



Scoring Criminal History in Kansas: Refresher and Updates CLE

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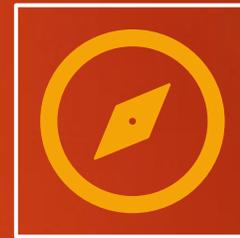
Webinar Rules



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Chat/Q&A



Survey

Overview

Scoring Out of State
Convictions

Scoring Misdemeanors,
City Ordinance
Violations, Municipal
Convictions, Juvenile
Adjudications, Burglaries,
etc.

Multiple Conviction
Cases

Roadmap: How to classify prior out of state convictions

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1. FELONY OR
MISDEMEANOR?

2. PERSON OR
NON-PERSON
CRIME?

OUT OF STATE CONVICTION: FELONY OR MISDEMEANOR IN KANSAS?

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See K.S.A. 2022 Supp. 21-6811(e)(2)

Person felony

- ▶ An out-of-state conviction or adjudication for the commission **of a felony offense**, or an attempt, conspiracy or criminal solicitation to commit a felony offense, **shall be classified as a person felony if one or more** of the following circumstances is present as defined by the convicting jurisdiction in the elements of the out-of-state offense:
 - ▶ (a) Death or killing of any human being;
 - ▶ (b) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;
 - ▶ (c) bodily harm or injury, physical neglect or abuse, restraint, confinement or touching of any person, without regard to degree;
 - ▶ (d) the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance;
 - ▶ (e) possessing, viewing, depicting, distributing, recording or transmitting an image of any person;
 - ▶ (f) lewd fondling or touching, sexual intercourse or sodomy with or by any person or an unlawful sexual act involving a child under the age of consent;
 - ▶ (g) being armed with, using, displaying or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or
 - ▶ (h) entering or remaining within any residence, dwelling or habitation.

Misdemeanors: Person or Nonperson?

In designating a misdemeanor as person or nonperson, comparable offenses under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a comparable person offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall be classified as a nonperson crime. K.S.A. 21-6811(e)(3)(A).

What is comparable? For an out-of-state conviction to be comparable to an offense under the Kansas criminal code, the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced. *State v. Wetrich*, 307 Kan. 552, 559, 412 P.3d 984 (2018)

What if the prior
conviction's classification
has changed?

CLASSIFYING PRIOR CONVICTIONS

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



State v. Terrell

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

The Kansas Supreme Court held on February 18th, 2022, that under the KSGA, all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, are to be classified as person or nonperson as of the time the new crime is committed. The Court specifically said, “We conclude that the better understanding of the statutory sentencing scheme requires that all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, be classified as person or nonperson as of the time the new infraction is committed.” *State v. Terrell*, 315 Kan. 68, 75, 504 P.3d 405 (2022).

Any objections to
prior Criminal Threat
convictions?

prior convictions of criminal threat

- ▶ The Kansas Supreme Court found that the provision in the Kansas criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), that allows for a criminal conviction if a person makes a threat in reckless disregard of causing fear is unconstitutionally overbroad. See *State v. Boettger*, 310 Kan. 800, 801, 450 P.3d 805 (2019).
- ▶ KSSC's belief is that if it can be proven a defendant was convicted of intentional criminal threat, the conviction will count. If it cannot be proven whether a defendant was convicted of reckless or intentional, it cannot be counted.
- ▶ How can this be proven?
- ▶ Case by case basis
- ▶ Issue when jury instructed on both intentional and reckless criminal threat and when the state's argument included both versions. See *State v. Lindemuth*, 470 P.3d 1279 (Kan. August 28, 2020) and *State v. Johnson*, 310 Kan. 835, 450 P.3d 790 (2019).

Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes.

K.S.A. 21-
6810(d)(9)

Juvenile Adjudications

Juvenile Adjudications
are not the equivalent
of adult convictions

State v. Crawford, 39 Kan.App.2d 897, 185 P.3d 315 (Ct. App. 2008) addressed whether an adult sentence could be consecutive to a juvenile sanction

- Judge applied Rule 9 to run the current sentence consecutive to prior sentence because the defendant committed a new felony while he was on juvenile probation
- The rule of *expressio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of another) governs in situations where a trial court utilizes juvenile adjudications for sentencing purposes.
- Based on the legislature's exclusion of specific language listing juvenile adjudications, we conclude that body meant to exclude juvenile adjudications from cases calling for consecutive adult sentences. The court here had no authority to impose a consecutive sentence.

