



**KANSAS**

**SENTENCING GUIDELINES**

**DESK REFERENCE MANUAL**

**2015**



# KANSAS SENTENCING COMMISSION

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# TABLE OF CONTENTS

<b>2015 DESK REFERENCE MANUAL</b>	<b>1</b>
<b>INTRODUCTION</b>	<b>1</b>
<b>TIME LINE OF KSGA SELECTED EVENTS</b>	<b>2</b>
<b>2015 LEGISLATIVE CHANGES TO THE KSGA AND RELATED CRIMINAL LAW</b>	<b>5</b>
<b>CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES</b>	<b>31</b>
SENTENCING CONSIDERATIONS .....	31
SENTENCING GUIDELINES AND GRIDS .....	31
DRUG GRID AND NONDRUG GRID.....	31
GRID BLOCKS .....	32
GENERAL RULES FOR DETERMINING SEVERITY LEVELS.....	32
OFF-GRID CRIMES .....	33
Capital Murder.....	33
Mandatory Minimums .....	33
NONGRID CRIMES .....	35
Criminal History .....	35
ANTICIPATORY CRIMES .....	36
Attempt .....	36
Conspiracy .....	37
Solicitation.....	38
MISDEMEANORS .....	38
DRUG DISTRIBUTION AND CULTIVATION CRIMES.....	39
Drug Distribution.....	39
Drug Cultivation .....	40
<b>CHAPTER II: PROCEDURE PRIOR TO SENTENCING</b>	<b>41</b>
DETERMINATION OF THE DATE OF OFFENSE: APPLICATION TO THE SENTENCING GUIDELINES .....	41
CHARGING DOCUMENTS .....	41
Consolidation.....	41
FINGERPRINTING.....	41
DNA SAMPLE COLLECTION.....	42
OFFICIAL RECORDS.....	43
PLEA AGREEMENT RULES.....	43
DIVERSIONS .....	44
DEFERRING SENTENCE PENDING MENTAL EXAMINATION .....	45
DOMESTIC VIOLENCE OFFENSE DESIGNATION.....	45
<b>CHAPTER III: CRIMINAL HISTORY</b>	<b>46</b>
CRIMINAL HISTORY RULES.....	46
Person and Nonperson Crimes.....	47
Select Misdemeanors .....	47
Criminal History Categories .....	47
Juvenile Adjudications.....	48
Decay .....	48
Diversion.....	49
Prior Conviction as Sentence Enhancement or Element of Present Crime .....	49
Nongrid Offenses.....	50
Person Misdemeanors – Conversion to Person Felonies .....	50

Involuntary Manslaughter and DUI .....	50
Leaving the Scene of an Accident .....	50
Burglary .....	51
Out-of-State Convictions .....	51
PROOF OF CRIMINAL HISTORY .....	53
Criminal History Worksheet .....	53
Uncounseled Misdemeanor Convictions .....	54
<b>CHAPTER IV: PRESENTENCE INVESTIGATION REPORTS</b> .....	<b>55</b>
REQUIREMENTS .....	55
<b>CHAPTER V: SENTENCING</b> .....	<b>57</b>
SENTENCING RANGE .....	57
Presumptive Imprisonment .....	57
Presumptive Nonprison .....	57
Border Boxes .....	57
SENTENCING OPTIONS .....	58
Authorized Dispositions .....	58
U.S. Armed Forces Service Treatment .....	59
Fines .....	60
Fees .....	60
Probation .....	62
Community Corrections Target Population (2000 Senate Bill 323) .....	65
*Correctional Conservation Camp .....	66
Good Time .....	66
Aggravated Habitual Sex Offenders .....	67
Extended Jurisdiction Juvenile Cases .....	67
SPECIAL SENTENCING RULES .....	67
Public Safety Offenses / Firearms Finding .....	67
Habitual or Repeat Offenses .....	69
Nongrid Offenses .....	73
Finance Offenses .....	74
MULTIPLE CONVICTIONS .....	75
DEPARTURES AND DEPARTURE FACTORS .....	77
Mitigating Factors .....	78
Aggravating Factors .....	79
Drug Grid Crimes - Additional Aggravating Factors .....	79
Durational Departures .....	80
Dispositional Departures .....	80
Jessica’s Law Offenses .....	81
Crimes of Extreme Sexual Violence .....	81
Postrelease Supervision Departure for Sexually Motivated Offenses .....	81
Jury Trial Procedures For Upward Durational Departure .....	81
Departure and Consecutive Sentencing Combination .....	82
REPORTING DISPOSITIONS TO THE KANSAS SENTENCING COMMISSION .....	83
REPORTING DISPOSITIONS TO THE KANSAS BUREAU OF INVESTIGATION .....	84
DNA SAMPLE COLLECTION .....	84
<b>CHAPTER VI: DRUG TREATMENT – SB 123 PROGRAM</b> .....	<b>85</b>
TARGET POPULATION .....	85
CRIMINAL RISK-NEED AND DRUG ABUSE ASSESSMENTS .....	85

QUALIFICATION FOR TREATMENT .....	86
PAYMENT OF FEES .....	86
LENGTH OF TREATMENT .....	87
CONDITION VIOLATIONS .....	87
Violation Sanctions.....	87
Revocation of Probation .....	87
POSTRELEASE SUPERVISION.....	87
*CONSERVATION CAMP .....	88
<b>CHAPTER VII: OFFENDER REGISTRATION</b> .....	<b>89</b>
LENGTH OF REGISTRATION REQUIREMENT .....	89
OFFENDER REGISTRATION TYPE.....	89
DUTIES OF THE SENTENCING COURT.....	89
VIOLATION OF THE ACT .....	90
Criminal History Calculation.....	90
<b>CHAPTER VIII: PROBATION VIOLATIONS AND REVOCATION</b> .....	<b>91</b>
PROBATION SANCTIONS .....	91
Quick Dips .....	91
Court Sanctions in Misdemeanor and Nongrid Felony Probation Cases.....	92
Court Sanctions In Felony Probation Cases .....	92
Postrelease Supervision .....	94
<b>CHAPTER IX: APPEALS</b> .....	<b>95</b>
APPELLATE REVIEW PRINCIPLES – K.S.A. 2015 SUPP. 21-6820.....	95
<b>CHAPTER X: POSTRELEASE SUPERVISION</b> .....	<b>96</b>
LENGTH OF SUPERVISION.....	96
Good Time Credit .....	96
Reduction of Postrelease Supervision Period .....	97
Multiple Conviction Cases.....	97
Sexually Motivated Crime Departures .....	97
Jessica’s Law And Sexually Violent Offense Supervision.....	97
Other Off-grid Offenses .....	98
VIOLATIONS OF POSTRELEASE SUPERVISION CONDITIONS .....	98
<b>CHAPTER XI: RETROACTIVITY OF SENTENCING GUIDELINES</b> .....	<b>99</b>
Conversion of Sentence for a Crime Committed between July 1, 1993, and March 24, 1994.....	99
<b>CHAPTER XII: POINTS OF INTEREST ABOUT THE GUIDELINES</b> .....	<b>100</b>
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT .....	100
SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA .....	102
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION .....	107
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE .....	107
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS.....	108
<b>Appendix A: Presentence Investigation Report (PSI) - Instructions and Forms</b> Criminal History Worksheet	
<b>Appendix B: Journal Entry of Judgment - Instructions and Forms</b>	
<b>Appendix C: Journal Entry of Probation Violation Hearing - Instructions and Forms</b>	
<b>Appendix D: Felony / Misdemeanor Crimes- Numerically by Statute Number</b>	
<b>Appendix E: Sentencing Grids</b> HB 2170 Flowchart	

**Available on the Kansas Sentencing Commission website [www.sentencing.ks.gov](http://www.sentencing.ks.gov):**

**Time Line of Selected Events Related to the KSGA**

**Selected Kansas Case Law Decisions on Topics Related to the KSGA and Sentencing Issues**

**Selected Attorney General Opinions on Topics Related to the KSGA and Sentencing Issues**

**Approved and Disapproved Non-Statutory Departure Reasons Cited by Sentencing Courts**



# 2015 DESK REFERENCE MANUAL

## INTRODUCTION

The Kansas Sentencing Guidelines Desk Reference Manual (DRM) provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2015 Supp. 21-6801 *et seq.* The DRM contains features that we hope will not only inform users of the latest developments in 2015 sentencing law but also help to facilitate more efficient understanding and application of the law.

The Kansas Sentencing Commission (KSC) encourages criminal justice professionals to contact our staff for further information and assistance concerning the Desk Reference Manual or the Kansas Sentencing Guidelines Act. Questions may be directed to our staff at (785) 296-0923, or by e-mail at [sentencing@sentencing.ks.gov](mailto:sentencing@sentencing.ks.gov).

In July of 2011 the Kansas Criminal Code was moved from K.S.A. 21-3101 *et seq.* to K.S.A. 21-5101 *et seq.* statutory citations within the DRM cite to the new, recodified statute numbers. The Kansas Sentencing Commission's website also offers a cross-reference document between the new and former statute numbers.

The statutory listings of felonies and misdemeanors in Appendix D have also been modified to reflect the specific statutory violations based upon the 2015 Legislative Changes. In a departure from previous versions of the manual, the felony and misdemeanor appendices have been combined and organized according to statute number. As a reference, there is a new alphabetical index of crimes to help users locate the correct statute number. The complete versions of both the felony and misdemeanor statute files are posted under the "Agency Publications" link of the website.

In order to reduce the size of the Manual, the Time Line of KSGA Selected Events is posted, along with other Appendices, on the KSC website at [www.sentencing.ks.gov](http://www.sentencing.ks.gov). Posting these documents on our website rather than publishing them in the Manual allows us to easily update the material as new information becomes available. All of the 2015 legislative changes relative to the sentencing guidelines remain in the Manual and are summarized in the first section.

## ADDITIONAL COPIES

Copies of the Manual in hard copy and electronic form may be ordered from the Kansas Sentencing Commission at [www.sentencing.ks.gov](http://www.sentencing.ks.gov) or may be accessed and printed free of charge at the KSC website.

This Manual is not copyrighted. The entire text of this Manual, along with all of the grids, charts and forms, may be reproduced in part or in its entirety by any party wishing to do so. The Desk Reference Manual should always be used in consultation with the applicable Kansas statutes and related case law, the language of which controls.

## TIME LINE OF KSGA SELECTED EVENTS

In the 2015 Legislative Session, the Legislature enacted several significant statutory changes affecting the general practice of criminal law and those specifically affecting sentencing law and procedure. We highlight the following:

### 1) Senate Bill 34 increases voter crimes penalties and creates new independent authority in the office of the Kansas Secretary of State to prosecute election crimes

Regarding election crimes and prosecution of those crimes, the bill does the following:

- Creates a separate crime of voting more than once, which currently is incorporated in the crime of voting without being qualified;
- Creates new law that gives the following officials independent authority to prosecute any person for a Kansas election crime: the district attorney or county attorney of the county where such violations occurred, the Kansas Attorney General, and the Kansas Secretary of State. Once one of the listed officers has commenced prosecution of a person for an election crime, the other officers may assist in the prosecution but may not commence a separate prosecution;
- Increases election criminal penalties for:
  - Prohibiting or requiring certain actions with regard to advance voting from a class C misdemeanor to a severity level 9, nonperson felony;
  - Voting or attempting to vote in any election district when not a lawfully registered voter in that district, or voting or attempting to vote at any election by a person who is not a U.S. citizen, or who does not otherwise qualify as an elector from a class A misdemeanor to a severity level 7, nonperson felony. The general criminal attempt statute does apply to the crime;
  - Election tampering from a severity level 8 to a severity level 7, nonperson felony; and
  - False impersonation of a voter from a severity level 9 to a severity level 8, nonperson felony.

### 2) Senate Bill 45 expands concealed carry gun laws

**SB 45** amends laws concerning the concealed carry of firearms in the state. The bill:

- Adds language allowing the concealed carry of a firearm without a concealed carry license issued by the State, as long as that individual is not prohibited from possessing a firearm under either federal or state law;
- Specifies the carrying of a concealed handgun cannot be prohibited in any building unless the building is posted in accordance with rules and regulations adopted by the Attorney General; and
- Concealed carry licenses will still be issued by the State, but the availability of those licenses cannot be construed to prohibit the carrying of handguns without a license, whether carried openly or concealed, loaded or unloaded.

### 3) House Bill 2048 creates new crime of Aggravated Criminal Damage to Property to deter scrap metal theft

**HB 2048** establishes the “Scrap Metal Theft Reduction Act” (Act) by adding and amending law related to scrap metal dealer registration and scrap metal sales. Additionally, the bill amends certain criminal provisions related to scrap metal theft in the following manner:

- The bill amends the statute providing for *prima facie* evidence of intent to permanently deprive an owner or lessor of possession, use, or benefit of property;
- The bill amends the statute governing the crime of criminal damage to property to create the crime of

**aggravated criminal damage to property**, which is defined as criminal damage to property, if the value or amount of damage exceeds \$5,000, committed with the intent to obtain regulated scrap metal or related items, where the crime is committed on any building, structure, residence, facility, site, place, property, vehicle, or infrastructure. The new crime is a severity level 6, nonperson felony, and a special sentencing rule is added to the sentencing grid statute imposing a sentence of presumptive imprisonment where an offender has a prior conviction for any nonperson felony.

- The bill sets forth various costs to be included in determining the amount of damage to property, including cost of repair or replacement; loss of production, crops, and livestock; labor and material costs; and costs of equipment used to abate or repair the damage; and
- The bill enacts new law establishing that, at a preliminary examination, the business records containing the details of the sales or transactions maintained by scrap metal dealers pursuant to the Act may be admitted into evidence as if the individuals who made the record and the records custodian had testified in person.

**4) House Bill 2051 increases program credit for inmates, good time credit for drug severity level three offenders, and expands the use of the risk assessment tool for Community Corrections placement**

**HB 2051** amends K.S.A. 21-6821 to increase the amount of good time credit an inmate sentenced for a drug severity level 3 crime committed on or after July 1, 2012, may earn, from 15 percent to 20 percent. The bill allows those same offenders to earn program credits and increases the amount of time that may be earned from 60 days to 90 days for all eligible offenders, including drug severity level 3.

The bill also amends the list of adult offenders in K.S.A. 75-5291 who are eligible to be placed in community correctional services programs to remove placements based on offense classification and expands placements based on the use of a standardized risk assessment tool specified by the Kansas Sentencing Commission. Those offenders who are determined, on or after July 1, 2014, to be moderate or very high-risk by this tool shall be eligible for placement. (Note: offenders who are determined to be high-risk by this tool are eligible for placement under current law.)

**5) Legislature responds to *State v. Murdock* ruling**

**HB 2053** amends K.S.A. 21-6810 and K.S.A. 21-6811 regarding the calculation of criminal history to specify that any prior adult felony conviction, prior misdemeanor, or prior juvenile adjudication for offenses committed before July 1, 1993, shall be scored as a person or nonperson crime using a comparable offense under the Kansas Criminal Code that was in effect on the date the current crime of conviction was committed. The bill states these amendments are procedural in nature and shall be construed and applied retroactively. This bill is in direct response to the invitation of the Supreme Court to legislate bill language in the revised Kansas Sentencing Guidelines Act that would resolve the issue presented in *State v. Murdock*, 299 Kan. 312, 323 P.3d 846 (2015).

**6) House Bill 2055 adds officials to list of Battery on a Law Enforcement Officer, clarifies misdemeanor criminal history calculation, creates special sentencing rule for Aggravated Battery while DUI and modifies special sentencing rule for Involuntary Manslaughter while DUI**

***Battery Against a Law Enforcement Officer***

The bill amends the crime of battery against a law enforcement officer in K.S.A. 21-5413 to include battery against a judge, attorney, court services officer, or community corrections officer in the performance of their official duty. Each of these positions are defined. The bill similarly amends the crime of aggravated battery against a law enforcement officer.

***Criminal History Determination for Misdemeanors***

The bill amends K.S.A. 21-6811 governing the determination of an offender’s criminal history to establish a procedure for classifying out-of-state misdemeanor convictions. The comparable Kansas offense shall be used to classify the out-of-state conviction as a class A, B, or C misdemeanor. If the comparable Kansas offense is a felony, the out-of-state conviction shall be classified as a class A misdemeanor. If there is no comparable Kansas offense, the out-of-state conviction will not be included in the criminal history.

