

Kansas Sentencing Proportionality Recommendations

REPORT ON PROPOSED IMPROVEMENTS

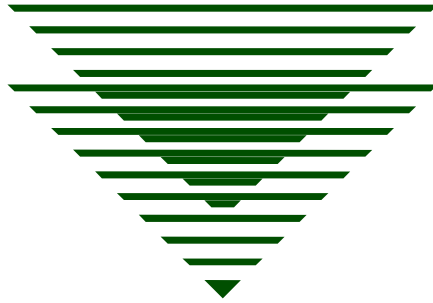
AND

MODIFICATIONS TO

KANSAS SENTENCING LAWS

**As Approved by the
Kansas Sentencing Commission
and the
Kansas Criminal Code Recodification Commission
January, 2009**

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Assistant Solicitor General.

KANSAS SENTENCING
PROPORTIONALITY RECOMMENDATIONS

REPORT ON PROPOSED IMPROVEMENTS
AND
MODIFICATIONS TO KANSAS SENTENCING LAWS

AS APPROVED BY THE
KANSAS SENTENCING COMMISSION
AND THE
KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

JANUARY, 2009

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I. INTRODUCTION

This report was initially adopted by the Kansas Sentencing Commission in January, 2008. The Kansas Criminal Code Recodification Commission (KCCRC) worked with the Kansas Sentencing Commission to formulate a joint set of recommendations on proportionality issues. This revised report contains the Proportionality Subcommittee's recommendations along with the revisions and additions of the KCCRC. The KCCRC approved these recommendations except for those that are outside of the scope of its legislative mandate. As the KCCRC is directed by statute to recodify the criminal code, it decided not to make any recommendations outside of Chapter 21 or the criminal drug provisions of Chapter 65.

In June, 2007, the Kansas Sentencing Commission formed a subcommittee to review proportionality of sentences. This subcommittee would work in conjunction with the Kansas Recodification Commission, charged with recodifying the criminal code. The subcommittee was asked to review changes in felony sentencing law since the inception of guidelines in 1993, to review the 2004 study by the Vera Institute of Justice, and to make recommendations regarding realigning and appropriately placing felonies by severity level within various crime categories and overall.

The establishment of the subcommittee was in keeping with the enumerated duties of the Commission pursuant to K. S. A. 74-9101(a) to:

- (2) consult with and advise the legislature with reference to the implementation, management, monitoring, maintenance and operations of the sentencing guidelines system;
- (7) make recommendations relating to modification to the sentencing guidelines as provided in K.S.A. 21-4725, and amendments thereto; 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.

The Kansas Sentencing Commission authorized the Proportionality Subcommittee to review and analyze all felony crimes in Kansas to ensure a system-wide overview in the comparison of offense severity for (a) presumptive prison sentences; (b) similar treatment of property, drug, and sex offenses with similar degrees of harm; (c) proportionate sentences for repeat domestic violence offenders; (d) proportionate sentences for drug and property crime offenses that minimize sentencing disparity between offenses with similar degrees of harm by utilizing threshold levels based on the quantity of drugs and the actual financial loss to the victim.

II. BACKGROUND

In 1989, the Kansas Legislature established the Kansas Sentencing Commission, directing the Commission to develop a sentencing guidelines model based on fairness and equity in sentencing. The Commission, called upon to recommend rational and consistent sentencing standards, established sentencing dispositions which were appropriate for all felonies based on a consideration of past practices and the availability of criminal justice resources. Given this directive, the Commission developed sentencing guidelines that met several goals:

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

In its preliminary recommendations to the Legislature, the Commission stated that, “Making the punishment proportional to the crime is a key ingredient in guidelines 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.” In recommending crime severity, the Commission determined that level of harm should be the main basis for punishment and thus created sentences that punish offenses involving greater harm more severely than offenses involving lesser harm. However, the Commission also recognized that offender intent should also play a part in determining level of punishment.