Look at the specific statute that applies

Juvenile adjudications do not constitute criminal convictions

See *State v. Crawford*, 39 Kan.App.2d 897, 185 P.3d 315 (Ct. App. 2008).

Juvenile Adjudications

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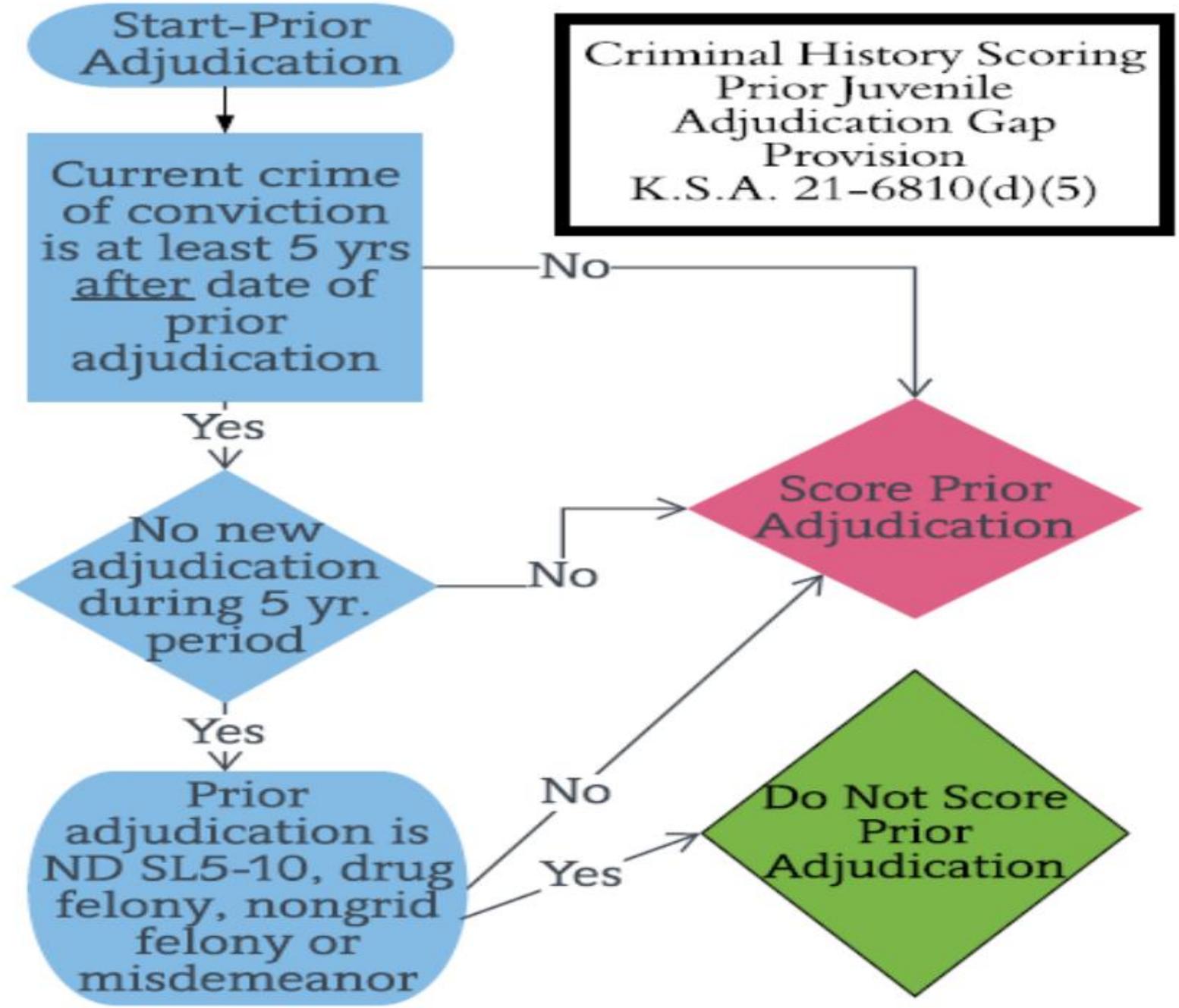
GAP
Provision

Decay

Special
Rules

Juvenile Adjudications

Except for adjudications that have decayed pursuant to K.S.A. 2022 Supp. 21-6810(d)(4) and (d)(5), prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history classification. Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. See K.S.A. 2022 Supp. 21-6811(f).