***Aggravated Battery While DUI***

The bill also amends K.S.A. 21-6811 with provisions known as Mija Stockman’s Law, which creates a special rule for determining criminal history for a conviction of aggravated battery when a person is DUI and great bodily harm to another person or disfigurement of another person results from such act. The rule provides that, for the purposes of determining an offender’s criminal history, the first prior adult conviction, diversion in lieu of criminal prosecution, or juvenile adjudication of DUI, commercial DUI, or DUI test refusal shall count as one nonperson felony. Each second or subsequent prior adult conviction, diversion in lieu of criminal prosecution, or juvenile adjudication of these offenses would count as one person felony.

***Involuntary Manslaughter While DUI***

The bill also adds commercial DUI and DUI test refusal to prior convictions, diversions, or juvenile adjudications that count as person felonies in determining the criminal history for a conviction of involuntary manslaughter while DUI.

## **2015 LEGISLATIVE CHANGES TO THE KSGA AND RELATED CRIMINAL LAW**

This summary is by no means exhaustive in its coverage of the session but contains criminal sentencing and relevant collateral issues that may be of interest to criminal justice stakeholders. Bills referenced here can be found at [www.kslegislature.org](http://www.kslegislature.org) under the Bills and Laws tab.

### **House Substitute for SB 12 Kansas Sexually Violent Predator Act**

**House Substitute for SB 12** creates and amends law governing the civil commitment of sexually violent predators and the Sexual Predator Treatment Program (SPTP), as follows.

The bill provides that continuing and new law governing such civil commitment shall be known as the Kansas Sexually Violent Predator Act (Act).

Provisions are added to the statute governing the initial identification of a person who may meet the criteria of a sexually violent predator (SVP) to require that notice be given to persons evaluated of the nature and purpose of the evaluation, that the evaluation will not be confidential, and that the person's statements and evaluator's conclusions could be disclosed to certain parties in proceedings under the Act. Disclosures to the Attorney General under the section are deemed to be in response to the Attorney General's civil demand for information to determine whether a petition shall be filed, and such information would have to be specific to the purposes of the Act and as limited in scope as reasonably practicable.

This statute also is amended to include certain mental health professionals on the multidisciplinary team and to remove a 30-day deadline for assessment by the team of whether a person is a SVP.

The statute governing the filing of a petition alleging a person is a SVP is amended to provide that the venue for a petition involving a person convicted of or charged with a federal or other state offense that would be a sexually violent offense in Kansas may be in the county where the person resides, was charged or convicted of any offense, or was released. Provisions are added to this statute to permit service of the petition on the attorney representing the person, to assess costs to the person for medical care and treatment provided for the person by the governmental entity having custody of the person and allow the governmental entity to obtain reimbursement for such costs from the person, and to clarify that court proceedings are civil in nature.

The statute establishing the Sexually Violent Predator Expense Fund is amended to broaden its use to include costs related to any civil action relating to commitment under the Act.

The statute governing the probable cause hearing is amended to specify that the person named in the petition shall be detained in the county jail until the SVP determination is made and to require the judge to file a protective order permitting disclosures of protected health information to parties, counsel, evaluators, experts, and others necessary to the SVP litigation proceedings. The 72-hour time requirement for the hearing is amended to also allow a hearing as soon as reasonably practicable or agreed upon by the parties.

The statute governing trial on the petition is amended to change a 60-day deadline from a deadline for

trial to a deadline to set the matter for pretrial conference to establish a mutually agreeable date for trial. A right-to-counsel provision is narrowed to apply only to this statute, rather than to all proceedings under the Act, and provisions regarding retention of experts or professional persons for examination are modified to instead allow an independent exam under the Rules of Civil Procedure. The bill clarifies the jury trial provisions of this section do not apply to proceedings for annual review or proceedings on petitions for transitional release, conditional release, or final discharge.

The statute governing appellate and commitment procedure following the SVP determination is amended to clarify that appeals would be taken as civil appeals and that persons committed for control, care, and treatment by the Kansas Department for Aging and Disability Services (KDADS) are required to be segregated in different units than other patients under KDADS supervision.

The statute governing annual examinations of SVPs' mental conditions is amended to reflect changes made elsewhere in the bill.

The bill amends the statute governing petitions for transitional release authorized by the Secretary for Aging and Disability Services (Secretary) to adjust the timing requirement for the hearing, remove a provision allowing a jury upon demand, and clarify the standard for transitional release.

The statute governing subsequent petitions for transitional release, conditional release, and final discharge and placement restrictions for transitional or conditional release is amended to adjust the standard for such release or discharge and expand the limit on SVPs that may be placed by the Secretary in any one county on transitional or conditional release from 8 to 16. This expansion is effective July 1, 2015.

The bill amends the statute setting forth rights and rules of conduct for SVPs as follows:

- Change the term "patient" to "person" in the definitions and throughout the section;
- Add definitions for "emergency lockdown" and "individual person management plan";
- Clarify that rights under the section are statutory rights;
- Adjust the provision related to therapeutic labor, including requiring evaluation of the labor by staff every 180 days, instead of every 120 days;
- Adjust provisions related to treatment and medication, including adding more specific directions for administering medication over a person's objection;
- Adjust provisions related to restraint and seclusion, including increasing the required monitoring interval from 15 to 30 minutes;
- Add provisions allowing for the use of individual person management plans;
- Specify that individual religious worship must comply with applicable law and facility rules and policies;
- Require persons to pay reasonable costs to receive copies of records, and allow the head of a treatment facility or designee to refuse disclosure if it will likely be injurious to the welfare of the person;
- Specify that the right to send and receive mail is subject to reasonable limitations and mail is subject to examination and inspection for contraband per facility rules and policies;
- Specify that contraband may be confiscated;
- Clarify what items a person may not receive through the mail;
- Clarify that use of clothing and toilet articles must comply with facility rules and policies;

- Clarify the right to possess personal property;
- Clarify the right to see visitors;
- Narrow the right to present grievances;
- Establish that reasonable limitations may be set on spending money;
- Remove a provision for an informal hearing regarding the denial of any rights under the decision, and clarify that notice of decision is all that is required when the facility makes an administrative decision of general applicability;
- Establish that proceedings concerning an action by KDADS shall be governed under the Kansas Administrative Procedure Act (KAPA) and the Kansas Judicial Review Act (KJRA), and that a person appealing any alleged violation or any other agency determination must exhaust all available administrative remedies before requesting a hearing under KAPA;
- Provide requirements for notice of right to appeal, request for hearing, and review of such request to the Office of Administrative Hearings (OAH);
- Allow any hearing before OAH, or any proceeding under KJRA, to be conducted by telephone or other electronic means, unless the presiding officer or court determines the interests of justice require an in-person hearing. An in-person proceeding shall occur at the place where the person is committed; and
- Establish venue in Pawnee County, Kansas, for all proceedings brought pursuant to KJRA, unless otherwise provided in the Act.

The bill amends the statute governing *habeas corpus* for persons committed under the Act to make the section's provisions applicable to any civil action filed by such person, adds the filing fee as a cost to be taxed, and taxes the costs to the person bringing the action. Provisions are added with certain requirements for affidavits, and trust fund and other account statements for persons committed under the Act who seek to file civil actions without prepayment of fees. If the court determines the person is indigent, costs shall be taxed to the county responsible for the costs, and a district court receiving a statement of costs from another district court is required to approve payment, unless it is not the county responsible for the costs. A claimant county could maintain an action against the debtor county if costs are not paid within 120 days. Requirements for payment of the filing fee, for filing *in forma pauperis*, and for payment of an initial partial filing fee are added. The bill specifies that no person committed under the Act is prohibited from bringing a civil action or pursuing an appeal for the reason that such person has no assets and no means by which to pay the initial partial filing fee. A provision for judgment of costs is added. Finally, existing provisions related to dismissal and a "three-strikes-and-you're-out" frivolous filing prohibition are moved to this section from the subsequent statutory section, and are deleted from the subsequent section.

Except for appeals under the KJRA, the statute governing appealable orders under Chapter 59 is amended to allow appeals under this section to have priority over all others. The KJRA is amended to allow it to apply to the Act.

A provision regarding the release of a person who has undergone an identified physiological change rendering the person unable to commit a sexually violent offense is moved to a new section and amended to change the burden of proof from the State to the person. The person is required to demonstrate such change by clear and convincing evidence.

The bill establishes that the cost of post-commitment hearings, annual review hearings, evaluations, or other expenses provided for in the Act, as well as any SPTP administrative hearings involving the statutory rights of a SVP, or other program decisions appealed to OAH, shall be paid by the county

responsible for the costs, which is defined as the county where the person was determined to be a SVP. OAH is required to provide a statement to such county at the conclusion of any of these proceedings, and the county is required to pay within the earlier of 60 days after receipt of the bill or prior to the expiration of the fiscal year in which the costs were incurred.

The bill establishes that the costs incurred for the care and custody of a person committed pursuant to the Act while such person is in the custody of a county law enforcement agency for a pending criminal proceeding shall be paid by the county with custody of the person, and the Secretary will be required to reimburse the county from the SPTP New Crimes Reimbursement Account (Account) for all costs that would have been paid from the account if the person had remained in the custody of the Secretary. Similarly, if a person committed pursuant to the Act commits a crime while committed and is prosecuted for such crime, the prosecution costs shall be paid by the county where the prosecution occurs, and the Secretary would be required to reimburse the county from the Account. If no funds are available in the Account, the county may file a claim against the State. The Secretary is directed to develop and implement a procedure for such reimbursements by January 1, 2016.

### **SB 13**

#### **Criminal History Record Information**

**SB 13** clarifies the definition of “criminal history record information” by excluding information regarding the release, assignment to work release, or any other change in custody status of a person confined by the Department of Corrections or a jail. The bill also removes a reference to the Juvenile Justice Authority.

### **SB 34**

#### **Elections Crimes**

**SB 34** creates or amends laws related to elections crimes, prosecution of those crimes, and elections definitions.

Regarding election crimes and prosecution of those crimes, the bill does the following:

- Creates a separate crime of voting more than once, which currently is incorporated in the crime of voting without being qualified. The new crime is defined as intentionally voting or attempting to vote more than once in the same jurisdiction in an election held on a particular date, voting in more than one U.S. jurisdiction in an election held on a particular date, or inducing or aiding any person to take the above actions. The crime is a severity level 7, nonperson felony, and the general criminal attempt statute does not apply to the crime;
- Creates new law that gives the following officials independent authority to prosecute any person for a Kansas election crime: the district attorney or county attorney of the county where such violations occurred, the Kansas Attorney General, and the Kansas Secretary of State. Once one of the listed officers has commenced prosecution of a person for an election crime, the other officers may assist in the prosecution but may not commence a separate prosecution;
- Amends the statute prohibiting or requiring certain actions with regard to advance voting to



increase the severity level for a violation of its provisions from a class C misdemeanor to a severity level 9, nonperson felony;

- Amends the election bribery statute to add an exemption for a business or organization providing a product worth less than \$3.00 to any person who asserts such person has voted, without regard to the voter's vote for or against a candidate or issue;
- Amends the crime of voting without being qualified to remove the provisions regarding voting more than once (which becomes a separate crime, as described above) and defines the crime as voting or attempting to vote in any election district when not a lawfully registered voter in that district, or voting or attempting to vote at any election by a person who is not a U.S. citizen, or who does not otherwise qualify as an elector. The severity level of this crime is increased from a class A misdemeanor to a severity level 7, nonperson felony, and the general criminal attempt statute does apply to the crime;
- Increases the severity level for the crime of election tampering from a severity level 8 to a severity level 7, nonperson felony; and
- Clarifies that the crime of false impersonation of a voter can occur by representing oneself as another person whether real or fictitious, and increases the severity level of this crime from a severity level 9 to a severity level 8, nonperson felony.

## **HB 45**

### **Constitutional Carry**

**SB 45** amends laws concerning the concealed carry of firearms. The bill adds language allowing the concealed carry of a firearm without a concealed carry license issued by the State, as long as that individual is not prohibited from possessing a firearm under either federal or state law. The bill specifies the carrying of a concealed handgun cannot be prohibited in any building unless the building is posted in accordance with rules and regulations adopted by the Attorney General. Concealed carry licenses will still be issued by the State, but the availability of those licenses cannot be construed to prohibit the carrying of handguns without a license, whether carried openly or concealed, loaded or unloaded.

Related to concealed carry licenses, the bill also allows the Attorney General to create a list of concealed carry handgun licenses or permits from other jurisdictions that have training requirements greater than or equal to the Kansas requirements. This list can be used by the Attorney General when reviewing concealed carry license applications and making a determination about whether an individual has completed an approved handgun safety and training course required for issuance of a concealed carry license. The bill also defines "equal to or greater than," "jurisdiction," and "license or permit" for the purposes of the new section of law.

The bill amends the definition of "criminal carrying of a weapon" to clarify that it is not legal for anyone under 21 years of age to carry any pistol, revolver, or other firearm concealed on one's person, except when on such person's land or in such person's abode or fixed place of business.

## **SB 95**

### **Creation of the Unborn Protection from Dismemberment Act**

**SB 95** creates the Kansas Unborn Child Protection from Dismemberment Abortion Act (Act). The bill defines relevant terms, establishes exceptions for the prohibition on dismemberment abortions, clarifies the individuals exempt from liability for involvement in dismemberment abortions, allows for injunctive relief and civil damages, establishes who may seek civil damages and what the damages include, authorizes the award of reasonable attorney fees, establishes penalties for violation of the Act, specifies the conditions under which the court orders the anonymity of a woman upon whom an abortion has been performed or attempted be preserved from public disclosure, clarifies no right to abortion nor a right to a particular method of abortion would be created, and includes a severability clause. Specific bill details follow.

#### ***Definitions***

The bill defines several terms, including “abortion” and “dismemberment abortion.” Dismemberment abortion is defined as an abortion “with the purpose of causing the death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp at a portion of the unborn child’s body in order to cut or rip it off.”

The bill establishes dismemberment abortion does not include an abortion that uses suction to dismember the body of an unborn child. The bill clarifies a dismemberment abortion includes the use of suction subsequent to a dismemberment abortion to extract fetal parts after the death of the unborn child. “Medical emergency” and “knowingly” also are defined.

#### ***Restrictions on the Performance of a Dismemberment Abortion***

The bill prohibits the performance of or the attempt to perform a dismemberment abortion unless the procedure is necessary to preserve the life of the pregnant woman or a continuation of the pregnancy would cause a substantial and irreversible physical impairment of a major bodily function. A claim or diagnosis the woman would engage in conduct resulting in her death or in substantial and irreversible physical impairment of a major bodily function does not allow for a dismemberment abortion under the Act.

#### ***Exemption from Liability***

The following persons are exempt from liability under the Act:

- The woman upon whom an abortion is performed or attempted;
- A nurse, technician, secretary, receptionist, or other employee or agent who is not a physician, but acts under the direction of a physician; and
- A pharmacist or other individual who is not a physician, but who fills a prescription or provides instruments or materials used in an abortion at the direction of or to a physician.

### ***Available Causes of Action and Damages***

The Attorney General or any district or county attorney with appropriate jurisdiction is authorized to bring a cause of action for injunctive relief against a person who performs or attempts to perform a dismemberment abortion in violation of the Act and, if the order is granted, prohibits the defendant from performing or attempting to perform any dismemberment abortions in violation of the Act.

A cause of action for civil damages is available to the following persons against a person who performs a dismemberment abortion in violation of the Act (unless the plaintiff is not the woman upon whom the abortion was performed and the pregnancy is a result of the plaintiff's criminal conduct):

- A woman upon whom a dismemberment abortion is performed in violation of the Act;
- The father of the unborn child, who is married to the woman at the time the dismemberment abortion is performed; or
- The parents or custodial guardians of a woman under 18 years of age at the time of the abortion or who dies as a result of the abortion.

Damages awarded in a cause of action for civil damages include money damages for psychological and physical damages caused by a dismemberment abortion, statutory damages equal to three times the cost of the dismemberment abortion, injunctive relief, and reasonable attorney fees under specified conditions.

In causes of action for injunctive relief, in addition to the awarding of other relief, attorney fees are awarded to a successful plaintiff or to a successful defendant if the court finds the plaintiff's action was frivolous and brought in bad faith. A woman upon whom a dismemberment abortion is performed or attempted is not assessed attorney fees, unless the court finds her action was frivolous or brought in bad faith.

### ***Penalties for Violation of Act***

A first conviction for a dismemberment abortion performed or attempted in violation of the Act is a Class A person misdemeanor. A second or subsequent conviction is a severity level 10, person felony.

