the defendant's whereabouts unknown to the defendant's supervising court services officer, community correctional services officer or parole officer” is consistent with the holding of the Kansas Supreme Court in [State v. Dooley, 308 Kan. 641, ¶4, 423 P.3d 469 \(2018\)](#).

14. **Modification of care and treatment for mentally ill persons law** – This proposal allows district courts to prohibit firearm possession at temporary custody hearing. Many of the current care and treatment cases never return to the district court after the temporary custody hearing. The person is sent to a state hospital for evaluation and is discharged without further hearing. The recommendation would serve a public safety interest by requiring the person to return to the district court to request release of their firearms upon release from state custody.

15. Designate certain legislative members for KSSC membership amending [K.S.A. 74-9102](#) -

This proposal amends the KSSC legislative membership to be members of the Senate Judiciary and House Corrections, the most common committees in which the KSSC routinely provides support and technical assistance. Currently, the law allows for Senate and House leadership appointments of any member. Requiring KSSC legislative members to be members of Senate Judiciary and House Corrections and Juvenile Justice committees will result in more engagement at the legislative committee level and is similar to 2020 HB 2493, as passed by House Corrections last year.

16. Total time on probation capped at twice the term – [KSA 21-6608](#) is amended to cap the probation terms of 12, 24, 36 and 60 months at twice the term. Provisions are currently in place to transfer any outstanding fines, costs or restitution to collections. Many jurisdictions already enjoy this practice. Adopting this practice would assist in caseload management for probation officers, while still maintaining offender accountability to the victim and court for cost incurred as a result of the case. Unsuccessful termination of probation could also be considered by the district in subsequent cases.

17. Expanding SB 123 drug treatment to nondrug offenders – The bill would allow for state-funded substance abuse treatment for offenders sentenced to nondrug severity level 7-10 crimes. It is commonplace that offenders committing burglary, theft and other property crimes do so due to support their controlled substances addiction. This bill would provide for SB 123-like funding for these probationers to break the cycle of recidivism.

In summary, we provide a list of options we believe are consistent with the goals of the Kansas Sentencing Guidelines Act to promote public safety by incarcerating violent offenders, reducing improperly biased sentence disparity and establishing sentences that are proportionate to the seriousness of the offense and the degree of injury to the victim.

We are willing to discuss any of these priorities at your request.

Sincerely,

Honorable W. Lee Fowler
Chair

CC: Senator Rick Wilborn, Chair
Representative J. Russell Jennings, Vice Chair
Senator Oletha Faust-Goudeau
Senator Molly Baumgardner
Senator Pat Pettey
Senator Ed Berger
Senator Mary Jo Taylor
Senator John Doll

Representative Sydney Carlin
Representative Gail Finney
Representative Dennis “Boog” Highberger
Representative Kyle Hoffman
Representative Stephen Owens
Representative John Resman
Executive Director Scott Schultz