Juvenile Decay

In K.S.A. 2022 Supp. 21-6810(d)(4), a juvenile adjudication will decay if the current crime of conviction is committed after the offender reaches the age of 25, and the adjudication is for an offense:

- Committed before July 1, 1993, which would have been a class D or E felony, if committed by an adult;
- Committed on or after July 1, 1993, which would have been a nondrug severity level 5-10 felony, a nongrid felony, or any drug felony, if committed by an adult; or
- Would be a misdemeanor, if committed by an adult.



Are traffic offenses
“convictions”
for decay
purposes?

Are traffic offenses “convictions” for decay purposes?

- ▶ Are the defendants 2015 convictions for driving with no proof of insurance and an illegal tag “convictions” for purposes of preventing the decay of prior juvenile adjudications?
- ▶ Defendant argues no because they cannot be counted in his criminal history
- ▶ COA mentioned that these particular offenses are misdemeanors and not traffic infractions
- ▶ “We hold that prior convictions cannot decay under K.S.A. 2017 Supp. 21-6810(d)(5)(B) if the defendant has any adjudication or conviction within five years from the prior juvenile adjudication. Nothing in the statute indicates the Legislature intended that only certain adjudications or convictions would qualify for exclusion under the language “no new adjudications or convictions during such five-year period.” K.S.A. 2017 Supp. 21-6810(d)(5)(B). Jones' interpretation does not give the statute “effect as written,” but rather requires us to speculate as to the legislative intent by reading the language “so as to add something not readily found in the statute.” *Ayers*, 309 Kan. at 164. Because the district court did not err in interpreting the statute, the district court correctly found Jones did not meet the requirements for decay of his prior juvenile adjudications under K.S.A. 2017 Supp. 21-6810(d)(5). Jones' 2015 misdemeanor convictions, while not scorable in criminal history on their own, do preclude decay of his earlier juvenile adjudications under subsection (d)(5)(B) because those misdemeanors were committed within the five years after the date of the prior juvenile adjudications. As a result, the district court did not err in calculating Jones' criminal history.” *State v. Jones*, No. 122,756, 2021 WL 2386044 at *5 (Kan. App. 2021)(unpublished opinion)(review granted September 27, 2021).
- ▶ **Kansas Supreme Court has granted review!!!**

How do you score
deferred
adjudications?

Conviction Defined

"Conviction"
includes a
judgment of guilt
entered upon a
plea of guilty.

K.S.A 2022 Supp. 21-
5111(d)

Deferred Adjudications

- ▶ Deferred adjudications and other processes that result in a finding of guilt without punishment from a foreign jurisdiction may be counted in the defendant's criminal history. See *State v. Macias*, 30 Kan. App. 2d 79, 39 P.3d 85 (2002). **However, an entry of a judgment of guilt by the foreign court is necessary to meet Kansas' definition of a conviction.** See *State v. Hankins*, 304 Kan. 226, 372 P. 3d 1124 at 1132 (2016).
- ▶ In *State v. Hankins*, where a defendant completed Oklahoma's deferred judgment procedure successfully, the Court found that there was no conviction for criminal history purposes because the defendant was discharged from the program without a court adjudication of guilt and a court order to expunge his guilty plea and to dismiss his case without prejudice. See *id.* at 1132.
- ▶ Additionally, in *State v. Looney*, where the defendant had pled guilty to enter Texas' deferred judgment program and had not finished his probationary period, the Court found that there was no conviction for criminal history purposes because the court never entered a judgment or adjudication of guilt. *State v. Looney*, No. 117,398, 2018 WL 3485727 (Kan.App.2018) (unpublished).

Misdemeanors/Municipal Convictions

1. Misdemeanor or Felony?

Misdemeanor in convicting jurisdiction → Refer to comparable KS misdemeanor (A, B, C) in effect the date the current crime of conviction committed → if comparable KS offense is a felony, then conviction treated as class A misdemeanor → if no comparable KS offense in effect date of current crime of conviction committed, do not use. See K.S.A. 21-6811(e)(2)(B).