### ***Anonymity of Woman Absent Consent to Disclose***

In every civil, criminal, or administrative proceeding or action arising out of a violation of the conditions under which an abortion on a viable or pain-capable unborn child or a partial birth or a dismemberment abortion may be performed, the court has authority to determine whether to preserve from public disclosure the anonymity of the woman upon whom the unlawful abortion is performed or attempted if the woman did not consent to the disclosure. Upon a ruling the anonymity of the woman should be preserved, the court is authorized to issue orders to the parties, witnesses, and counsel; direct the record be sealed; and exclude individuals from the courtroom or hearing rooms, as needed, to safeguard her identity from public disclosure.

Orders to preserve the identity of the woman require accompanying specific written findings explaining the need for anonymity, why the order is essential, the narrow tailoring of the order to accomplish anonymity, and why no reasonable less restrictive alternative exists. Unless a woman upon whom an unlawful abortion is performed or attempted consents to the disclosure of her identity, a cause of action

for a violation of the conditions under which an abortion on a viable or pain-capable unborn child or a partial birth or dismemberment abortion could be performed, brought by anyone other than a public official, is required to do so under a pseudonym. The anonymity provisions are not to be construed to conceal the identity of the plaintiff or witnesses from the defendant or attorneys for the defendant.

***Right to an Abortion not Recognized or Created***

The bill does not create or recognize a right to an abortion or to a specific abortion method.

**SB 113**  
**Human Trafficking; Civil Action for Victims & Related Conduct; Commercial Sexual Exploitation of a Child**

**SB 113** creates and amends law related to human trafficking crimes and the crime of commercial sexual exploitation of a child.

The bill creates a civil cause of action for a victim of conduct that constitutes human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child against the person or persons who engaged in such conduct, if the victim suffered personal or psychological injury as a result of the conduct. The victim may seek actual damages, exemplary or punitive damages, injunctive relief, and any other appropriate relief. The court is required to award costs to the prevailing plaintiff, including reasonable attorney fees, and a victim awarded damages shall be deemed to have sustained damages of at least \$150,000. The bill requires the action be filed within 10 years after the victim was freed from the human trafficking situation or turned 18 years of age, whichever is later. A victim is allowed to request the Attorney General pursue the case on the victim's behalf, with damages awarded going to the victim. The Attorney General is allowed to seek reasonable attorney fees and costs. The action is subject to the subrogation provisions for compensation by the Crime Victims Compensation Board, and it will not preclude any other remedy available to the victim under federal or state law.

The bill adds human trafficking, aggravated human trafficking, and commercial sexual exploitation of a child to the list of offenses covered by the civil action available for victims of such offenses when any portion of the offense was used in the production of child pornography.

The bill requires a sentencing court to order a person convicted of human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child to pay restitution to the victim of the offense for expenses incurred or reasonably certain to be incurred as a result of the offense, including reasonable attorney fees and costs, as well as the greater of three times the following amounts, without reduction for the defendant's expenses in maintaining the victim:

- Gross income to the defendant for, or the value to the defendant of, the victim's labor, services, or sexual activity;
- Amount the defendant contracted to pay the victim; or
- The value of the victim's labor, services, or sexual activity, calculated under the higher of the state or federal minimum wage.

Restitution shall be ordered even if the victim is unavailable to accept the restitution. If the restitution is not claimed within five years, the restitution shall be paid to the Human Trafficking Victim Assistance Fund.

The bill adds statutory references to the crimes of human trafficking, aggravated human trafficking, and commercial sexual exploitation of a child within the following statutory provisions, for the purpose of including the crimes within those provisions:

- Prohibition on the polygraph examination of certain victims;
- Convictions giving rise to a presumption of parental unfitness under the Code for Care of Children;
- Information identifying victims of certain offenses that shall not be open for public inspection as part of the files of proceedings under the Revised Juvenile Justice Code;
- Information identifying victims of certain offenses that shall not be disclosed or open to public inspection when part of law enforcement records or municipal court records under the Revised Juvenile Justice Code;
- Worker convictions disqualifying the operation of an adult care home;
- Worker convictions disqualifying the operation of a home health agency;
- Convictions preventing the issuance or renewal of a teacher's license; and
- Special timing requirements for application for compensation from the Crime Victims Compensation Board and an exception from the lower limit for compensation.

Similarly, the bill adds statutory references to the crime of commercial sexual exploitation of a child within the following statutory provisions, for the purpose of including the crime within those provisions:

- Application of sex offense definitions;
- Definition of a "covered person" under the Kansas Racketeer Influenced and Corrupt Organization Act;
- Information a prosecuting attorney must provide to victims of certain crimes, and the victim's right to be present at certain hearings;
- Notice to be given to victims (or their families) of certain crimes of an application for pardon or commutation;
- Notice to be given by the Secretary of Corrections to victims (or their families) of certain crimes prior to the release or after the escape or death of the inmate;
- Notice to be given by the county or district attorney to victims (or their families) of certain crimes upon the escape or death of committed defendants in the custody of the Secretary for Aging and Disability Services;
- Exception from notice of change in child's residence under the Parentage Act when the other parent has been convicted of certain crimes;
- Exception from notice of change in child's residence under provisions related to child custody when the other parent has been convicted of certain crimes;
- Convictions that may be used to prove the existence of domestic violence for the purpose of avoiding disqualification for unemployment benefits;
- Convictions to be included in a criminal history determination as part of an adoption assessment;
- Criminal cases excluded from requirements that a county or district attorney file a special allegation of sexual motivation and a court make a finding thereon;
- Application of the rule of evidence regarding other crimes or civil wrongs to sex offenses, and the definition of "act or offense of sexual misconduct" within this rule;
- Definition of "sexual assault" for the purposes of a substitute mailing address, making victims of the crime eligible for a substitute mailing address; and
- Exceptions from due process requirements for teachers at the state schools for the blind and the

deaf whose certificates are nonrenewed or revoked for certain convictions.

The bill amends the definition of “sexual abuse” within the Code for Care of Children to include allowing, permitting, or encouraging a child to engage in aggravated human trafficking, if committed for the sexual gratification of the offender or another.

## **SB 240** **Banking Code**

**SB 240** recodifies the Kansas Banking Code (Chapter 9, *Kansas Statutes Annotated*) and also make amendments to two statutes where provisions of the Banking Code are referenced. As part of the recodification, the bill adds 18 previously issued Special Orders of the Bank Commissioner to existing or new statutes and repeals 56 statutes. Of the 56 statutes repealed, 36 are recodified into existing or new statutes upon enactment of the bill.

### *New Sections Incorporated into the Banking Code*

The bill adds law relating to allowing Kansas banks to pledge assets to secure certain deposits in out-of-state branches, informal agreements, consent orders, the crime of obstructing an investigation or examination; establishing fees in statute and providing when the Commissioner could change or waive fees, and allowing banks to pledge to secure funds of federally recognized Indian tribes. More specifically, the bill creates a new crime, making it unlawful for any director, officer, employee, or agent of a bank or trust company to alter, destroy, shred, mutilate, conceal, cover up, or falsify any record with the intent to impede, obstruct, impair, or influence any examination, investigation, or proceeding by the Commissioner. Persons convicted shall be guilty of a severity level 8, nonperson felony (New Section 8).

### *Repealed Statutes*

In addition to the 36 statutes that are recodified into new or existing statutes, 20 additional statutes are repealed with the enactment of the bill.

## **SB 252** **Unlawful Abuse of Toxic Vapors**

**SB 252** amends the crime of unlawful abuse of toxic vapors in K.S.A. 21-5712(e)(7) to include “other halogenated hydrocarbons” within the definition of “toxic vapors.”

## **HB 2013** **Commercial Driver’s License Driving Test Fee; Use of Vehicle Registration Receipt**

**HB 2013** creates a commercial driver’s license (CDL) drive test fee and allows use of a receipt to prove timely vehicle registration under certain circumstances.

### *CDL Driving Test Fee*

The bill establishes a \$15 driving test fee for the drive test portion of the CDL application. It also establishes an additional \$10 fee if a CDL applicant failed and must retake the pre-trip, skills test, or road

test portion of the driving test.

The new fees will be remitted to a Commercial Driver’s License Drive Test Fee Fund (Fund) created by the bill. The bill requires moneys credited to that Fund to be used by the Kansas Department of Revenue (KDOR) only for the purposes of funding the administration and operation of the CDL drive test, including software and equipment maintenance, software enhancement, equipment purchase, acquisition and maintenance of one or more test tracks or courses for conducting a driving test, training, and marketing associated with CDL issuance. Expenditures will be made in accordance with appropriation acts.

***Receipt as Proof of Vehicle Registration***

The bill amends motor vehicle registration law to allow a person to provide proof of current registration using a receipt in lieu of a decal on the license plate, for no more than ten days following expiration of registration. The required receipt will be a printed payment receipt or an electronic payment receipt from an online electronic payment processing system. Any charge for failing to display a registration decal up to and including the tenth day following expiration of registration will be dismissed if the person produces a registration receipt for the current 12-month registration period in court. The bill specifies the provisions above also apply to a truck that can be registered using the online system. The provisions do not apply to proof of registration of any vehicle registered as a commercial motor vehicle or as part of a commercial motor vehicle fleet.

**HB 2048**  
**Scrap Metal Theft Reduction Act**

**HB 2048** establishes the “Scrap Metal Theft Reduction Act” (Act) by adding and amending law related to scrap metal dealer registration and scrap metal sales. Additionally, the bill amends certain criminal provisions related to scrap metal theft.

***Scrap Metal Theft Reduction Act***

The bill gives the Attorney General jurisdiction and authority over the implementation, administration, and enforcement of the Act, including certain specified powers, and authorizes the Attorney General to adopt rules and regulations to implement the Act.

The bill establishes the Scrap Metal Theft Reduction Fee Fund to be administered by the Attorney General, which will be credited with all fees, charges, or penalties collected by the Attorney General under the Act. Expenditures from the Fund will be used for the administration of the duties, functions, and operating expenses incurred under the Act.

By July 1, 2016, the Attorney General is required to establish and maintain a database of scrap metal sales regulated elsewhere in the Act. Information from this database will be used for law enforcement and other purposes necessary to implement and enforce the Act. Information in the database will be confidential and released only to law enforcement for authorized uses. The information is not a public record or subject to the Kansas Open Records Act.

The bill gives the Attorney General power to administer oaths and affirmations, subpoena witnesses or matter (in-state or out-of-state), and collect evidence to investigate possible violations of the Act. The bill

specifies how service may be made for these purposes. The Attorney General may request a court to order an individual to comply with a subpoena, and the bill provides immunity for a person who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination. The Attorney General may apply for, and the district court can order injunctive relief action against, the corporate charter or other licenses, permits, or certificates of any entity failing or refusing to file any statement or report required by the Act, or other relief as may be required against such entities.

On and after January 1, 2016, the bill establishes civil penalties of \$100 to \$5,000 for each violation of the Act by a scrap metal dealer, which can be imposed by the Attorney General and will be subject to appeal under the Kansas Judicial Review Act.

On and after January 1, 2016, the bill allows the Attorney General to bring a civil action to obtain a declaratory judgment that an act or practice violates the Act; enjoin or restrain any person who has violated, is violating, or is likely to violate the Act; recover reasonable expenses and investigation fees; or impose any civil penalty authorized by the Act. The court is allowed to take these actions without requiring bond of the Attorney General. The Attorney General is allowed to accept a consent judgment, which must be approved by the district court. Violation of such consent judgment will be subject to penalties for violation of a court order. Civil penalties of up to \$5,000 for each violation will be imposed, and willful violation of a court order under the Act will incur a civil penalty of up to \$10,000 per violation.

The bill establishes jurisdiction for Kansas courts over any person who, in-person or through an agent or instrumentality, engages in business as a scrap metal dealer as defined in the Act, and provides for venue in Shawnee County District Court or in any other district otherwise authorized by law.

The bill prohibits municipalities from enacting or enforcing any ordinance, resolution, or regulation relating to the implementation, administration, and enforcement of the Act, and declares any such ordinance, resolution, or regulation adopted prior to July 1, 2015, null and void. No action or prosecution based upon such ordinance, resolution, or regulation may be taken for any violation on or after July 1, 2014.

The bill amends existing statutes related to scrap metal to incorporate them within the Act.

Within the scrap metal definitions statute, the bill amends the definitions of “scrap metal dealer,” “regulated scrap metal,” “junk vehicle,” “nonferrous metal,” and “vehicle part.” The bill removes definitions of “regulated scrap metal yard,” “ferrous metal,” and “tin,” and adds definitions of “person” and “attorney general.”

In the statute setting forth transaction requirements for scrap metal sellers, the bill makes clarifying amendments to several requirements. It moves a requirement for a signed statement by the seller to this statute from the statute setting forth transaction requirements for scrap metal buyers. The bill also amends this section to require a dealer to photograph the seller and any regulated items being sold and to keep the photographs with the transaction record and dealer’s register of information. Dealers are required to forward the information required by this section to the database established by the Act. The bill further amends this section to remove exceptions related to transactions involving catalytic converters and prohibitions on payment methods other than prenumbered checks or automated cash or electronic payment distribution. Exceptions for sellers who are scrap metal dealers are clarified and an



exception for sellers who are licensed vehicle dealers is added.

In the statute setting forth transaction requirements for scrap metal buyers, the bill removes vehicle titles as acceptable documents to be provided by the seller of a vehicle purchased from an impounding facility or agency (leaving a bill of sale as the only option). The bill adds certain vendors to the list of entities for whom sellers must be authorized in order to sell restricted scrap metal items and adds “burnt wire” to the list of restricted scrap metal items.

A statute setting forth misdemeanor penalties for the violation of the existing statutes described above is repealed.

In the statute governing scrap metal dealer registration, the bill removes or transfers to the Attorney General registration requirements involving the board of county commissioners or the governing body of a city. The bill requires the Attorney General to establish a system for the public to confirm scrap metal dealer registration certificates, but disclosure of information from the system shall not constitute an endorsement of any scrap metal dealer. The bill requires applicants to provide additional information regarding their names, corporate structure, and location and hours. The list of prior convictions within ten years an applicant must disclose is expanded to include all crimes involving property, poisoning a domestic animal, perjury, compounding a crime, obstructing legal process or official duty, falsely reporting a crime, interference with law enforcement, interference with judicial process, or any crime involving dishonesty or false statement, including similar convictions in other jurisdictions. The bill allows the Attorney General to set registration fees of \$500 to \$1,500 per place of business, and the registration period is lowered from ten years to one year, with renewal fees of not more than \$1,500. A provision making violation of the registration provisions a class A nonperson misdemeanor is removed.

Effective January 1, 2016, the list of disqualifications for registration is expanded to include:

- A person who is not a U.S. citizen or legal permanent resident;
- A person who has entered into a diversion agreement for certain crimes; and
- A person who does not own the premises for which a license is sought, unless the person has a written lease for at least three-fourths of the period of the license.

The disqualifications statute is also amended with the following provisions, effective January 1, 2016:

- The look-back period for current disqualifications involving revocation or false statements on applications is extended from three to ten years. The look-back period for the disqualifying crimes is extended from five to ten years, and the bill clarifies that disqualifying crimes include those involving dishonesty or false statement, or similar convictions in other jurisdictions;
- A disqualifying provision for convictions within the preceding five years of violating the existing scrap metal statutes is removed; and
- The bill allows a criminal history records check for applicants for registration, including fingerprinting provisions. An applicant disqualified due to criminal history record information shall be informed in writing of the decision.

The statute governing registration suspension is amended, effective January 1, 2016, to reflect the transfer of jurisdiction from local authorities to the Attorney General and the restructuring of the Act. Nonpayment of a civil penalty after notice that the penalty is more than 30 days past due is added as a reason for revocation or suspension. A provision for appeal to the district court is removed and replaced

with a provision for appeal in accordance with rules and regulations promulgated by the Attorney General.

### ***Criminal Provisions***

The bill amends the statute providing for *prima facie* evidence of intent to permanently deprive an owner or lessor of possession, use, or benefit of property to clarify the methods by which someone giving false identification may obtain control over property and to establish that various actions involving the failure to give information or giving of false information required by the Act or transportation or alteration of scrap metal shall be such *prima facie* evidence under the statute in a prosecution for theft involving regulated scrap metal.

The bill amends the statute governing the crime of criminal damage to property to create the crime of aggravated criminal damage to property, which is defined as criminal damage to property, if the value or amount of damage exceeds \$5,000, committed with the intent to obtain regulated scrap metal or related items, where the crime is committed on any building, structure, residence, facility, site, place, property, vehicle, or infrastructure. The bill sets forth a number of specific locations or properties that fall within these categories, and it provides definitions for “infrastructure” and “site.” The new crime is a severity level 6, nonperson felony, and a special sentencing rule is added to the sentencing grid statute imposing a sentence of presumptive imprisonment where an offender has a prior conviction for any nonperson felony.