Three societal interests, in order of importance, were used to determine the level of harm involved in each crime seriousness ranking:

1. Protection of individuals from physical and emotional harm;
2. protection of private and public property rights; and
3. protection and preservation of the integrity of government institutions, public peace, and public morals.

Data reviewed by the Proportionality Subcommittee shows a large number of sentencing departures. The vast majority are downward departures. The number of downward departures suggests a disconnect between the current law on the books and the law in practice; or the possibility that the current severity level is not supported by the proportionality rationale that punishment should be relational to the degree of harm inflicted by the offense. Of equal concern is the consideration that border boxes contained on the grid are presumptive imprisonment border (PIB) boxes, yet result in a probation sentence approximately 80% of the time. There appears to be a disconnect between the law and practice in sentencing cases involving PIB boxes.

Also, in certain offenses, offender culpability does not seem proportional to the injury or harm to the victim. This is especially true for repeat property, domestic battery and drug offenses. The Subcommittee recognizes that offender culpability plays a role and should be considered in sentencing for repeat offenses.

With respect to drug offenses, changes are recommended to advance uniformity, consistency and proportionality, clarifying the distinction between offenses involving personal use possession and those involving distribution, manufacturing, or cultivation.

III. RECOMMENDATIONS

A. RECOMMENDATIONS CONCERNING THE SENTENCING GRID

1. Merge the nondrug and drug sentencing grids into one Kansas Sentencing Grid.
2. While one of the goals of the Kansas Sentencing Guidelines is to treat similar defendants similarly, the Subcommittee recognizes that a “one size fits all” sentencing structure leads to disproportional sentencing. For this reason the Subcommittee recommends that aggravating and mitigating sentences within each grid box, originally set at 5% above and below the standard sentence, be adjusted to 10% above and below the standard sentence.
3. In order to promote “truth in sentencing”, uniformity, proportionality, and prediction of prison bed space needs, it is important to place as many felonies on the grid as possible. Most off-grid and nongrid felonies would be placed on the grid, with the exception of first degree murder, capital murder, treason, terrorism, and furthering terrorism through weapons of mass destruction.
4. Most unclassified felonies (such as K.S.A. 75-4228, criminal and civil liability of treasurer and director of accounts and reports, and 75-4314, officer or employee receiving funds without subscribing and filing an oath) would be classified on the grid as severity level 10 nonperson felonies.
5. A name change from “border box” to “presumptive imprisonment - border box”, or “PIB” box, clarifies the original purpose and provides a renewed emphasis that these sentences are presumed imprisonment, recognizing that the sentencing court has discretion to impose a nonprison sanction.
6. Information would be provided to the court and considered in determining the appropriate disposition of cases in PIB boxes. Any party requesting the nonprison sanction shall be required to notify the court and opposing counsel prior to sentencing, regarding the proposed placement in a treatment program and/or a behavior modification program. The notice must provide a reasonable opportunity before sentencing for the presentence investigator to confirm and verify the availability and adequacy of the proposed treatment provider(s) and plan.

7. An increase from 8 border boxes to 16 PIB boxes would provide a mechanism to address the repeat property offender, to reduce the need for special rules, and to allow the court the discretion necessary to consider PIB sentencing on a case by case basis.
8. All sentences at severity level 5 would be presumptive imprisonment. PIB Boxes would exist at grid boxes 6-E through 6-I, 7-C through 7-F, 8-C through 8-F, and 9-C through 9-E.
9. Some special rules would be eliminated, including those associated with aggravated battery/aggravated assault of a law enforcement officer, felony driving under the influence, felony domestic battery, second or subsequent manufacture of a controlled substance, and third or subsequent forgery - See Appendix G.
10. Standard sentences would be amended according to the proposed grid – See Appendices A through C:

Severity Level	Proposed Range In Months	Current Range In Months
1	140-682	147-653
2	108-514	109-493
3	54-256	55-247
4	38-178	38-172
5	29-143	31-136
6	22-48	17-46
7	16-35	11-34
8	14-26	7-23
9	12-22	5-17
10	12-18	5-13

B. GENERAL POLICY CHANGES IN SENTENCING STATUTES

1. All felony sentences would be at least 12 months in length.
2. All class A misdemeanants would be supervised by court services.
3. The Subcommittee recommends that most crimes be placed on the grid with the exception of first degree murder, capital murder, treason, terrorism, and furthering terrorism through weapons of mass destruction. In order to predict prison bed space needs it is important to have as many felonies on the grid as possible.
4. The Subcommittee recommends that domestic battery felony offenders be supervised by community corrections.