2. Person vs. Nonperson?

- ▶ In designating a misdemeanor as person or nonperson, comparable offenses under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a comparable person offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall be classified as a nonperson crime. K.S.A. 21-6811(e)(3)(A).
- ▶ What is comparable? For an out-of-state conviction to be comparable to an offense under the Kansas criminal code, the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced. *State v. Wetrich*, 307 Kan. 552, 559, 412 P.3d 984 (2018)

Converting Misdemeanors to Person Felonies

- ▶ Prior adult convictions and juvenile adjudications for class A person misdemeanors and class B person misdemeanors convert to person felonies at a rate of 3 to 1.
 - ▶ If the resulting number is a fraction, do not convert the fractional portion because these figures must be in whole numbers. For example, eight person misdemeanor convictions and/or juvenile person adjudications would be converted to two person felony convictions (i.e., $8/3 = 2$). Do not count the remaining "unconverted" or fractional person misdemeanor convictions and/or juvenile person adjudications in the felony score. However, the two remaining convictions and/or adjudications in the example should still be listed in the Person Misdemeanor section. See K.S.A. 2022 Supp. 21-6811 (a).
- ▶ The Assault Rule
 - ▶ Every three prior adult convictions or juvenile adjudications of misdemeanor assault (a class C person misdemeanor), as defined in K.S.A. 21-3408, prior to its repeal, or subsection (a) of K.S.A. 2022 Supp. 21-5412, that occurred within a period of three years commencing immediately prior to the date of conviction for the current crime, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 2022 Supp. 21-6811 (a).
- ▶ Check out page 52 of the DRM!

Misdemeanors/Municipal Convictions

A previous misdemeanor conviction in which the defendant was denied counsel and sentenced to a term of imprisonment, even if such term of imprisonment was suspended or conditioned upon a nonprison sanction, may not be counted in the offender's criminal history or used for enhancement purposes. See *State v. Long*, 43 Kan. App. 2d 328, 225 P.3d 754, 759-760 (2010).

Scoring Prior Burglaries

- ▶ K.S.A. 2022 Supp. 21-6811 (d)
- ▶ Prior burglary adult convictions and juvenile adjudications will be scored for criminal history purposes as follows:
 - ▶ (1) As a prior person felony if the prior conviction or adjudication was classified as a burglary as defined in K.S.A. 21-3715(a), prior to its repeal, or K.S.A. 2022 Supp. 21-5807(a)(1), and amendments thereto.
 - ▶ (2) As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary as defined in K.S.A. 21-3715(b) or (c), prior to its repeal, or K.S.A. 2022 Supp. 21-5807(a)(2) or (a)(3), and amendments thereto.

State v. Dickey

- ▶ 301 Kan. 1018, 350 P.3d 1054 (2015) (*Dickey I*)
- ▶ Dickey had a prior in state 1992 burglary adjudication
- ▶ When he was convicted of the prior burglary, there was no dwelling requirement
- ▶ Prior burglary convictions are specifically controlled by statute
- ▶ “Determining whether Dickey's prior burglary involved a dwelling would necessarily involve judicial factfinding that goes beyond merely finding the existence of a prior conviction or the statutory elements constituting that prior conviction. Accordingly, we agree with the Court of Appeals that classifying Dickey's prior burglary adjudication as a person felony violates his constitutional rights as described under *Descamps* and *Apprendi*.” *Id.* at 1021.
- ▶ Thus, prior adjudication must be scored as NPF. See *id.*

CATEGORICAL APPROACH

statute forming the basis of the defendant's prior conviction contains a single set of elements constituting the crime. [nondivisible statute]

A sentencing court cannot look beyond elements of prior statute to compare to comparable crime in Kansas.

MODIFIED CATEGORICAL APPROACH

Statute forming the basis of the defendant's prior conviction contains multiple, alternate versions of the crime [divisible statute]

At least one of the versions matches the elements of the comparable crime in KS.

Sentencing court can look beyond the elements of the statute and examine a limited class of documents to determine which of a statute's alternative elements should be compared to the current KS offense.

Documents include charging documents, plea agreements, jury instructions, verdict forms, and transcripts from plea colloquies as well as findings of fact and conclusions of law from a bench trial.