In amendments to the criminal damage to property statute and the authorized dispositions statute, the bill sets forth various costs to be included in determining the amount of damage to property, including cost of repair or replacement; loss of production, crops, and livestock; labor and material costs; and costs of equipment used to abate or repair the damage. The bill also makes a reconciling amendment to the authorized dispositions statute and repeals a conflicting version of the statute.

The bill enacts new law in the Kansas Code of Criminal Procedure establishing that, at a preliminary examination, the business records containing the details of the sales or transactions maintained by scrap metal dealers pursuant to the Act may be admitted into evidence as if the individuals who made the record and the records custodian had testified in person.

## **HB 2051**

### **Good Time & Program Credits; Use of Risk Assessment Tool for Community Corrections Placement**

**HB 2051** amends K.S.A. 21-6821 to increase the amount of good time credit an inmate sentenced for a drug severity level 3 crime committed on or after July 1, 2012, may earn, from 15 percent to 20 percent. The bill allows the same inmates to earn program credits and increases the amount of time that may be earned by any eligible inmate for program credits from 60 days to 90 days.

The bill provides immunity for the State, the Secretary, and the Secretary’s agents and employees for damages caused by negligent or wrongful acts or omissions in making good time or program credit calculations. The bill directs the Secretary to make the good time and program credit calculations authorized by the bill no later than January 1, 2016, and the provisions of the bill shall be construed and applied retroactively.

The bill also amends the list of adult offenders in K.S.A. 75-5291 who are eligible to be placed in community correctional services programs to remove placements based on offense classification and expands placements based on the use of a standardized risk assessment tool specified by the Kansas Sentencing Commission. Those offenders who are determined, on or after July 1, 2014, to be moderate or very high-risk by this tool shall be eligible for placement. (Note: offenders who are determined to be high-risk by this tool are eligible under current law.)

### **HB 2053** **Criminal History Calculation**

**HB 2053** amends K.S.A. 21-6810 and K.S.A. 21-6811 regarding the calculation of criminal history to specify that any prior adult felony conviction, prior misdemeanor, or prior juvenile adjudication for offenses committed before July 1, 1993, shall be scored as a person or nonperson crime using a comparable offense under the Kansas Criminal Code that was in effect on the date the current crime of conviction was committed. The bill states these amendments are procedural in nature and shall be construed and applied retroactively, and the bill contains a severability provision.

### **HB 2055** **Battery Against a Law Enforcement Officer; Criminal History; Aggravated Battery when Driving Under the Influence; Search Warrants**

**HB 2055** amends law related to battery against a law enforcement officer, determination of criminal history, aggravated battery when driving under the influence (DUI), and the items that may be included in a search warrant.

#### ***Battery Against a Law Enforcement Officer***

The bill amends the crime of battery against a law enforcement officer in K.S.A. 21-5413 to include battery against a judge engaged in the performance of the judge's duty, an attorney engaged in the performance of the attorney's duty, or a court services or community corrections officer in the performance of such officer's duty. The bill similarly amends the crime of aggravated battery against a law enforcement officer.

The bill defines "judge" to include appellate justices and judges, district court judges, district magistrate judges, and municipal judges. "Attorney" is defined to include county, assistant county, and special assistant county attorneys; district, assistant district, and special assistant district attorneys; the attorney general, assistant attorneys general, and special assistant attorneys general; and public defenders, assistant public defenders, State Board of Indigents' Defense Services contract counsel, or attorney appointed to represent indigent persons. "Court services officer" is defined to include an employee of the Judicial Branch or local judicial district who supervises, monitors, writes reports, or performs related duties as assigned by the court. "Community corrections officer" is defined to include an employee of a community correctional services program who supervises adults or juveniles as assigned by the court or provides enhanced supervision of offenders.

The bill amends references to "juvenile correctional facility officer or employee" to reflect the reorganization of juvenile justice services within the Kansas Department of Corrections. The bill strikes a reference to the Rainbow Mental Health Facility and clarify that the definition of "mental health

employee” includes Kansas Department for Aging and Disability Services (KDADS) contractors.

### ***Criminal History Determination for Misdemeanors***

The bill amends K.S.A. 21-6811 governing the determination of an offender’s criminal history to establish a procedure for classifying out-of-state misdemeanor convictions. The comparable Kansas offense shall be used to classify the out-of-state conviction as a class A, B, or C misdemeanor. If the comparable Kansas offense is a felony, the out-of-state conviction shall be classified as a class A misdemeanor. If there is no comparable Kansas offense, the out-of-state conviction will not be included in the criminal history.

### ***Aggravated Battery While DUI***

The bill also amends K.S.A. 21-6811 with provisions known as Mija Stockman’s Law, which create a special rule for determining criminal history for a conviction of aggravated battery when a person is DUI and great bodily harm to another person or disfigurement of another person results from such act. The rule provides that, for the purposes of determining an offender’s criminal history, the first prior adult conviction, diversion in lieu of criminal prosecution, or juvenile adjudication of DUI, commercial DUI, or DUI test refusal shall count as one nonperson felony. Each second or subsequent prior adult conviction, diversion in lieu of criminal prosecution, or juvenile adjudication of these offenses would count as one person felony.

The bill also adds commercial DUI and DUI test refusal to prior convictions, diversions, or juvenile adjudications that count as person felonies in determining the criminal history for a conviction of involuntary manslaughter while DUI.

### ***Search Warrants***

The bill amends the statute governing search warrants to add a provision allowing the search or seizure of anything that can be seized under the Fourth Amendment to the *U.S. Constitution*. The bill also adds a specific provision allowing the search or seizure of biological material, DNA, cellular material, blood, hair, or fingerprints.

## **HB 2106 Kansas Uniform Securities Act**

**HB 2106** makes several amendments to the Kansas Uniform Securities Act (Act). The first amendment, concerning exemptions from securities registration requirements, states nothing in the statutory section governing denial, suspension of the application of, condition, limit, or revocation of an exemption should be construed to exempt a person from the relevant anti-fraud provisions, nor should any existing exemption be construed to provide relief from any other provision of the Act if the sale of the security violates the provisions of the anti-fraud statute.

Further, the bill amends the law governing criminal penalties of the Act, which often are based on the amount lost as a result of the violation. The bill clarifies that when amounts are obtained in violation of the Act under one scheme or continuing course of business, whether from the same or several sources, the conduct can be considered one continuing offense and the amounts aggregated in determining the

grade of the offense.

If a crime under the Act is a continuing offense, the bill specifies the statute of limitations does not begin to run until the last act in the scheme or course of business is completed. The bill states this does not prevent the exclusion of a time period as currently provided by statute.

The bill also adds a section to the Kansas Code of Criminal Procedure to allow business records obtained pursuant to the investigative authority of the Office of the Securities Commissioner to be admissible in evidence at any preliminary examination in the same manner and with the same force and effect as if the individuals who made the record and the record custodian who keeps the record had testified in person.

## **HB 2111**

### **Courts – District Magistrate Judge Jurisdiction; Items Allowable as Costs, Judgment Dormancy, and Debts Owed to Courts**

**HB 2111** amends the law governing courts, including district magistrate judge jurisdiction, county law libraries, items allowable as costs; judgment dormancy; and debts owed to courts.

#### ***District Magistrate Judge Jurisdiction***

The bill clarifies the jurisdiction of district magistrate judges, by:

- Adding jurisdiction over wildlife, parks, and tourism violations;
- Reorganizing provisions within the statute related to jurisdiction in uncontested actions for divorce and jurisdiction in other civil cases and rewording to clarify these provisions;
- Rewording language related to reassignment of a petition or motion requesting termination of parental rights to match language in the Revised Kansas Code for Care of Children; and
- Adding a list of specific actions over which district magistrate judges would not have jurisdiction without consent of the parties, including:
  - Actions in which the amount in controversy exceeds \$10,000, with some exceptions;
  - Actions for official misconduct;
  - Actions for specific performance for real estate;
  - Certain actions involving real estate;
  - Actions to foreclose real estate mortgages or to establish and foreclose liens on real estate;
  - Contested actions for divorce, separate maintenance, or custody of minor children; and
  - *Habeas corpus*, receiverships, declaratory judgments, *mandamus* and *quo warranto*, injunctions, class actions, and actions for commitment of sexually violent predators.

#### ***Items Allowable as Costs***

The bill amends the statute governing which items may be included in the taxation of court costs to include convenience fees and other administrative fees levied for the privilege of paying assessments, fees, costs, fines, or forfeitures by credit card or other means, including, but not limited to, fees for electronic filing of documents or pleadings with the court.

### *Dormancy of Judgments for Court Costs*

The bill amends law relating to dormant judgments to specify any judgment for court costs, fees, fines, or restitution not void as of July 1, 2015, are not and will not be or become dormant for any purpose. If the judgment would have become dormant under certain conditions, it ceases to operate as a lien on the real estate of the judgment debtor as of the date the judgment would have become dormant, but it would not be released.

### *Debts Owed to Courts*

The bill amends the statute governing the collection of restitution or debts owed to courts to add court costs, fines, fees, or other charges arising from failure to comply with a traffic citation within 30 days from the mailing of the notice to the definition of “debts owed to courts.” It also adds a provision requiring, when a contracting agent uses the state debt setoff procedures to recover a debt owed to the courts, that the agent’s cost of collection for debt recovered through that program be the contracted amount minus the collection assistance fee imposed by the Director of Accounts and Reports of the Department of Administration (Director). In this section, the bill replaces references to the Attorney General with references to the Judicial Administrator and replaces authorization for the Attorney General to adopt rules and regulations with authorization for the Supreme Court to adopt rules.

### *State Debt Setoff Program*

The bill amends statutes governing the state debt setoff program. The bill adds the following to the definition of “debt”: assessment of court costs, fines, fees, moneys expended by the state in providing counsel and other defense services to indigent defendants, or other unpaid charges ordered by a district court judgment be paid to the court, including any interest or penalties and the cost of collection when the collection services of a contracting agent are used. The definition of “refund” is amended to remove the term “Kansas.” The definition of “state agency” is amended to include a contracting agent contracted by a district court to collect debts owed to the court, who could directly establish a debt setoff account with the Director for the sole purpose of collecting such debts.

## **Senate Substitute for HB 2124 Smoking Ban – Clinical Research Exemption; Tobacco Master Settlement Agreement**

**Senate Sub. for HB 2124** amends the statute prohibiting smoking in an enclosed area or at a public meeting to add an exemption for a separately-ventilated portion of a medical or clinical research facility used exclusively for clinical research activities conducted in accordance with U.S. or Kansas regulations.

The bill also amends various statutes in the chapter governing requirements for sale of cigarettes related to the Master Settlement Agreement (MSA) and escrow funds for nonparticipating tobacco product manufacturers, as follows.

The bill amends the definition of “units sold” and add definitions for “Indian tribe” and “qualified tribal land.”

The bill expands a provision prohibiting persons from selling, offering, possessing for sale, or importing cigarettes of a tobacco product manufacturer (manufacturer) brand family not included in the directory of

manufacturers and brand families required by the chapter, by eliminating a requirement that such cigarettes be for personal consumption in the state.

The Attorney General is allowed to remove a manufacturer or brand family from the directory if the Attorney General concludes the manufacturer or certain affiliates, officers, or directors have pleaded guilty or *nolo contendere* to, or have been found guilty of, a felony related to the sale or taxation of cigarettes or tobacco products, or if the manufacturer and its brand families have been removed from the directory of another state for acts or omissions that would be the basis for removal in Kansas, unless the removal in another state was without due process. A manufacturer removed from the directory may be eligible for relisting upon curing the violation or being reinstated to the other state's directory. A nonparticipating manufacturer deemed an elevated risk could be required to post a bond for reinstatement.

The bill adds a requirement that, to be listed and have brand families listed in the directory, a manufacturer must certify annually that it has a federal manufacturer permit and is in compliance with federal reporting and registration requirements and must pay an annual \$500 directory fee to the Attorney General, to be deposited in the Tobacco Master Settlement Agreement Compliance Fund.

Criminal penalties for selling, distributing, acquiring, holding, owning, possessing, transporting, or importing cigarettes in violation of the chapter are increased from a class B misdemeanor, as follows:

- Upon a first conviction, a class A misdemeanor with a sentence of up to one year in confinement and a fine of \$1,000 to \$2,500;
- Upon a second conviction, a severity level 9 nonperson felony and a fine of \$10,000 to \$100,000; and
- Upon a third or subsequent conviction, a severity level 9 nonperson felony and a fine of \$50,000 to \$100,000.

Such penalties are cumulative to remedies or penalties, including civil penalties, provided under other Kansas laws.

Finally, a statute in the chapter governing the Department of Revenue is amended to allow the Secretary of Revenue or designee to share confidential information with the Attorney General for the purposes of determining compliance with or enforcing the MSA statutes, the MSA, and all related agreements. Similar confidentiality provisions to those added to the MSA statutes, as described above, are also added here.

## **HB 2154**

### **Veterans Municipal & District Court Diversions, Court-Ordered Treatment & Sentencing**

**HB 2154** amends statutes related to diversions, court-ordered treatment, and sentencing with regard to military service members.

#### ***Municipal and District Court Diversion***

The bill expands the list of factors that must be considered by prosecuting attorneys when determining

whether to enter into a diversion agreement with a defendant, by including the following factors:

- Whether there is a probability the defendant committed the crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder, or traumatic brain injury (all terms defined below) connected to service in a combat zone while in the U.S. Armed Forces; and
- If so, whether there is a probability the defendant will cooperate with and benefit from inpatient or outpatient treatment in a facility operated by the U.S. Department of Defense, the U.S. Department of Veterans Affairs, or the Kansas National Guard, with the defendant's consent, as a condition of diversion.

### ***Court-Ordered Treatment***

Current law allows a defendant, at the time of conviction or prior to sentencing, to assert the offense was committed as a result of mental illness stemming from service in a combat zone while in the U.S. Armed Forces. If the court determines the defendant meets certain criteria, and falls within a presumptive non-prison category under sentencing guidelines, the court may order the defendant to undergo inpatient or outpatient treatment in facilities or programs operated by the U.S. Department of Defense, the U.S. Department of Veterans Affairs, or the Kansas National Guard.

The bill makes the following changes:

- Replaces the term “mental illness” with the phrase “injury, including major depressive disorder, polytrauma, post-traumatic stress disorder, or traumatic brain injury” and provide the following definitions:
  - “Major depressive disorder” and “posttraumatic stress disorder” mean the same as the terms are defined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5, 2013);
  - “Polytrauma” means injury to multiple body parts and organ systems that occurred as a result of events during the defendant's service in one or more combat zones; and
  - “Traumatic brain injury” means injury to the brain caused by physical trauma that occurred as a result of events during the defendant's service in one or more combat zones;
- Eliminates from the qualifying criteria the requirement that the defendant separated from the armed forces with an honorable discharge or general discharge under honorable conditions; and
- Provides an alternative for a defendant who meets the qualifying criteria but is ineligible for treatment in facilities or programs operated by the U.S. Department of Defense, the U.S. Department of Veterans Affairs, or the Kansas National Guard. If a court determines such defendant meets the requirements for treatment under the alternative sentencing provisions of 2003 SB 123 (applicable to certain nonviolent offenders convicted of drug possession), the statutes pertaining to SB 123 must apply.

### ***Sentencing***

The bill expands the nonexclusive list of mitigating factors a sentencing judge may consider in



determining whether to depart from the presumptive sentence provided by sentencing guidelines. In addition to the mitigating factors in continuing law, the judge may consider whether the offender committed the crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder, or traumatic brain injury connected to service in a combat zone while in the U.S. Armed Forces.

### **Substitute for HB 2159**

#### **Authorizing a driver’s license with a DUI-IID designation; amending authorized restrictions of driving privileges, ignition interlock device; amending timeframe for expungements of DUI and other driving offenses**

**Sub. for HB 2159** amends the law concerning driving under the influence (DUI).

The bill amends the statute governing ignition interlock restrictions of driving privileges following a first occurrence of a DUI related test refusal, test failure, or conviction, to allow the person under the restriction to drive to and from the ignition interlock provider for maintenance and downloading of data from the device.

The bill also amends provisions related to expungements of DUI and test refusal offenses. Specifically, the bill amends the statutes governing expungements of DUIs and test refusal and city ordinance violations that also constitutes a DUI or test refusal to change to five years that must have elapsed since the person satisfied the sentence or the terms of a diversion agreement or was discharged from probation, parole, postrelease supervision, conditional release, or a suspended sentence before petitioning for expungements of a first DUI conviction. A person may petition for expungements of a second or subsequent conviction of DUI or test refusal after ten years. Current law required the elapse of ten years for a municipal DUI violation and seven years for a DUI conviction under state law. For test refusal, current law required the elapse of three years for a municipal violation and seven years for a conviction under state law.