5. K.S.A. 21-3413(a)(3)(D) Battery on a city or county corrections officer would be amended from a severity level 5 person felony to a severity level 9 person felony, with a sentencing enhancement of presumptive imprisonment.
6. K.S.A. 21-3414, Aggravated Battery would be modified as follows:
 - a. intentionally, resulting in great bodily harm would remain a severity level 4 person felony;
 - b. intentionally, resulting in bodily harm would remain a severity level 7 person felony;
 - c. recklessly, resulting in great bodily harm, currently a severity level 5 person felony, would be classified as a severity level 6 person felony; and
 - d. recklessly, resulting in bodily harm, currently a severity level 8 person felony, would be classified as a severity level 9 person felony.
7. K.S.A. 21-3415, Aggravated Battery on a Law Enforcement Officer would be modified as follows:
 - a. intentional, bodily harm or physical contact where great bodily harm can be inflicted, currently a severity level 4 person felony, would be classified as a severity level 5 person felony;
 - b. intentional, great bodily harm would remain a severity level 3 person felony; and
 - c. intentional, with a motor vehicle would remain a severity level 3 person felony.
8. K.S.A. 21-3609 –Abuse of a child; Intentionally torture, cruelly beat, or shake resulting in great bodily harm. Penalties would be amended from a severity level 5 person felony to a severity level 6 person felony if the infliction of cruel and inhuman corporal punishment is present; and a severity level 3 person felony, if torture, cruel beating, or shaking results in great bodily harm. A severity level 3 for conduct that results in great bodily harm provides more protection for children than the Aggravated Battery statute.
9. K.S.A. 21-3608a-Aggravated Endangering a Child; Intentionally cause or permit a child under 18 to be in a situation in which the child’s life, body or health is injured or endangered. Currently, this statute punishes conduct that both endangers and actually injures a child. This poses a conflict with other offenses that punish actual harm to the victim. In order to focus this offense on endangerment, the KCCRC recommends striking the phrase “is injured” and amending the offense from a severity level 9 to a severity level 7.
10. K.S.A. 21-3812(d) Aiding Person Required to Register Under the Kansas Offender Registration Act. Currently, this crime is ranked as a severity level 5 person felony. Amending this felony to a severity level 10 person felony brings it in line with the amendment recommended regarding K.S.A. 22-4903, Kansas Offender Registration Act.
11. K.S.A. 22-4903-Kansas Offender Registration Act; Failure to register as required. Currently, this crime is ranked as a severity level 5 person felony. Amending this felony to a severity level 9 person felony reflects a more proportional ranking.

12. K.S.A. 75-4228, 75-4314, 79-15, 137, 79-15,235(e), 79-3228(f) are all unclassified and are recommended to be moved onto the grid and classified as severity level 10 nonperson felonies.
13. Sex crimes against children should be brought back onto the sentencing grid. However, due to the complexity of this issue, the Commission continues to work toward a plan that will incorporate appropriate lengths of sentence, postrelease, and/or probation supervision.

C. RECOMMENDATIONS CONCERNING DRUG LAWS

The recommendations made in this section address, to a large degree, the concerns expressed in the Vera Study, which identified drug crimes in general as disproportionate to other felonies. Data examined by the Proportionality Subcommittee shows a large number of downward departures, suggesting a disconnect between the current law and practice; or the possibility the current severity level is not supported by the proportionality rationale that punishment should be relational to the degree of harm inflicted or threatened. The Proportionality Subcommittee makes the following recommendations based on the goals of uniformity and reductions in disparity, but which are equally calculated to ensure that sentences are proportionate to the seriousness of the offense and the degree of injury to the victim.