See *State v. Dickey*, 301 Kan. 1018, 1037-1039, 350 P.3d 1054 (2015)(Dickey I)

Dickey applied in *State V. Marshall*

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- ▶ Defendant was sentenced in his current crime during the brief window when residential burglaries were treated as non-person felonies.
- ▶ He argued that *Keel* applies, and thus, his 5 prior burglaries should all be treated as NPF
- ▶ The classification of prior burglaries is controlled specifically by statute, not *Keel*. See *State v. Marshall*, No. 119,710, 2019 WL 5849911 at *6 (Kan. App. 2019) (unpublished opinion) (rev. denied July 27, 2020).
- ▶ “Therefore, for a defendant convicted under the post-KSGA burglary statutes—in which “dwelling” is included as an element of the offense—the district court does not engage in impermissible judicial fact-finding when it classifies the defendant's prior residential burglary conviction as a person felony under K.S.A. 2018 Supp. 21-6811 (d)(1) **as long as it is clear from the record the defendant was convicted under the section of the burglary statute in which “dwelling” is an essential element of the offense.**” *Id.* at *7.

Scoring Out of State DUI Convictions

Out-of-state DUI prior convictions

- ▶ Out of state convictions can be counted in determining whether the DUI conviction is the second, third, fourth or greater. This applies to DUI and Commercial DUI.
- ▶ For the purposes of determining whether an offense is comparable, the following shall be considered: 1. The name of the out-of-jurisdiction offense; 2. The elements of the out-of-jurisdiction offense; and 3. Whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense. K.S.A. 2022 Supp. 8-1567(j) and K.S.A. 2022 Supp. 8-2,144(o).

State v. Mejia

- ▶ Defendant had 3 prior Missouri convictions that were used to elevate the DUI from a misdemeanor to a felony
- ▶ The Court of Appeals ruled that the holding in *Wetrich* does not apply to DUI cases because the Legislature has amended K.S.A. 8-1567 to permit charging and sentencing enhancements for DUIs based on out-of-state convictions under statutes that are comparable to Kansas law—meaning “similar to” rather than the same as or narrower than Kansas law. See *State v. Mejia*, 58 Kan.App.2d 229, 229, 466 P.3d 1217 at *1 (Kan. App. 2020) (rev. denied September 29, 2020).

Criminal History Classifications in Multiple Conviction Cases

In all sentencing cases involving multiple convictions, the sentencing court must establish the base sentence for the primary crime. The primary crime is determined pursuant to K.S.A. 2022 Supp. 21-6819(b)(2).

Consolidation

Consolidation

- ▶ In *Shiple*, where a defendant argued that his two cases were effectively consolidated, the Court of Appeals found that the cases counted as prior convictions for criminal history purposes because the cases were never joined for trial. See *State v. Shiple*, 62 Kan.App.2d 272, 280, 510 P.3d 1194 (Kan. App. 2022). Shiple had no trial because he pleaded, but his cases were set for trial on the same day, he pleaded to both cases by a joint plea agreement on the same day, and he was sentenced in both cases on the same day. *Id.* at 276. Neither party asked the court to consolidate the cases for trial. See *id.* at 272.
- ▶ The COA found that the district court did not err in relying on the convictions in each complaint to calculate a criminal history score in the other. See *id.* at 273.

Consolidation Continued

“Second, although Shipley insists the cases could have been joined under K.S.A. 22-3202 and K.S.A. 22-3203, **the fact remains that they were not joined.** Although Shipley entered pleas on the same day and the plea agreement deals with both cases, **the district court never ordered the cases joined for trial. And because the cases were never “joined for trial,” as is required here to prevent his convictions from being “prior convictions” under K.S.A. 2020 Supp. 21-6810(a), the district court was duty bound to use the convictions in each case to calculate the criminal history score in the other.** See *Roderick*, 259 Kan. at 115-16, 911 P.2d 159 (holding that the district court should count multiple convictions entered on same date in different cases in determining a defendant's criminal history score). Our cases have consistently so held. See *State v. Helko*, No. 112,961, 2016 WL 1296081, at *1 (Kan. App. 2016) (unpublished opinion) (finding convictions in one case qualified as “prior conviction[s]” for criminal history scoring purposes even though defendant was convicted in that case and in another case on the same day and sentenced for both cases at one hearing); *State v. Freimark*, No. 108,839, 2013 WL 5976056, at *2 (Kan. App. 2013) (unpublished opinion) (“when a defendant is convicted of crimes in two separate cases on the same day and sentenced in both cases at one hearing, the convictions in each case are scored against the other case for criminal history purposes”); *State v. Loggins*, No. 90,171, 2004 WL 1086970, at *6 (Kan. App. 2004) (unpublished opinion) (“The fact the court set the cases for sentencing on the same date, likewise, did not prevent them from being prior convictions for purposes of Loggins' criminal history.”).” *State v. Shipley*, 62 Kan.App.2d 272, 279, 1201, 510 P.3d 1194 (Kan. App. 2022).