Finally, the bill allows the Division of Vehicles to issue a restricted driver’s license with a DUI-IID (Ignition Interlock Device) designation to a licensee allowed to operate a motor vehicle under ignition interlock restrictions. The bill applies an additional \$10 fee to the DUI-IID restricted license; moneys collected from this fee would be deposited into a DUI-IID Designation Fund created by the bill. All other requirements for issuance and renewal of a driver’s license would apply.

### **HB 2223**

#### **Alcoholic Liquor—Infusion of Alcohol; Citations for Violations of Liquor Control Act; Alcohol Sampling; Alcohol Consumption; Alcohol on Capitol Premises; Alcohol on Unlicensed Premises; Powdered Alcohol;**

**HB 2223** makes changes to several different areas of law concerning alcoholic liquor: infusing alcohol with flavors or other ingredients; citations issued for violations of the Liquor Control Act and the Club and Drinking Establishment Act; powdered alcohol; consumption of alcohol at the State Capitol and on unlicensed premises; and allowing distributors to provide samples.

### ***Infusing Alcohol with Flavors or Other Ingredients***

The bill allows drinking establishments to sell and serve alcoholic liquor infused with spices, herbs, fruits, vegetables, candy, or other substances intended for human consumption if no additional fermentation occurs during the process.

### ***Citations Issued for Violations of the Liquor Control Act and the Club and Drinking Establishment Act***

The bill specifies when issuing a citation for a violation of the liquor laws, agents of the Department of Revenue, Division of Alcoholic Beverage Control (ABC) must deliver the citation issued to a person in charge of the licensed premises at the time of the alleged violation. Previously, the law required delivery of the citation to the person allegedly committing the violation. The bill defines “person in charge” as any individual or employee present on the licensed premises at the time of the alleged violation who is responsible for the operation of the licensed premises. If no designated individual or employee is a person in charge, then any employee present is considered the person in charge.

The bill also adds law concerning the delivery of citations by local law enforcement officers other than agents of ABC. The new provisions allow any local law enforcement officer observing a violation of the liquor laws to submit a report of the violation to ABC for review after serving notice of the violation to a person in charge of the licensed premises. Notice is required to:

- Be made at the time of the alleged violation;
- Be made in writing;
- Contain the name of the licensee;
- Contain the date and time of the alleged violation;
- Contain a description of the alleged violation; and
- Contain a statement indicating a report of the violation will be submitted to ABC for review.

The bill also adds language stating any citation not issued in accordance with the provisions laid out in the new and amended law is void.

### ***Powdered Alcohol***

The bill bans the sale and service of powdered alcohol. The Club and Drinking Establishment Act is amended to prohibit clubs, drinking establishments, caterers, holders of temporary permits, and public venues from selling, offering to sell, or serving free of charge any form of powdered alcohol.

The bill also defines “powdered alcohol” as alcohol prepared in a powdered or crystal form for either direct use or for reconstruction in a nonalcoholic liquid. Violation of this provision is a misdemeanor

### ***Consumption of Alcohol at the State Capitol and on Unlicensed Premises***

The bill allows the consumption of alcoholic liquor on the premises of the State Capitol Building for official state functions that are nonpartisan in nature. Any such function requires the approval of the Legislative Coordinating Council before the consumption of alcoholic liquor can commence.

The bill also provides that patrons and guests of unlicensed businesses will be authorized to consume

alcoholic liquor and cereal malt beverages on the premises of an unlicensed business property only if:

- The business, or any owner of the business, has not had a license that is issued under the Kansas Liquor Control Act or the Club and Drinking Establishment Act revoked for any reason;
- No charge of any sort is made by the business for the privilege of possession or consuming alcohol on the premises, or for mere entry onto the premises;
- Any alcoholic liquor:
  - Remains in the personal possession of the patron, and
  - Is not sold, offered for sale, or given away by the owner or employees of such business; and
- No possession or consumption of alcoholic liquor takes place between 12 a.m. and 9 a.m.

The bill defines “patron” to mean a natural person who is a customer or guest of an unlicensed business. Violation of this provision is a misdemeanor.

### ***Allowing Distributors to Provide Samples***

The bill allows alcoholic beverage distributor licensees to provide samples of spirits, wine, and beer or cereal malt beverages to alcoholic beverage retailer licensees and their employees or other distributor licensees and their employees in the course of business or at industry seminars. The bill specifies that no licensee is allowed to sell alcoholic liquor for consumption on the premises and liquor provided as samples under the provisions of the bill is subject to the liquor enforcement tax.

The service of samples is authorized on the distributor licensee’s premises or on the retailer licensee’s premises, with the exception of those areas open to the public where alcoholic sales occur. Samples are required to come out of the distributor licensee’s inventory and the distributor is required to pay retail sales enforcement taxes on such samples. No sample can be served to a minor and the sizes of the samples are as defined in the Club and Drinking Establishment Act.

## **Senate Substitute for HB 2258**

### **Eligibility Requirements for Temporary Assistance for Needy Families and Food Assistance**

**Senate Sub. for HB 2258** places the authorization of the Temporary Assistance for Needy Families (TANF) program in statute rather than by rule and regulation, which was the current means used to establish the program. The bill also modifies and creates certain definitions and requirements pertaining to TANF assistance and food assistance programs. It repeals certain sections of law that authorize the KanWork Act and general assistance. In addition, the bill requires an electronic check for any false information provided on an application for TANF or other programs by the Department for Children and Families (DCF). DCF is required to maintain sufficient staffing to conduct work program case management services in a timely manner.

### ***TANF Assistance and Requirements***

On and after January 1, 2017, DCF is required to conduct an electronic check for false information on an application for TANF and other benefits programs administered by DCF.

General eligibility for federal assistance is revised to include reference to cohabiting partners in addition to a husband and wife living together. The husband and wife, or cohabiting partners, are required to register for work in accordance with criteria set by the Secretary by rule and regulation. A family group is ineligible for TANF if one household member has received the maximum number of months of TANF assistance under state law. When determining eligibility for federally funded assistance, the Secretary considers the equity owned in any boat, personal water craft, recreational vehicle, or all-terrain vehicle, as those terms are defined by law. An additional motor vehicle used by the applicant or the applicant's spouse or cohabiting partner for the primary purpose of making income may be considered exempt personal property at the discretion of the Secretary. Currently, the Secretary must consider the value of additional motor vehicles owned; one vehicle may be exempted as personal property.

All adults applying for TANF are required to complete a work program assessment as specified by DCF. This includes adults who were previously disqualified or denied TANF due to non-cooperation (which the bill defines), drug testing, or fraud. Adults who are ineligible aliens or receiving Supplemental Security Income are not required to complete the assessment process. An adult can be exempt from the work program assessment as set forth in the bill.

Recipients are limited over a lifetime to receiving 36 months of TANF assistance but the bill allows for hardship assistance during an additional 12 months for those that are eligible.

In order to meet mandatory work participation requirements, households are required to work at least 30 hours per week, which includes 20 hours of primary components and 10 hours of secondary components in one-parent households where the youngest child is six years of age or older. In two-parent households, participation hours are 55 hours, with 35 hours per week if child care is not used. The maximum assignment per week per individual is 40 hours.

To meet federal work participation requirements, the following work participation is required:

- For two-parent families:
  - Both parents are required to participate in a combined total of 55 hours per week, 50 hours of which must be in primary components; or
  - One or both parents may be assigned a combined total of 35 hours per week, including 30 hours of primary components, if child care paid by DCF is not provided.
- For single-parent families with a child under the age of 6, the parent is required to engage in work or work activities for at least 20 hours per week in a primary work component.

Primary components include full-or part-time employment, apprenticeship, work study, self-employment, Job Corps, subsidized employment, work experience sites, on-the-job training, supervised community service, vocational education, and job search and readiness. Secondary components include job skills training, education directly related to employment, and completion of a GED or high school diploma.

A parent or other caretaker with a child less than three months of age is not required to engage in work participation. The three-month limitation does not apply to a parent or other caretaker personally providing care for a child born significantly prematurely, with serious medical conditions or with a disability as defined by the Secretary, in consultation with the Secretary of Health and Environment, and

adopted in rules and regulations. Under certain conditions, the exemption from work participation for caring for a child under three months may not apply.

Work experience placements are reviewed after 90 days and are limited to six months per 48-month lifetime limit. However, client progress is reviewed prior to each placement. TANF participants with disabilities are required to engage in employment activities to the maximum extent consistent with their abilities.

If a TANF participant or a recipient for child care subsidies engages in non-cooperation, which the bill defines, the penalty for the first instance is for three months; for a second penalty, six months; for a third penalty, one year; and for a fourth or subsequent penalty, ten years. Individuals who have not cooperated without good cause with child support services are ineligible to participate in the food assistance program. If an individual is found to have committed TANF or child care fraud or found guilty of theft on or after July 1, 2015, all adults in the family unit are ineligible for TANF assistance for a lifetime. In that case, households are required to name a protective payee, which the Secretary approves, to receive TANF payments or food assistance on behalf of the children.

No TANF cash assistance is available for use to purchase alcohol, cigarettes, tobacco products, lottery tickets, concert tickets, professional or collegiate sporting event tickets, tickets for other entertainment events intended for the general public, or sexually oriented adult materials. No TANF cash assistance is allowed for use in a liquor store, casino, gaming establishment, jewelry store, tattoo or body piercing parlor, spa, massage parlor, nail salon, lingerie shop, tobacco paraphernalia store, vapor cigarette store, psychic or fortune telling business, bail bond company, video arcade, movie theater, swimming pool, cruise ship, theme park, dog or horse racing facility, parimutuel facility, or an adult sexually oriented retail business or entertainment establishment.

### ***Food Assistance***

Food stamps are renamed food assistance, and eligibility is limited to citizens and qualified non-citizens as determined by the U.S. Department of Agriculture (USDA). Noncitizens who are unwilling or unable to provide documentation, as defined by USDA, are not included in their household's size when benefits are calculated. No funds from federal or state sources are to be used for promoting food assistance. The Secretary is prohibited from requesting or implementing a food assistance waiver from USDA for able-bodied adults. The Secretary also is prohibited from enacting the state option from the USDA for broad-based categorical eligibility for households applying for food assistance. The Secretary is not permitted to apply gross income standards for food assistance higher than the standards specified by federal law.

Any person convicted on or after July 1, 2015, of a felony involving controlled substances or their analogs is disqualified permanently from receiving food assistance. Individuals are eligible for food assistance if they enroll and participate in a drug treatment program approved by the Secretary. Individuals must submit to drug testing, if requested by DCF pursuant to a drug-testing plan. Failure to submit to a drug test or pass it results in ineligibility for food assistance until the individual complies with the drug treatment plan approved by the Secretary. The drug treatment plan exception does not apply to any individual convicted on or after July 1, 2015, of a second or subsequent felony involving controlled substances or their analogs.

## **HB 2275**

### **Controlled Substances**

**HB 2275** adds several additional drugs or drug classes to the schedules of controlled substances. Specifically, the bill adds a hallucinogenic drug and a cannabinoid to schedule I, reschedules two hydrocodone drugs from schedule III to schedule II, adds perampanel to schedule III, and adds three drugs to schedule IV. The bill also corrects or standardizes spellings or descriptions of several substances, including marijuana.

## **HB 2336**

### **Risk Assessment and Juvenile Offender Placement**

**HB 2336** requires the court to administer a risk assessment tool or review a risk assessment tool administered within the past six months before a juvenile offender can be placed in a juvenile detention center, under house arrest, or in the custody of the Department of Corrections, or can be committed to a sanctions house or to a juvenile correctional facility.

Additionally, the bill modifies a general prohibition on placement of any juvenile convicted as an adult in a juvenile correctional facility by permitting placement of juveniles between 16 and 18 years of age who are convicted as adults or under extended jurisdiction juvenile prosecution in a juvenile correctional facility.

## **CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES**

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense of conviction. Substantive amendments that impact the sentence of an offender are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

### **SENTENCING CONSIDERATIONS**

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in typical case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals will continue their efforts in reestablishing offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases, but departures are only legislatively authorized when the sentencing court properly follows statutory departure procedures. K.S.A. 2015 Supp. 21-6802.

### **SENTENCING GUIDELINES AND GRIDS**

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. K.S.A. 21-4701 *et seq.* The revised KSGA may be found at K.S.A. 2015 Supp. 21-6801 *et seq.* The KSGA provides for determinate sentencing based on sentencing charts or “grids.” Each sentencing grid is a two-dimensional crime severity and criminal history classification tool. The grid's vertical axis is the crime severity scale which classifies current crimes of conviction. The grid's horizontal axis is the criminal history scale which classifies criminal histories. The provisions for the nondrug crime grid are found in K.S.A. 2015 Supp. 21-6804. The provisions for the drug crime grid are found in K.S.A. 2015 Supp. 21-6805. The presumptive sentence is determined by two factors: the severity level of the current crime of conviction and the offender's criminal history. The grid block at the intersection of the severity level of the crime of conviction and the offender's criminal history score provides the presumed sentencing range, and includes prescribed aggravated, standard and mitigated sentences in months. Each grid also contains a dispositional line: grid blocks above the line presume a sentence of imprisonment; grid blocks below the line presume a sentence of probation. Each grid also includes border blocks or boxes, which are above the dispositional line and therefore presume imprisonment, but which provide that the court may impose an optional nonprison sentence, i.e., probation. See K.S.A. 2015 Supp. 21-6804 and K.S.A. 2015 Supp. 21-6805. The grids can be found in Appendix E, and are the final two pages of this Manual.

### **DRUG GRID AND NONDRUG GRID**

There are two grids used for sentencing of felony convictions. The nondrug grid is used for sentencing of all felony crimes other than drug grid crimes.

The drug grid is used for sentencing of all drug crimes under article 57 of chapter 21 of the Kansas Statutes Annotated, except for K.S.A. 2015 Supp. 21-5705(d)(6)(B), 21-5707, 21-5708, 21-5713, 21-5714 and subsections of 21-5710(3)(A) and (4)(B), which are sentenced pursuant to the nondrug grid. Prior versions of the act were found in K.S.A. 65-4101 *et seq.*, then briefly in K.S.A. 21-36a01 *et seq.*, before being transferred to their current location in K.S.A. 2015 Supp. 21-5701 *et seq.*

The criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis. Each grid contains nine criminal history categories. The drug grid contains five severity levels while the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line the grid blocks are designated as presumptive prison sentences. Below the dispositional line are shaded grid blocks, which are designated as presumptive probation sentences.

The grids also contain blocks that may have lines passing through them, or, in this manual, darker shading, which are referred to as “border boxes.” The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains seven border boxes in levels 4-E, 4-F, 4-G, 4-H, 4-I, 5-C and 5-D. See K.S.A. 2015 Supp. 21-6804 and 21-6805. The court has the power to grant border box probation without departing from the grid (which otherwise would require a finding of substantial and compelling reasons) if the court makes the following findings on the record: (1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and (2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or (3) the nonprison sanction will serve community safety interests by promoting offender reformation. K.S.A. 2015 Supp. 21-6804(q).

### **GRID BLOCKS**

Within each grid block are three numbers, representing months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence at any place within the range. The middle number in the grid block is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors insufficient to warrant a departure. See K.S.A. 2015 Supp. 21-6804 and 21-6805.

### **GENERAL RULES FOR DETERMINING SEVERITY LEVELS**

The severity levels range from severity level 1 to severity level 10 on the nondrug grid. Level 1 is used to categorize the most severe crimes and level 10 is used to categorize the least severe crimes. Crimes listed within each level are considered relatively equal in severity. K.S.A. 2015 Supp. 21-6807(a).

The crime severity scale contained in the sentencing guidelines grid for drug crimes consisted of four levels of crimes between July 1, 1993 and July 1, 2012. On and after July 1, 2012, there are five levels of drug crimes. Crimes listed within each level are also considered relatively equal in severity. Level 1 is used to categorize the most severe crimes and level 5 is used to categorize the least severe crimes. K.S.A. 2015 Supp. 21-6808(a).

The following provisions shall be applicable with regard to ranking offenses according to the crime severity scale:

- The sentencing court will designate the appropriate severity level if it is not provided by statute. When considering an unranked offense in relation to the crime severity scale, the sentencing court should refer to comparable offenses on the crime severity scale. K.S.A. 2015 Supp. 21-6807(c)(1);
- Except for off-grid felony crimes, which are classified as person felonies, any felony crimes omitted from the crime severity scale shall be considered nonperson felonies. K.S.A. 2015 Supp. 21-6807(c)(2); and



- All unclassified felonies shall be scored as level 10 nonperson crimes. K.S.A. 2015 Supp. 21-6807(c)(3).