1. Amend language throughout from “within 1,000 feet of a school,” to “to a minor or in the presence of a minor” and increase the penalty one severity level to more clearly meet the intent to protect children regardless of their location. Define presence of a minor as:

 “(1) a minor is within close physical proximity to the illegal activity; (2) the illegal activity is conducted in a place where minors can reasonably be expected to be present; or (3) the minor’s dwelling. Nothing in this section shall be construed to require that (1) a defendant actually be aware of the presence of a minor or (2) a minor actually be aware of the illegal activity.”
2. Adopt drug quantity thresholds based on four categories of small, medium, large and super for sale, distribution, and possession with intent to distribute. K.S.A. 65-4161 and 65-4163 (Sale or distribution of opiates, opium, narcotic drugs or designated stimulants) would be categorized as follows: Small quantity, severity level 9 person felony; medium quantity, severity level 7 person felony; large quantity, severity level 4 person felony; and super quantity, severity level 3 person felony. Only the weight of drug, not purity, shall be considered.
3. The KSC Subcommittee relies on the recommendations of the KCCRC as to the precise quantities which constitute small, medium, large, or super. - See Appendix F.
4. Personal use possession would be ranked as a severity level 10 nonperson felony. This one severity level includes K.S.A. 65-4160 (Personal use possession of opiates, opium, narcotic drugs or designated stimulants) and felony convictions of K.S.A. 65-4162 (Personal use

possession of depressants, stimulants or hallucinogenic drugs other substances). Present misdemeanor penalties for first-time possession would remain unchanged.

5. Strike enhancement provisions that increase severity levels for repeat drug offenses. Because of the modification to a “person” designation, penalties for repeat offenses would move the offender to more severe penalties along the criminal history continuum.
6. The alternative sentencing substance abuse treatment program pursuant to K.S.A. 21-4729 (SB 123) would remain intact.
7. Manufacturing of Methamphetamine would be a severity level 3 person felony, while manufacturing of all other drugs would be a severity level 5 person felony.
8. Drug repackaging and addition of diluents would be removed from the definition of “manufacturing.”

Possession of drug paraphernalia would be a severity level 9 nonperson felony, and in addition, “to a minor or in the presence of a minor” increases the sentence one severity level. Delivery of a simulated controlled substance would be a severity level 9 nonperson felony under the identical condition. *This section is to be removed. In lieu of recommendation #9 (below) it is unnecessary to amend this severity level. This recommendation was presented to and approved by the KSC at the November 2008 meeting.*

9. Possession of drug paraphernalia and precursors would be integrated into the law of attempts. Possession of these items would be defined as a sufficient overt act to establish an attempted violation of the drug possession, distribution, or manufacturing offenses.
10. Language would be added to the offense of Representing a Non-Controlled Substance As a Controlled Substance. This language would clarify that an offender may be prosecuted for that offense and Theft By Deception.

D. RECOMMENDATIONS CONCERNING PROPERTY OFFENSES

All felony offenses resulting in loss of monetary value were reconciled. While presumptive imprisonment is generally reserved for violent offenders, the Subcommittee recognizes that repeat property offenders, especially burglars, pose a danger to society and warrant punishment through incarceration. Through modification of the Kansas sentencing grid, the number of special sentencing rules would be reduced. Property issues will be discussed and reviewed by the Recodification Commission during the first half of 2008. Property recommendations follow:

1. Adopt dollar value threshold requirements based on victim financial loss as follows:

Up to \$499.99 would be classified as a Class B nonperson misdemeanor;
\$500.00 - \$999.99 classified as a Class A nonperson misdemeanor;
\$1,000.00 - \$1,999.99 classified as a severity level 10 nonperson felony;

\$2,000.00 - \$24,999.99 classified as a severity level 9 nonperson felony;
\$25,000.00-\$49,999.99 classified as a severity level 8 nonperson felony;
\$50,000.00-\$74,999.99 classified as a severity level 7 nonperson felony;
\$75,000.00-\$99,999.99 classified as a severity level 6 nonperson felony;
\$100,000.00+ classified as a severity level 5 nonperson felony.