DOUBLE RULE

The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence. This limit shall apply only to the total sentence, and it shall not be necessary to reduce the duration of any of the nonbase sentences imposed to be served consecutively to the base sentence. The postrelease supervision term will reflect only the longest such term assigned to any of the crimes for which consecutive sentences are imposed. Supervision periods shall not be aggregated. K.S.A. 2022 Supp. 21-6819(b)(4).

DOUBLE RULE WHEN CONSOLIDATING CASES FOR TRIAL

- ▶ Three sexual assaults on different women, 2 different cases charged
- ▶ Cases consolidated for trial; sentenced separately, base sentence determined for each
- ▶ More specifically, Dixon argues that K.S.A. 2020 Supp. 21-6819(b)(4), commonly known as the “double rule,” violated his equal protection rights in the manner that it was applied to his sentencing following his consolidated trial of two criminal cases. He asserts the double rule treats one class of defendants—those that have multiple counts charged in one charging document—differently from another class of defendants—those that have multiple cases consolidated for trial because the charges could have been brought in one charging document—even though the only difference between the two classes is the number of case numbers attached to the charges.” *State v. Dixon*, 60 Kan.App.2d 100, 130, 492 P.3d 455 (Kan. App. 2021) (rev. denied September 27, 2021).

STATE V. DIXON CONT'D.

- ▶ “Before proceeding with further analysis, we observe that the Kansas Supreme Court has held that under the language of the statute, the double rule does not apply to separate cases that are consolidated for trial under K.S.A. 22-3203. *State v. McCurry*, 279 Kan. 118, 127, 105 P.3d 1247 (2005). But the holding in *McCurry* is based strictly on statutory construction and the constitutionality of the statute was not challenged in that case.” *State v. Dixon*, 60 Kan.App.2d 100, 132, 492 P.3d 455 (Kan. App. 2021) (rev. denied September 27, 2021).
- ▶ Court’s Analysis: (1) double rule treats arguably indistinguishable defendants differently, (2) double rule as applied to Dixon’s cases does not pass rational basis scrutiny and (3) the remedy for the constitutional violation identified herein is to extend the double rule to cases consolidated for trial based on a finding that the charges could have been brought in one charging document. See *id.* 133-140.

DOUBLE RULE WHEN CONSOLIDATING CASES FOR TRIAL CONT'D.

- ▶ 2 cases consolidated for trial
- ▶ Found guilty and judge sentenced him for the cases separately
- ▶ The COA held “...that when the State chooses to consolidate cases for trial because the charges could have been brought in one charging document, then the State must be held to the sentencing limitations—applying only one base sentence—applicable to a trial based on one charging document. See *Dixon*, 60 Kan. App. 2d at 140, 492 P.3d 455 (reasoning same in relation to double rule).” *State v. Myers*, No. 123,439, 2022 WL 1052077 at *27 (Kan. App. 2022) (unpublished opinion).

State v. Anderson

Defendant was charged in 3 separate cases

Judge consolidated the cases for plea

At sentencing, criminal history score of "C" was applied to all 3 cases

Defendant argued that criminal history score of "C" should only be applied to one count and the rest should be "I."

District Court denied defendant's request to treat the cases like they were charged in a single complaint

See *State v. Anderson*, No. 124,727, 2023 WL 176658 (Kan. App. January 13th, 2023) (unpublished opinion).

State v. Anderson, cont'd.

Where the district court consolidated a defendant's 3 cases and sentenced the defendant using a separate primary crime for each, the Kansas Court of Appeals remanded the case for the district court to designate a base sentence for the most severe crime among the three cases to serve as the base sentence for all. See *State v. Anderson*, No. 124,727, 2023 WL 176658 at *6, (Kan. App. January 13th, 2023) (unpublished opinion). The Court of Appeals found the differential treatment violated his constitutional right to equal protection because Anderson's controlling prison sentence was several months longer than it would have been if the State had filed only one charging document. *Id.* at *1.



Any other
criminal history
issues that you
are seeing?



QUESTIONS?

KSSC RESOURCES

Staff Attorney Contact

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Training

- Francis.givens@ks.gov

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