All felony crimes, with the exception of off-grid crimes and nongrid crimes, should be categorized in one or more of the crime severity levels. The severity level designation of each felony crime is included in the statutory definition of the crime. Some crimes include a broad range of conduct. In such circumstances, there may be a different severity level designated for violations of different subsections of the statute. All felonies and misdemeanors are listed in Appendix D of this Manual numerically by statute number.

### **OFF-GRID CRIMES**

Off-grid offenses, by definition, are not subject to the classifications of the KSGA. Off-grid crimes include the most serious of criminal offenses:

- Capital murder (K.S.A. 2015 Supp. 21-5401),
- Murder in the first degree (K.S.A. 2015 Supp. 21-5402),
- Treason (K.S.A. 2015 Supp. 21-5901),
- Terrorism (K.S.A. 2015 Supp. 21-5422),
- Illegal use of Weapons of Mass Destruction (K.S.A. 2015 Supp. 21-5422) and
- Jessica's Law sex offenses involving victims less than 14 years of age and offenders 18 years of age or older. (K.S.A. 2015 Supp. 21-6627)

For such crimes, the term of imprisonment shall be imprisonment for life. K.S.A. 2015 Supp. 21-6806. However, such a life sentence does not necessarily mean that the offender will remain imprisoned for the remainder of the offender's life. Offenders who commit off-grid crimes and are released from prison are placed on supervised parole.

Off-grid crimes are classified as person felonies. K.S.A. 2015 Supp. 21-6807(c)(2)

### **CAPITAL MURDER**

Offenders who commit capital murder may be sentenced to death pursuant to K.S.A. 2015 Supp. 21-6617. Offenders who are not sentenced to death are sentenced to imprisonment for life without the possibility of parole.

### **MANDATORY MINIMUMS**

Generally, an offender sentenced for an off-grid crime will become eligible for parole after serving a mandatory minimum term of years in confinement. The exceptions are for aggravated habitual sex offenders and capital murder, which carry life sentences without the possibility of parole. Good time credit shall not apply to any mandatory minimum sentences for off-grid felonies.

#### **Attempted Capital Murder**

Offenders who are convicted of attempt to commit capital murder shall be sentenced to imprisonment for life, and shall not be eligible for parole prior to serving either 25 years' imprisonment, or the offender's sentence on the sentencing grid, whichever is greater. K.S.A. 2015 Supp. 21-6620(a)(2).

### **Premeditated First Degree Murder**

For premeditated murder (K.S.A. 2015 Supp. 21-5402(a)(1)) committed on and after July 1, 2014, an offender convicted of premeditated first degree murder shall be eligible for parole after serving 50 years' imprisonment unless the sentencing judge finds substantial and compelling reasons to impose a lesser sentence after a review of mitigating circumstances. In that case, the offender shall serve 25 years pursuant before becoming eligible for parole. See K.S.A. 2015 Supp. 21-6620(c) and 21-6623. The aforementioned mandatory minimum sentences shall not apply if the offender's sentencing grid sentence is greater. Under such circumstances, the mandatory minimum shall equal the grid sentence. K.S.A. 2015 Supp. 21-6620(c).

For crimes committed on and after September 6, 2013, the provisions of K.S.A. 2015 Supp. 21-6620(d) shall apply.

For crimes committed prior to September 6, 2013, the provisions of K.S.A. 2015 Supp. 21-6620(e) shall apply.

### **Felony Murder**

Offenders who are convicted of felony murder in the first degree (K.S.A. 2015 Supp. 21-5402(a)(2)) shall be sentenced to imprisonment for life, and shall not be eligible for parole prior to serving either 25 years' imprisonment, or the offender's sentence on the sentencing grid, whichever is greater. K.S.A. 2015 Supp. 21-6620(b)(2).

### **Other Off-Grid Offenses**

Off-grid offenses other than those otherwise specified in statute carry terms of life imprisonment with eligibility for parole only after serving 15 years for crimes committed after July 1, 1993 but prior to July 1, 1999, and 20 years for crimes committed on or after July 1, 1999. K.S.A. 2015 Supp. 22-3717(b)(3).

### **Jessica's Law Sex Offenses**

In 2006, Kansas' version of Jessica's Law was enacted and designated certain sex offenses involving victims less than 14 years of age and offenders 18 years of age or older as off-grid felonies. If an offender is convicted of one of these off-grid sex offenses, the sentence shall be imprisonment for life pursuant to with a mandatory minimum term of imprisonment of 25 years before parole eligibility on the first such sex offense, or a mandatory minimum term of 40 years on a second such offense. K.S.A. 2015 Supp. 21-6627.

Where a mandatory sentence of 25 or 40 years could be imposed, such sentence will not be imposed if the offender's criminal history would result in a guidelines sentence in excess of 300 or 480 months, respectively. In that case, the mandatory minimum will be the sentence as provided by the guidelines grid. K.S.A. 2015 Supp. 21-6627(b)(2)(B).

When the court finds substantial and compelling reasons to impose a downward departure, the court may impose the guidelines sentence in lieu of the mandatory minimum sentence. K.S.A. 2015 Supp. 21-6627(d)(1).

Upon release from imprisonment, offenders convicted of a crime under Jessica's Law will be subject to electronic monitoring for the remainder of the person's life and shall reimburse the state for all or part of the cost of such monitoring.. K.S.A. 2015 Supp. 22-3717(u) and (v).

### **Juvenile Offenders**

The death penalty and the sentence of life imprisonment without parole do not apply to juveniles who were under the age of 18 at the time they committed capital murder. K.S.A. 2015 Supp. 21-6618. Juveniles who are prosecuted as adults may be subject to a mandatory minimum term of imprisonment. K.S.A. 2015 Supp. 21-6621.

### **Offenders with Intellectual Disability**

Offenders who are convicted of capital murder or premeditated first degree murder who are determined to have an intellectual disability may not be sentenced to a death, life without parole or a mandatory minimum sentence. K.S.A. 2015 Supp. 21-6622.

## **NONGRID CRIMES**

Certain felony offenses are classified as nongrid offenses, (not to be confused with off-grid offenses) which are not assigned a severity level and are not subject to punishment pursuant to the sentencing grid. These offenses each contain specific penalties and other provisions within their respective statutes. Each of these crimes has a corresponding special sentencing rule which must be checked on the Special Rules Supplemental Page of the Journal Entry and Presentence Investigation Report when applicable.

These crimes are:

- felony driving under the influence, K.S.A. 8-1567, (Special Rule #6)
- felony test refusal, K.S.A. 2015 Supp. 8-1025, (Special Rule #39)
- felony domestic battery, K.S.A. 2015 Supp. 21-5414, (Special Rule #8)
- animal cruelty, K.S.A. 2015 Supp. 21-6412 and harming or killing certain dogs, K.S.A. 2015 Supp. 21-6416. (Special Rule #21)

### **CRIMINAL HISTORY**

Criminal history, except as provided in each specific statute for determining whether the crime is the second, third, fourth or subsequent such offense, is not relevant to the punishment for nongrid offenses.

#### **DUI**

Certain convictions, including diversions, shall be counted in determining whether the DUI conviction is the second, third, fourth or greater. These convictions include:

- DUI occurring on or after July 1, 2001,
- test refusal, K.S.A. 8-1025,
- driving a commercial motor vehicle under the influence, K.S.A. 8-2,144,
- operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131,
- involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or K.S.A. 2015 Supp. 21-5405(a)(3),
- aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and
- a violation of an ordinance of any city, military justice code or resolution of any county which prohibits DUI. K.S.A. 8-1567(i).

#### **Test Refusal**

For the purpose of determining whether a test refusal conviction is a first, second, third, fourth or subsequent conviction the following convictions and diversions shall be taken into account:

- 1) Convictions occurring on or after July 1, 2001 AND when such person was 18 years of age or

- older for a violation of K.S.A. 8-1567,
- 2) any convictions or diversions which occurred when such person was 18 years of age or older:
    - (A) K.S.A. 8-1025;
    - (B) driving a commercial motor vehicle under the influence, K.S.A. 8-2,144;
    - (C) operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131;
    - (D) involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or of K.S.A. 2015 Supp. 21-5405(a)(3);
    - (E) aggravated battery, K.S.A. 2015 Supp. 21-5413(b)(3); and
    - (F) aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and a violation of an ordinance of any city, military justice code or resolution of any county which prohibits the acts that such section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations. K.S.A. 2015 Supp. 8-1025(h).

### **Domestic Battery**

For the purpose of determining whether the domestic battery conviction is a first, second, third or subsequent conviction, only convictions and diversions within the previous 5 years shall be taken into account. K.S.A. 2015 Supp. 21-5414(c)(2).

## **ANTICIPATORY CRIMES**

### **ATTEMPT**

#### **Off-grid Crimes**

An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1, with the following exceptions: (See K.S.A. 2015 Supp. 21-5301)

- 1) Terrorism, K.S.A. 2015 Supp. 21-5421;
- 2) Illegal use of weapons of mass destruction, K.S.A. 2015 Supp. 21-5421;
- 3) Capital murder, K.S.A. 2015 Supp. 21-5401;
- 4) An attempt to commit the following offenses, if the offender is 18 years of age or older:
  - A) Rape, K.S.A. 2015 Supp. 21-5503(a)(3);
  - B) Aggravated indecent liberties with a child, K.S.A. 2015 Supp. 21-5506(b)(3); and
  - C) Aggravated criminal sodomy, K.S.A. 2015 Supp. 21-5504(b)(1) or (b)(2);
- 5) An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
  - A) Aggravated human trafficking, K.S.A. 2015 Supp. 21-5426(b);
  - B) Commercial sexual exploitation of a child, K.S.A. 2015 Supp. 21-6422; and
  - C) Sexual exploitation of a child, K.S.A. 2015 Supp. 21-5510(a)(1) or (a)(4).

#### **Nondrug Crimes**

An attempt to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for an attempt to commit a nondrug felony shall be a severity level 10. K.S.A. 2015 Supp. 21-5301(c)(1).

## **Drug Crimes**

An attempt to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term by six months, except that this does not apply in cases involving an attempt to manufacture a controlled substance under K.S.A. 2015 Supp. 21-5703. K.S.A. 2015 Supp. 21-5301(d).

## **Misdemeanors**

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. K.S.A. 2015 Supp. 21-5301(e). An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. K.S.A. 2015 Supp. 21-5301(e). An attempt to commit a class B or C misdemeanor is a class C misdemeanor. K.S.A. 2015 Supp. 21-5301(f).

## **Crimes where Attempt is an Element**

There are certain crimes where an attempt constitutes the completed crime. In such crimes, the statutory definition will include an attempt as a means, or alternate means, of completing the crime. For example, DUI, K.S.A. 8-1567, says “No person shall operate or attempt to operate any vehicle...” In such cases, the completed crime may be charged based on the conduct described, which will not be subject to the reduction in severity level. Other such instances include K.S.A. 2015 Supp. 21-5428 - blackmail, 21-5508 - indecent solicitation of a child, and 21-5909 - witness intimidation.

## **CONSPIRACY**

### **Off-grid Crimes**

Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2, with the following exceptions: (K.S.A. 2015 Supp. 21-5302)

- 1) Terrorism, K.S.A. 2015 Supp. 21-5421;
- 2) Illegal use of weapons of mass destruction, K.S.A. 2015 Supp. 21-5421;
- 3) Violations of the Kansas racketeer influenced and corrupt organization act, K.S.A. 2015 Supp. 21-6329;
- 4) An attempt to commit the following offenses, if the offender is 18 years of age or older:
  - A) Rape, K.S.A. 2015 Supp. 21-5503(a)(3);
  - B) Aggravated indecent liberties with a child, K.S.A. 2015 Supp. 21-5506(b)(3); and
  - C) Aggravated criminal sodomy, K.S.A. 2015 Supp. 21-5504(b)(1) or (b)(2);
- 5) An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
  - A) Aggravated human trafficking, K.S.A. 2015 Supp. 21-5426(b);
  - B) Commercial sexual exploitation of a child, K.S.A. 2015 Supp. 21-6422; and
  - C) Sexual exploitation of a child, K.S.A. 2015 Supp. 21-5510(a)(1) or (a)(4).

### **Nondrug Crimes**

Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10. K.S.A. 2015 Supp. 21-5302(d)(1).

### **Drug Crimes**

Conspiracy to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months. K.S.A. 2015 Supp. 21-5302(e).

## **Misdemeanors**

Conspiracy to commit a misdemeanor is a class C misdemeanor. K.S.A. 2015 Supp. 21-5302(f).

## **SOLICITATION**

### **Off-grid Crimes**

Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3, with the following exceptions: (See K.S.A. 2015 Supp. 21-5303)

- 1) Terrorism, K.S.A. 2015 Supp. 21-5421;
- 2) Illegal use of weapons of mass destruction, K.S.A. 2015 Supp. 21-5421;
- 3) An attempt to commit the following offenses, if the offender is 18 years of age or older:
  - A) Rape, K.S.A. 2015 Supp. 21-5503(a)(3);
  - B) Aggravated indecent liberties with a child, K.S.A. 2015 Supp. 21-5506(b)(3); and
  - C) Aggravated criminal sodomy, K.S.A. 2015 Supp. 21-5504(b)(1) or (b)(2);
- 4) An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
  - D) Aggravated human trafficking, K.S.A. 2015 Supp. 21-5426(b);
  - E) Commercial sexual exploitation of a child, K.S.A. 2015 Supp. 21-6422; and
  - F) Sexual exploitation of a child, K.S.A. 2015 Supp. 21-5510(a)(1) or (a)(4).

### **Nondrug Crimes**

Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for solicitation to commit a nondrug felony shall be a severity level 10. K.S.A. 2015 Supp. 21-5303(d)(1).

### **Drug Crimes**

Criminal solicitation to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months. K.S.A. 2015 Supp. 21-5303(e).

## **MISDEMEANORS**

Punishment and disposition of misdemeanors is not provided on the drug or nondrug sentencing grids. Misdemeanors are established by class as follows:

- Class A misdemeanors, punishable by a county jail sentence of not more than 1 year;
- Class B misdemeanors, punishable by a county jail sentence of not more than 6 months;
- Class C misdemeanors, punishable by a county jail sentence of not more than 1 month; and
- Unclassified misdemeanors, which are punishable as specified by law, but if no such penalty is provided they are treated as Class C misdemeanors. See K.S.A. 2015 Supp. 21-6602.

A person convicted of a misdemeanor may be punished by a fine pursuant to K.S.A. 2015 Supp. 21-6611. Additional sentencing dispositions for misdemeanors are provided in K.S.A. 2015 Supp. 21-6604. The period of probation for a misdemeanor shall not exceed two years, subject to renewal and extension for additional fixed periods of two years. The court may terminate probation at any time. K.S.A. 2015 Supp. 21-6608(a). The district court may parole any misdemeanant sentenced to confinement in a county jail. Such period of parole shall not exceed two years and may be terminated by the court at any time. K.S.A. 2015 Supp. 21-6608(b).

## DRUG DISTRIBUTION AND CULTIVATION CRIMES

### DRUG DISTRIBUTION

Most drug distribution and cultivation crimes are punished on the drug grid according to the type and amount of substance distributed, possessed with the intent to distribute, or cultivated. The one exception is distribution of drugs listed in K.S.A. 65-4113 (Schedule V), which is not punished according to amount. It is either a Class A person misdemeanor, or if distributed to a minor, a nondrug severity level 7 person felony.

Distributing or possessing with intent to distribute a controlled substance within 1000 feet of school property shall increase the severity level by one level. For example, distributing 3.5 grams of heroin within 1000 feet of a school would be a level 1 drug felony.

The following tables show the amount of each drug and amount, along with the corresponding severity level of punishment. Certain substances may be measured according to “dosage units”, which include discrete units such as pills, capsules and microdots. K.S.A. 2015 Supp. 21-5705.

<b>Heroin/Meth</b>		<b>Marijuana</b>		<b>Dosage Unit</b>		<b>All Others</b>	
<b>Amount</b>	<b>SL</b>	<b>Amount</b>	<b>SL</b>	<b>Amount</b>	<b>SL</b>	<b>Amount</b>	<b>SL</b>
Less than 1 gram	4	Less than 25 grams	4	Less than 10 units	4	Less than 3.5 grams	4
1 gram but less than 3.5 grams	3	25 grams but less than 450 grams	3	10 units but less than 100 units	3	3.5 grams but less than 100 grams	3
3.5 grams but less than 100 grams	2	450 grams but less than 30 kilograms	2	100 units but less than 1,000 units	2	100 grams but less than 1 kilogram	2
100 grams or more	1	30 kilograms or more	1	1,000 units or more	1	1 kilogram or more	1

There is a rebuttable presumption of intent to distribute when the offender possesses the following amounts, or greater, of the following controlled substances. The burden to overcome this rebuttable presumption is upon the defendant. The quantities at which the rebuttable presumption applies are as follows:

<b>Type of Drug</b>	<b>Amount</b>
Marijuana	450 grams
Heroin	3.5 grams
Methamphetamine	3.5 grams
Any other drug	100 grams
Dosage Units	100

See K.S.A. 2015 Supp. 21-5705(e).