2. Increase the number of PIB Boxes to eliminate the need for several special rules and address repeat offenders.

E. RECOMMENDATIONS CONCERNING REPEAT DOMESTIC BATTERY OFFENSES

1. A 3rd or subsequent domestic battery would be reclassified from a nongrid felony as follows: A 3rd domestic violence would be classified as a severity level 7 person felony with a mandatory 30-day sentence; A 4th domestic battery would be classified as a severity level 7 person felony with a mandatory 90-day sentence; A 5th or subsequent domestic battery would be classified as a severity level 7 person felony with a mandatory one year sentence. Community Corrections would supervise probation upon release from the incarceration term. Community supervision would include a behavior modification program.
2. The Legislature should assure the availability of adequate and appropriate treatment providers.
3. The Subcommittee makes no recommendation regarding criminal history decay, pending release of a report from the Governor's Task Force on Domestic Violence.

IV. CONCLUSION

An assessment of the appropriateness of current sentences begins with an inquiry into whether current guideline sentences continue meeting the goal of proportionality, thereby ensuring that sentences are not only reasonably congruent with the seriousness of the offense, but bear some rational relationship to the degree of injury or harm to the victim as well. Of equal concern is the primary goal of sentencing, to reserve incarceration for violent and/or repeat offenders.

This report presents the findings of that analysis which include, but are not limited to, the following suggestions for modification and improvement:

1. Merge drug and nondrug grids into one, single Kansas sentencing grid;
2. amend the severity levels of some property, drug, domestic violence and sex offenses in order to reemphasize presumptive imprisonment for violent person felonies as well as for repeat and habitual offenders;
3. adopt quantity and actual financial loss thresholds for drug and property offenses to minimize sentence disparity and ensure proportionality; and

4. general policy changes which reflect actual practice and appropriate proportional sentences.

While one of the goals of the Kansas Sentencing Guidelines is to treat similar defendants similarly, the Subcommittee recognizes that a “one size fits all” sentencing structure leads to disproportional sentencing. For this reason the Subcommittee recommends that aggravating and mitigating sentences within each grid box, originally set at 5% above and below the standard sentence, be increased to 10% above and below the standard sentence. An increase from 8 border boxes to 16 PIB boxes would provide a mechanism to address the repeat property offender, to reduce the need for special rules, and to allow the court the discretion necessary to consider PIB sentencings on a case by case basis.

In reviewing the proportionality of sentences under the Kansas sentencing guidelines in relation to actual sentencing practices for particular offenses, there are specific steps that the state may consider based on the findings in this report. These would include:

1. The examination of the sentencing guidelines is to emphasize that presumptive imprisonment is the appropriate and proportional sentence for both person and some nonperson felonies, especially in those cases involving repeat or habitual offenders.
2. Adopt severity rankings for drug offenses based on thresholds of drug quantity to better identify the degree of harm and distinguish personal use from distribution, manufacturing, and cultivation.
3. Severity rankings for property offenses should be based on the amount of financial loss as the best predictor of amount of harm to the victim.
4. Propose policy changes calculated to harmonize current law with actual sentencing practice, thereby addressing a large number of downward departures, as shown by sentencing data collected.

It is the Subcommittee’s conclusion that adoption of the recommended changes herein will further the goal of proportional sentences, based upon the degree of harm to the victim and the seriousness of the offense, thereby ensuring public safety through appropriate sentencing. Such an approach will reserve prison for violent offenders and repeat nonviolent offenders and promote offender reformation through appropriate community sanctions.