

December 16, 2021

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 November 30, 2021, represented 80% of the overall capacity within the Kansas correctional system. On that date, there were 8,345 inmates compared to a total capacity of 10,368. Of the total inmate population, 7,623 were male and 722 were female. Total correctional system capacity for housing males is 9,420; for females, the capacity is 948. The November 30, 2021, inmate population represented 81% of capacity for males and 76% for females. Due to recent staffing shortages, 12 housing units are offline, bringing the staffed capacity to 8,502, of which there were 8,345 inmates.

The Commission publishes annual adult prison population projections each year for KDOC. The projections indicate that prison admissions will trail releases for the next 10-year forecast period, with **384** fewer new inmates over the F.Y. 2021 population. This represents a **4.3%** decrease in the adult prison population through F.Y. 2031. The COVID-19 pandemic has been a major driver in decreased prison populations. But as state courts work their way through substantial jury trial backlogs, those prison admissions are estimated to increase.

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 Commission considered 10 proposals at its September 2021 meeting and one at its December meeting. It is acknowledged that some of these proposals will have fiscal notes and may affect probation 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 10 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.	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. Also provides for total time on probation capped at twice the term (currently H.B. 2084).	248, 289, or 326	263, 306, or 305
2.	Allowing earned discharge credit while in prison (currently HB 2147).	200	184
3.	Expand presumptive probation and border boxes on drug grid (previously HB 2146).	178	217
4.	Expand presumptive probation and border boxes on nondrug grid (currently HB 2350).	112	169
5.	Increasing good time and program credit for certain offenders - 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 (currently H.B. 2031).	86	564
6.	Reducing the length of sentence of drug severity level 5 possession crimes to be proportional with nondrug severity level 8 crimes (currently HB 2139).	44	47
7.	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 (currently H.B. 2092).	34	65
8.	Increase felony loss threshold to \$1,500 for 11 property crimes to be consistent with the current felony theft threshold (currently S.B. 5).	2	2
9.	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 (currently H.B. 2030).	unknown	unknown

10.	Clarifying prior convictions for special sentencing rules – amends <u>K.S.A. 21-6805(e)</u> and (f)(1) to require the use prior convictions rather than convictions in the same case to apply special sentencing rules 12 and 26. Also resolves conflict of mandatory or discretionary consecutive sentences for new crimes while on felony bond in <u>K.S.A. 21-6604(f)(4)</u> and <u>K.S.A. 21-6606(d)</u> (currently H.B. 2081).	unknown	unknown
11.	Transfer 2003 SB 123 substance abuse treatment provider certification duties from KDOC to KSSC.	0	0

1. **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.

A second initiative includes total time on probation capped at twice the term. K.S.A. 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 costs incurred as a result of the case. Unsuccessful termination of probation could also be considered by the district in subsequent cases. This proposal is 2021 H.B. 2084, which is currently in House Corrections.

2. **Allowing earned discharge credit while in prison**– This recommendation seeks to incentivize nonviolent inmates sentenced for drug offenses by releasing them to community corrections for the remainder of their sentence if it is determined they do not present a future risk to public safety. Upon application by an offender in the custody of the secretary of corrections who is serving only a sentence for a severity level 2 through 5 drug crime or serving a sentence for a primary crime that is a severity level 2 through 5 drug crime, the prisoner review board may grant release to probation or assignment to a community correctional services program to such offender for the remainder of such offender's sentence if such offender has successfully served 50% of the prison part of the original sentence. These are direct commits only. Those incarcerated due to probation revocation and those serving time for an off-grid offense are not eligible. This proposal is 2021 HB 2147, which is currently in House Corrections.
3. **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** and the **Kansas Criminal Justice Reform Commission**. This proposal was 2021 HB 2146 and passed favorably out of House Corrections. It received no hearing on the floor and died.

4. **Expanding the number of presumptive probation and border grid blocks in the sentencing grid for nondrug crimes.** This recommendation amends the sentencing grid to expand nondrug border boxes to grid blocks 4H, 4I, 5G, 5H, 5I, 6B, 6C, 6D, 6E, 6F, 7B, 8B, 9B or 10B, by which the court may impose an optional nonprison sentence. Currently, there are three border boxes (5H, 5I, and 6G). The proposed border boxes are presently presumptive prison boxes. The current nondrug border box in 6G is amended to a presumptive probation box. The currently sentencing realities disclose that most offenders falling into these grid boxes are being sentenced to probation instead of prison. The changes simply reflect the current practice of the system. This proposal is 2021 HB 2350, which is currently in House Corrections. It is also supported by **Council for State Governments Justice Center** and the **Kansas Criminal Justice Reform Commission**.
5. **Increasing good time and program credit for certain offenders** - 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 2021 H.B. 2031, which is currently in House Corrections.
6. **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 proposal is 2021 HB 2139, which is currently in House Corrections. It is also a joint recommendation of the **Kansas Criminal Justice Reform Commission**.
7. **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 proposal is 2021 H.B. 2092, which is currently in House Corrections. The KSSC also supports the Judicial Council's extensive

work on offender registration and plans to support a bill similar to 2021 HB 2349 that they introduced last year.

8. **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. This proposal is 2021 S.B. 5, which is currently in Senate Judiciary. It is also a joint recommendation of the **Kansas Criminal Justice Reform Commission**.
9. **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 proposal is 2021 H.B. 2030, which passed the House and is currently in Senate Judiciary. It is also a joint recommendation of the **Kansas Criminal Justice Reform Commission**.
10. **Clarifying prior convictions for special sentencing rules by amending K.S.A. 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. Also resolves 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)** – 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 K.S.A. 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 K.S.A. 21-6805(f)(1), which currently provides an enhancement to presumptive prison for the present conviction if the offender has two or more convictions.

Also included in the proposal is an initiative to resolve conflict of mandatory or discretionary consecutive sentences for new crimes while on felony bond in K.S.A. 21-6604(f)(4) and

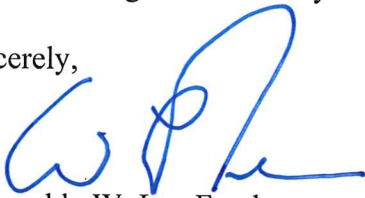
K.S.A. 21-6606(d). Two sentencing statutes appear to conflict with one another. One mandates consecutive sentences (K.S.A. 21-6606(d)) when a new felony is committed while on bond. The other, K.S.A. 21-6604(f)(4), appears to give the district court discretion to run sentences consecutive or concurrently. 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 proposal is 2021 H.B. 2081, which passed the House and is currently in Senate Judiciary.

11. **Transfer 2003 SB 123 substance abuse treatment provider certification duties from KDOC to KSSC** – After consultation with KDOC, it does not have objection to the transfer of duties and responsibilities of treatment provider certification for the SB 123 program to the KSSC. This supports further continuity in the program, requires the transfer of one staff position and amends K.S.A. 21-6824 and K.S.A. 75-52,144.

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 Molly Baumgardner, Vice Chair
Senator Elaine Bowers
Senator Oletha Faust-Goudeau
Senator Renee Erickson
Senator Ethan Corson
Senator Kristen O'Shea
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