## **DRUG CULTIVATION**

It shall be unlawful for any person to cultivate any controlled substance or controlled substance analog listed in K.S.A. 2015 Supp. 21-5705(a). The severity level for drug cultivation crimes are as follows:

<b>Number of Plants</b>	<b>Severity Level</b>
More than 4 but less than 50	3
50 or more but less than 100	2
100 or more	1

See K.S.A. 2015 Supp. 21-5705(d)(7).



## **CHAPTER II: PROCEDURE PRIOR TO SENTENCING**

### **DETERMINATION OF THE DATE OF OFFENSE: APPLICATION TO THE SENTENCING GUIDELINES**

The Kansas Sentencing Guidelines Act (KSGA) applies to all felony crimes committed on or after July 1, 1993. All felony crimes committed prior to that date should be prosecuted under the laws existing prior to that date. A crime is committed prior to July 1, 1993, if any essential elements of the crime as then defined occurred before July 1, 1993. If it cannot be determined that the crime was committed prior to or after July 1, 1993, the offender should be prosecuted under laws existing prior to the KSGA. See K.S.A. 2015 Supp. 21-6802.

The date of offense controls selection of the Presentence Investigation (PSI) and Journal Entry (JE) forms. Each year the Kansas Sentencing Commission modifies these forms to comport with the laws and special sentencing rules in effect beginning July 1 of that year. Therefore, when completing a PSI or journal entry form make sure that the year of the form corresponds with the laws in effect for the date of offense. Examples: For an offense committed on May 1, 2001, complete the 2000 Journal entry form. For an offense committed October 7, 1996, the 1996 Journal entry form should be completed.

When using the Probation Violation Journal Entry (PVJE) form, the most recent version should be used, regardless of the date of the offense.

Forms may be found at the Kansas Sentencing Commission website: [www.sentencing.ks.gov/forms](http://www.sentencing.ks.gov/forms).

### **CHARGING DOCUMENTS**

All charging documents filed for crimes to be sentenced under the KSGA system should allege facts sufficient to classify the crime severity level of the offense on the guidelines grid. If a particular felony crime is sub-classified into different versions of the same offense that have been assigned different severity levels, the charge should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the charging document. See K.S.A. 22-3201 for the requisites of a complaint, indictment or information.

### **CONSOLIDATION**

Consolidation for trial of separate indictments or informations. The court may order two or more complaints, informations or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment. K.S.A. 22-3203.

### **FINGERPRINTING**

#### **MUNICIPAL COURT DUTIES**

The court is required to ensure that fingerprints are taken upon conviction for a city ordinance violation comparable to a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2015 Supp. 21-5412. See K.S.A. 2015 Supp. 12-4517(a).

## **LAW ENFORCEMENT DUTIES**

Every sheriff, police department, or countywide law enforcement agency in the state is required to make two sets of fingerprint impressions and one set of palm impressions of a person who is arrested if the person:

- is wanted for the commission of a felony. On or after July 1, 1993, fingerprints and palm prints shall also be taken if the person is wanted for the commission of a class A or B misdemeanor or a violation of a county resolution which would be the equivalent of a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2015 Supp. 21-5412;
- is believed to be a fugitive from justice;
- may be in the possession at the time of arrest of any goods or property reasonably believed to have been stolen by the person;
- is in possession of firearms or other concealed weapons, burglary tools, high explosives or other appliances believed to be used solely for criminal purposes;
- is wanted for any offense which involves sexual conduct prohibited by law or for violation of the uniform controlled substances act; or
- is suspected of being or known to be a habitual criminal or violator of the intoxicating liquor law.

See K.S.A. 2015 Supp. 21-2501(a).

## **COUNTY/DISTRICT COURT DUTIES**

The court shall ensure, upon the accused person's first appearance, or in any event, before final disposition of a felony or a class A or B misdemeanor or a violation of a county resolution which prohibits an act which is prohibited by a class A or B misdemeanor, the offender has been processed, fingerprinted and palm printed. See K.S.A. 2015 Supp. 21-2501(b).

## **JUVENILE COURT DUTIES**

Fingerprints or photographs shall not be taken of any juvenile who is taken into custody for any purpose, with the following exceptions:

- Fingerprints or photographs of a juvenile may be taken if authorized by the court having jurisdiction;
- Fingerprints and photographs shall be taken of all juvenile offenders adjudicated due to commission of an offense which if committed by an adult would constitute the commission of a felony, a class A or B misdemeanor or assault as defined in K.S.A. 2015 Supp. 21-5412(a).
- Fingerprints or photographs of a juvenile may be taken under K.S.A. 2015 Supp. 21-2501, if the juvenile has been prosecuted as an adult pursuant to K.S.A. 2015 Supp. 38-2347; and
- Fingerprints or photographs shall be taken of any juvenile admitted to a juvenile correctional facility
- Photographs may be taken of any juvenile admitted to a juvenile detention facility.

See K.S.A. 2015 Supp. 38-2313.

## **DNA SAMPLE COLLECTION**

Offenders who are convicted of certain crimes or adjudicated of certain juvenile offenses shall be required to submit a DNA or biological sample to the Kansas Bureau of investigation. The details of this procedure are provided in K.S.A. 21-2511.

## **OFFICIAL RECORDS**

All Kansas law enforcement agencies shall maintain a permanent record, on forms approved by the Attorney General, of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions. K.S.A. 21-2501a(a). All law enforcement agencies must file a report of such offenses, on a form approved by the Attorney General, with the Kansas Bureau of Investigation (KBI) within 72 hours after such offense is reported, or known to have been committed. K.S.A. 21-2501a(b). All law enforcement agencies must report within 30 days, on forms approved by the Attorney General, any methamphetamine laboratory seizures or dump sites and any theft or attempted theft of anhydrous ammonia that occurs in such agency's jurisdiction. K.S.A. 21-2501a(c).

## **PLEA AGREEMENT RULES**

### **PERMISSIBLE AND IMPERMISSIBLE PLEAS**

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

- Move for dismissal of other charges or counts;
- recommend a particular sentence within the sentencing range applicable to the offense or to the offense to which the offender pled guilty;
- recommend a particular sentence outside of the sentencing range only when departure factors exist and such factors are stated on the record;
- agree to file a particular charge or count;
- agree not to file charges or counts; or
- make any other promise to the defendant, except as provided below. K.S.A. 2015 Supp. 21-6812.

However, a prosecutor shall NOT:

- enter into any agreement to decline to use a prior drug conviction of the defendant to elevate or enhance the severity level of a drug crime as provided in K.S.A. 2015 Supp. 21-5703, 21-5705 or 21-5706; or
- make any agreement to exclude any prior conviction from the criminal history of the defendant. K.S.A. 2015 Supp. 21-6812(f).

### **DUI AND TEST REFUSAL PLEAS**

No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation DUI or Test Refusal, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the same, to avoid the mandatory penalties established by statute or ordinance. K.S.A. 2015 Supp. 8-1025(l) and 8-1567(m).

### **ACCEPTANCE OF PLEA AND SENTENCING**

At the time of acceptance of a plea of guilty or *nolo contendere*, the sentencing court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. See K.S.A. 2015 Supp. 22-3210.

The sentencing court is not bound to follow an agreed sentencing recommendation. It has the discretion to impose up to the maximum sentence in the applicable grid block. See K.S.A. Supp. 2015 21-6804(e)(1) and K.S.A. Supp. 2015 21-6805(c)(1), and, e.g., *State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).

Once the guilty or *nolo contendere* plea has been accepted by the court, the severity level of the crime cannot be elevated for sentencing purposes due to the subsequent discovery of prior convictions which would have raised the severity level of the crime; instead the prior convictions will be used in the determination of the criminal history category. See K.S.A. 2015 Supp. 21-6807(c)(4).

### **SB 123 DRUG TREATMENT**

As part of a plea, the offender must still have the requisite LSI-R and SASSI score in order to be admitted into the SB 123 program. The court may direct the defendant to undergo criminal risk-need and drug abuse assessments required by K.S.A. 2015 Supp. 21-6824 at any time in order to determine SB 123 drug treatment eligibility. The defendant will still be responsible for payment of all assessment fees imposed by the court at sentencing.

### **DIVERSIONS**

A diversion agreement cannot be entered into for a class A or B felony or for crimes committed on or after July 1, 1993, constituting an off-grid crime, a nondrug severity level 1, 2 or 3 felony, or a drug severity level 1 or 2 felony for drug crimes committed on or after July 1, 1993 but before July 1, 2012, or a drug severity level 1, 2, or 3 felony committed on or after July 1, 2012. K.S.A. 2015 Supp. 22-2908(b)(2).

For more information on the specific requirements of diversion agreements for certain offenses, please see K.S.A. 22-2909. No defendant shall be required to enter any plea to a criminal charge as a condition of diversion. K.S.A. 22-2910.

### **DUI AND TEST REFUSAL**

A diversion agreement cannot be entered into for a DUI or test refusal violation if: the defendant has previously participated in a diversion for alleging a violation of that statute; has previously been convicted of or pleaded *nolo contendere* to a DUI; or, during the time of the DUI the defendant was involved in a motor vehicle accident or collision resulting in personal injury or death. K.S.A. 2015 Supp. 22-2908(b)(1).

A diversion agreement cannot be entered into for a DUI or test refusal violation more than once in a person's lifetime. K.S.A. 2015 Supp. 8-1025(h)(7) and K.S.A. 8-1567(i)(6).

### **DOMESTIC VIOLENCE OFFENSES**

A diversion agreement cannot be entered into where the complaint alleges a domestic violence offense, as defined in K.S.A 2015 Supp. 21-5111, and the defendant has participated in two or more diversions in the previous five year period upon complaints alleging a domestic violence offense. K.S.A. 22-2908(b)(3).

## **BUYING SEXUAL RELATIONS**

A person may enter into a diversion agreement for a violation of buying sexual relations, or a similar ordinance, only once during the person's lifetime. K.S.A. 2015 Supp. 21-6421(c)(2).

## **WILDLIFE, PARKS AND TOURISM LAWS**

A county or district attorney may enter into a diversion agreement in lieu of criminal proceedings on a complaint for violation of Wildlife, Parks, and Tourism laws (K.S.A. 2015 Supp. 32-1001 *et. seq.*) if the diversion carries the same penalties as the conviction for the corresponding violation. If the defendant has previously participated in one or more diversions then each subsequent diversion would carry the same penalties as the conviction for the corresponding violation. See K.S.A. 2015 Supp. 22-2908(c).

## **DEFERRING SENTENCE PENDING MENTAL EXAMINATION**

A mental health examination may be completed on the offender as part of the presentence investigation report. The sentencing court may commit the offender to a state security hospital or suitable local mental health facility for such examination. The maximum duration of commitment that can be imposed for the examination is 120 days. K.S.A. 2015 Supp. 22-3429.

## **DOMESTIC VIOLENCE OFFENSE DESIGNATION**

In all criminal cases filed in district or municipal court, if there is evidence that the defendant committed a domestic violence offense, the trier of fact shall determine whether the defendant committed a domestic violence offense. K.S.A. 2015 Supp. 22-4616.

If the trier of fact determines that the defendant committed a domestic violence offense, the court shall place a domestic violence designation on the criminal case and the defendant shall be subject to the provisions of subsection (p) of K.S.A. 2015 Supp. 21-6604, and amendments thereto.

The court shall not place a domestic violence designation on the criminal case and the defendant shall not be subject to the provisions of subsection (p) of K.S.A. 2015 Supp. 21-6604, only if the court finds on the record that:

- The defendant has not previously committed a domestic violence offense or participated in a diversion upon a complaint alleging a domestic violence offense; AND
- the domestic violence offense was not used to coerce, control, punish, intimidate or take revenge against a person with whom the offender is involved or has been involved in a dating relationship or against a family or household member. K.S.A. 2015 Supp. 22-4616.

The assessment may be used by the court to determine an appropriate sentence, and shall be provided to the supervising entity after sentencing. The defendant shall be required to pay for the assessment and all subsequent recommendations. K.S.A. 2015 Supp. 21-6604(p).

## **DOMESTIC BATTERY**

The definition of the crime of domestic battery and provisions relating thereto, are provided in K.S.A. 2015 Supp. 21-5414.

## CHAPTER III: CRIMINAL HISTORY

### CRIMINAL HISTORY RULES

The horizontal axis or top of the grid represents the criminal history categories. Nine categories are used to designate prior criminal history. Category A is used to categorize offenders having 3 or more prior felony convictions designated as person crimes. Category I is used to categorize offenders having either no criminal record or a single conviction or juvenile adjudication for a misdemeanor. The criminal history categories classify an offender's criminal history in a quantitative as well as a qualitative manner. The categories between A and I reflect cumulative criminal history with an emphasis on whether prior convictions were for person crimes or nonperson crimes. Generally, person crimes are weighed more heavily than nonperson crimes. Within limits, prior convictions for person crimes will result in a harsher sentence for the current crime of conviction. See K.S.A. 2015 Supp. 21-6809.

The criminal history scale is represented in an abbreviated form on the horizontal axis of the nondrug grid and the drug grid. The relative severity of each criminal history category decreases from left to right on the grids, with Criminal History Category A being the most serious classification and Criminal History Category I being the least serious classification.

<b>Criminal History Category</b>	<b>Descriptive Criminal History</b>
A	The offender's criminal history includes three or more adult convictions or juvenile adjudications, in any combination, for person felonies.
B	The offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies.
C	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult convictions or juvenile adjudications for nonperson felonies.
D	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudication for a nonperson felony.
E	The offender's criminal history includes three or more adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
F	The offender's criminal history includes two adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
G	The offender's criminal history includes one adult conviction or juvenile adjudication for a nonperson felony, but no adult conviction or juvenile adjudication for a person felony.
H	The offender's criminal history includes two or more adult convictions or juvenile adjudications for nonperson and/or select misdemeanors, and no more than two adult convictions or juvenile adjudications for person misdemeanors, but no adult conviction or juvenile adjudication for either a person or nonperson felony.
I	The offender's criminal history includes no prior record, or one adult conviction or juvenile adjudication for a person, nonperson, or a select misdemeanor, but no adult conviction or juvenile adjudication for either a person or a nonperson felony.

## **PERSON AND NONPERSON CRIMES**

The “person” designation generally refers to crimes that inflict, or could inflict harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery.

The “nonperson” designation generally refers to crimes committed that inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver’s license, perjury, etc.

### **Unclassified Crimes**

Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2015 Supp. 21-6810(d)(6).

### **Drug Crimes**

Drug crimes are designated as nonperson crimes for criminal history scoring. K.S.A. 2015 Supp. 21-6811(h).

### **Anticipatory Crimes**

A prior conviction for an attempt, conspiracy, or solicitation to commit a crime will be treated as a person or nonperson crime in accordance with the designation of the underlying crime. K.S.A. 2015 Supp. 21-6811(g).

## **SELECT MISDEMEANORS**

The “select” designation refers to specific weapons violations. A conviction of criminal possession of a firearm as defined in subsection (a)(1) or (a)(5) of K.S.A. 21-4204, prior to its repeal, criminal use of weapons as defined in subsection (a)(10) or (a)(11) of K.S.A. 2014 Supp. 21-6301, and amendments thereto, or unlawful possession of a firearm as in effect on June 30, 2005, and as defined in K.S.A. 21-4218, prior to its repeal, will be scored as a select class B nonperson misdemeanor conviction or adjudication and shall not be scored as a person misdemeanor for criminal history purposes. See K.S.A. 2015 Supp. 21-6811(b).

## **CRIMINAL HISTORY CATEGORIES**

Criminal history is based upon the following types of prior convictions and/or adjudications:

- person felonies;
- nonperson felonies;
- person misdemeanors and comparable municipal ordinance and county resolution violations;
- class A nonperson misdemeanors and comparable municipal ordinance and county resolution violations; and
- class B nonperson *select* misdemeanors and comparable municipal ordinance and county resolution violations. K.S.A. 2015 Supp. 21-6810.

Class B and C nonperson misdemeanor convictions/adjudications are **not** scored for criminal history purposes.

All convictions and adjudications, except as otherwise provided, should be included in the offender’s criminal history. Prior convictions should be recorded in descending order by the date of conviction,

starting with the most recent conviction. An offender's criminal history classification is determined using the following rules:

- Only verified prior convictions will be considered and scored. K.S.A. 2015 Supp. 21-6810 (d)(1).
  - A prior conviction is any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, which occurred prior to imposition of sentence in the current case, regardless of whether the crime that was the subject of the prior conviction was committed before or after the commission of the current crime of conviction. K.S.A. 2015 Supp. 21-6810(a).
  - The classification of a prior conviction will be made in accordance with the law applicable at the time of the conviction. See K.S.A. 2015 Supp. 21-6810(d)(9) and 21-6802(c).
- Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately. K.S.A. 2015 Supp. 21-6810(c).
- All prior adult felony convictions, including expungements, will be considered and scored. K.S.A. 2015 Supp. 21-6810(d)(2).
- Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2015 Supp. 21-6810(d)(6).
- Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction. K.S.A. 2015 Supp. 21-6810(d)(7).
- 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. 2015 Supp. 21-6810(d)(8).

## **JUVENILE ADJUDICATIONS**

Except for adjudications that have decayed pursuant to K.S.A. 2015 Supp. 21-6810(d)(3) and (d)(4), 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. K.S.A. 2015 Supp. 21-6811(f).

The parties are entitled access to the juvenile files and records of the offender in order to discover or verify criminal history. K.S.A. 2015 Supp. 22-3212(i).

## **DECAY**

There will be no decay factor applicable to adult convictions. K.S.A. 2015 Supp. 21-6810(d)(3).

The following juvenile adjudications will not decay:

- Juvenile adjudications that would constitute a person felony or off-grid felony if committed by an adult. K.S.A. 2015 Supp. 21-6810(d)(3)(B).
- For acts committed before July 1, 1993, a juvenile adjudication that would constitute a class A, B, or C felony, if committed by an adult. K.S.A. 2015 Supp. 21-6810(d)(3)(C).
- For acts committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1, 2, 3, 4, or 5 felony, or a drug severity level 1, 2, or 3 felony, for an offense committed on or after July 1, 1993, but prior to July 1, 2012, or a drug severity level 1, 2, 3 or 4 felony for an offense committed on or after July 1, 2012, if committed by an adult. K.S.A. 2015 Supp. (d)(3)(D).



Juvenile adjudications for the following offenses (if committed by an adult) will decay if the current crime of conviction is committed after the offender reaches the age of 25:

- A nonperson class D or class E felony if committed before July 1, 1993,
- A nondrug severity level 6, 7, 8, 9 or 10 nonperson felony;
  - a drug severity level 4 felony if committed on or after July 1, 1993 but prior to July 1, 2012;
  - a drug severity level 5 felony if committed on or after July 1, 2012; or
  - a misdemeanor. K.S.A. 2015 Supp. 21-6810(d)(4).

## **DIVERSIONS**

Diversions are not “convictions” and are therefore not included in criminal history, except as otherwise provided by law for current convictions of:

- Involuntary Manslaughter, K.S.A. 2015 Supp. 21-5405(a)(3);
- DUI, K.S.A. 8-1567;
- Test Refusal, K.S.A. 8-1025;
- Domestic Battery, K.S.A. 2015 Supp. 21-5414; and
- Buying Sexual Relations, K.S.A. 2015 Supp. 21-6421.

A person entering into a diversion agreement does not have a Sixth Amendment right to counsel, thus prior uncounseled diversions may be counted for criminal history purposes. See *State v. Tims*, 49 Kan. App. 2d 845, 317 P.3d 115 (2014).

## **PRIOR CONVICTION AS SENTENCE ENHANCEMENT OR ELEMENT OF PRESENT CRIME**

If a prior conviction of any crime operates to enhance the severity level for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, that prior conviction cannot be counted in the offender’s criminal history. K.S.A. 2015 Supp. 21-6810(d)(9). Note, however, that prior convictions which elevate the penalty or punishment without raising the severity level of the current crime may be counted for criminal history purposes. *State v. Pearce*, 51 Kan. App. 2d 116, 342 P.3d 963 (2015).

Additional convictions which are not used as enhancements may be used for criminal history purposes. See *State v. Williams*, 47 Kan. App. 2d 102, 272 P.3d 1282 (2012).

### **Failure to Register as Offender Convictions**

A prior conviction that creates the need for registration as a sex, drug or violent offender is an element of the offense of failure to register and may not be counted in determining the criminal history score on conviction of failure to register. See *State v. Pottoroff*, 32 Kan. App. 2d 1161, 96 P.3d 280 (2004).

### **Aggravated Escape from Custody Convictions**

For a conviction of the crime of aggravated escape from custody (K.S.A. 2015 Supp. 21-5911) that requires that the offender be in custody for a felony, such felony is considered an element of the crime and may not be counted in the defendant’s criminal history. See *State v. Taylor*, 262 Kan. 471, 939 P.2d 904 (1997). However, not all alternative means of the crime of aggravated escape require the element of being in custody for a felony. See *State v. Brown*, 32 Kan. App. 2d 24, 80 P.3d 404 (2003).

### **Tampering with Electronic Monitoring Equipment Convictions**

The conviction giving rise to the order requiring the defendant be subjected to electronic monitoring equipment is not an element of the crime of tampering with electronic monitoring equipment and may be counted for criminal history purposes. (K.S.A. 2015 Supp. 21-6322). See *State v. Thacker*, 48 Kan. App. 2d 515, 292 P.3d 342 (2013).

### **NONGRID OFFENSES**

Nongrid offenses each contain specific penalty provisions within their respective statutes. Criminal history, except as provided in each statute for determining whether the crime is the second, third, fourth or subsequent such offense, are not relevant to the punishment for nongrid offenses. For more information on nongrid offenses, please see Chapter I.

### **PERSON MISDEMEANORS – CONVERSION TO PERSON FELONIES**

#### **Class A and B Person Misdemeanors**

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.,  $8 \div 3 = 2$ ). 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. 2015 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. 2015 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. 2015 Supp. 21-6811(a).

### **INVOLUNTARY MANSLAUGHTER AND DUI**

See Special Rule #42. If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 2015 Supp. 21-5405(a)(3), each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a violation of K.S.A. 8-2,144 (Commercial DUI), K.S.A. 8-1567 (DUI), K.S.A. 2015 Supp. 8-1025 (Test Refusal) or a violation of a law of another state or an ordinance of any city, or resolution of any county which prohibits acts described in K.S.A. 8-2,144 (Commercial DUI), 8-1567 or K.S.A. 2015 Supp. 8-1025 (Test Refusal), shall count as one person felony for criminal history purposes. K.S.A. 2015 Supp. 21-5405(a)(3) and K.S.A. 2015 Supp. 21-6811(c)(2).

### **LEAVING THE SCENE OF AN ACCIDENT**

See Special Rule #41. If the current crime of conviction is leaving the scene of an accident when the accident involves property damage of \$1000 or more, great bodily harm or the death of any person, K.S.A. 8-1602(b)(2),(3) and (4), the following prior convictions, if for an act committed on or after July 1, 2011, shall count as a person felony for criminal history purposes:

- 8-235, driving a vehicle without a license;
- 8-262, driving while license is canceled, suspended, or revoked;
- 8-287, driving while one’s privileges are revoked for being a habitual violator;
- 8-291, violating restrictions on driver’s license or permit;
- 8-1566, reckless driving;
- 8-1567, driving under the influence of alcohol or drugs;
- 8-1568, fleeing or attempting to elude a police officer;
- 8-1602, leaving the scene of an accident resulting in injury, great bodily harm, or death;
- 8-1605, failing to contact the owner of vehicle following an accident causing damage to unattended property;
- 40-3104, failing to obtain motor vehicle liability insurance coverage;
- K.S.A. 2015 Supp. 21-5405(a)(3), involuntary manslaughter committed while DUI;
- K.S.A. 2015 Supp. 21-5406, vehicular homicide; or
- A violation of a city ordinance or law of another state which would also constitute a violation of such sections. K.S.A. 2015 Supp. 21-6811(i).

## **BURGLARY**

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

- As a prior person felony if the prior conviction or adjudication was classified as a burglary to a dwelling, as described in subsection (a) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(1) of K.S.A. 2015 Supp. 21-5807. K.S.A. 2015 Supp. 21-6811(d)(1); or
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a building other than a dwelling, as described in subsection (b) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(2) of K.S.A. 2015 Supp. 21-5807 or as a burglary to a motor vehicle or other means of conveyance of persons or property, as described in subsection (c) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(3) of K.S.A. 2015 Supp. 21-5807. K.S.A. 2015 Supp. 21-6811(d)(2).

The facts required to classify prior adult convictions or juvenile adjudications for burglary must be established by the State by a preponderance of the evidence. See K.S.A. 2015 Supp. 21-6811(d).

When scoring burglary prior convictions that occurred prior to the Kansas Sentencing Guidelines Act (1993), such burglary convictions are scored as nonperson because burglary of a “dwelling” is not included in the statutory elements making up the conviction. *State v. Dickey*, 301 Kan. 618, 350 P.3d 1054 (2015), (District court was constitutionally prohibited from classifying Dickey’s prior burglary adjudication as a person felony because doing so would have required the district court to make or adopt a factual finding that went beyond simply identifying the statutory elements that constituted the prior burglary adjudication).

## **OUT-OF-STATE CONVICTIONS**

Prior out-of-state convictions and juvenile adjudications will also be used to determine the appropriate criminal history category classification.

Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal, or military courts are considered out-of-state convictions or adjudications. K.S.A. 2015 Supp. 21-6811(e).

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) (No matter what lenience another state may wish to show, once we are satisfied that a defendant's factual guilt was established in a foreign state, that prior crime will count in Kansas).

#### **Classification as Felony or Misdemeanor**

Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 2014 Supp. 21-6811(e)(2). If a crime is a felony in another state, it will be counted as a felony in Kansas. If a crime is a misdemeanor in another state, the state of Kansas shall refer to the comparable offense in order to classify the out-of-state crime as a class A, B or C misdemeanor. If the comparable misdemeanor crime in the state of Kansas is a felony, the out-of-state crime shall be classified as a class A misdemeanor. If the state of Kansas does not have a comparable crime, the out-of-state crime shall not be used in classifying the offender's criminal history. K.S.A. 2015 Supp. 21-6811(e)(2)(B). The facts required to classify out-of-state adult convictions and juvenile adjudications must be established by the State by a preponderance of the evidence. K.S.A. 2015 Supp. 21-6811(e).

The Legislature intended the sentencing court to compare a prior conviction to the most comparable Kansas offense to make a felony or misdemeanor determination when such conviction occurred in a jurisdiction that does not distinguish between felonies and misdemeanors, such as a military proceeding. *State v. Hernandez*, 24 Kan. App. 2d 285, 286-289, 944 P.2d 188, 192-193 (1997).

#### **Classification as Person or Nonperson Crime**

A comparable offense need not contain elements identical to those of the out-of-state crime, but must be similar in nature and cover a similar type of criminal conduct. *State v. Schultz*, 22 Kan. App. 2d 60, 62, 911 P.2d 1119 (1996).

The court may use any comparable Kansas offense, regardless of whether the crime is a felony or a misdemeanor. For example, if the out-of-state conviction is a misdemeanor, the court could use a Kansas felony as the comparable crime in order to determine if the conviction is scored as a nonperson or person crime. *State v. LaGrange*, 21 Kan. App. 2d 477, 901 P.2d 44 (1995).

The legislature intended for all prior convictions and juvenile adjudications—including convictions and adjudications occurring before implementation of the KSGA—to be considered and scored for purposes of determining an offender's criminal history score. In order to do this, a pre-KSGA conviction and/or adjudication must be classified as either a person or nonperson offense by comparing the criminal statute under which the prior offense arose to the comparable post-KSGA criminal statute. The comparable post-KSGA Kansas criminal statute is the one in effect at the time the current crime of conviction was committed. *State v. Keel*, 302 Kan. 360, 357 P.3d 251 (2015).

If Kansas has no comparable offense, the sentencing court must classify the out-of-state conviction as a nonperson crime. K.S.A. 2015 Supp. 21-6811(e)(3).

### **Comparable Offenses - Examples**

The crime of second-degree burglary in Missouri applies when the structure involved is “a building or inhabitable structure.” Mo.Rev.Stat. § 569.170.1 (1994). An “inhabitable structure” is defined in Mo.Rev.Stat. § 569.010(2) (1994), in pertinent part, as “a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) Where any person lives or carries on business or other calling.” (Emphasis \*63 added.) Thus, under the Missouri burglary statute, a gas station would be an “inhabitable structure” because business is carried on there.

In contrast, the Kansas burglary statute distinguishes between structures which are or are not “dwellings.” According to K.S.A. 1994 Supp. 21-3110(7), [now K.S.A. 2015 Supp. 21-5111] ‘dwelling’ means a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation, home or residence.” From these definitions, it is clear that normally a gas station would not be considered a “dwelling” as contemplated by our legislature absent some proof that the gas station either is used or intended for use as a human habitation, home, or residence. *State v. Schultz*, 22 Kan. App. 2d 60, 911 P.2d 1119 (1996). See also *State v. Barajas*, 43 Kan. App. 2d 639, 230 P.3d 783 (2010).

### **Military Convictions**

When military convictions are at issue, “a specification is the allegation of a distinct offense in support of the general charge, and is comparable to a count in a civilian indictment.” *Hunsaker v. Ridgely*, 85 F. Supp. 757, 758 (S.D.Me. 1949), cited in *State v. Swilley*, 25 Kan. App. 2d 492, 967 P.2d 339 (1998).

## **PROOF OF CRIMINAL HISTORY**

### **CRIMINAL HISTORY WORKSHEET**

Except as provided in K.S.A. 2015 Supp. 21-6814, the sentencing court may take judicial notice in a subsequent felony proceeding of an earlier criminal history worksheet included in a presentence investigation report prepared for a prior sentencing of the defendant for a felony committed on or after July 1, 1993, as verification of the criminal history reflected on the worksheet. K.S.A. 2015 Supp. 21-6813(f). See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

Unless disputed by the offender, the criminal history worksheet serves as adequate verification of the offender's criminal history. If the offender disputes any aspect of the criminal history worksheet portion of the presentence investigation report as prepared by the field services officer, the offender shall immediately notify the district attorney and the court with a written notice specifying the exact nature of the alleged error. The State will then have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part, or parts, of the criminal history. The sentencing judge must allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence. If the offender later challenges such offender’s criminal history, which has been previously established, the burden of proof shall shift to the offender to prove such offender’s criminal history by a preponderance of evidence. K.S.A. 2015 Supp. 21-6814.

The sentencing court has the duty and authority to correct any errors on the criminal history worksheet.

## **UNCOUNSELED MISDEMEANOR CONVICTIONS**

A person accused of a misdemeanor has a Sixth Amendment right to counsel if the sentence to be imposed upon conviction includes a term of imprisonment, even if the jail time is suspended or conditioned upon a term of probation. *State v. Long*, 43 Kan. App. 2d 328, 225 P.3d 754 (2010). 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. However, if the offender's sentence did not include a term of imprisonment, the previous conviction may be counted in the offender's criminal history.

## **CHAPTER IV: PRESENTENCE INVESTIGATION REPORTS**

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form along with the instructions for completing the form are contained in Appendix A of this Manual.

### **REQUIREMENTS**

The sentencing court is required to order a Presentence Investigation Report (PSI) to be prepared by a court services officer as soon as possible after every felony conviction involving crimes committed on or after July 1, 1993, including all unclassified felonies. K.S.A. 2015 Supp. 21-6813(a). All presentence investigation reports in any case in which the defendant has been convicted of a felony shall be on a form approved by the Kansas Sentencing Commission. K.S.A. 2015 Supp. 21-6813(g). This format must be used to provide consistency statewide.

A copy of the PSI, including the Criminal History Worksheet, and the Journal Entry of Judgment, all attached together, must be sent to the Kansas Sentencing Commission for each felony case within thirty days after sentencing. K.S.A. 2015 Supp. 22-3439(a).

Field services officers are responsible for preparing the Presentence Investigation Report (PSI). The PSI report is mandatory in all felony cases under the KSGA. The primary purpose of the PSI report is to provide complete and accurate information about the criminal history of the offender, because criminal history is one of the two primary determining factors of the appropriate sentence established by the guidelines for the crime of conviction. Consequently, the Criminal History Worksheet is an essential component of the PSI report. The PSI report will contain a computation of the presumptive sentence provided by the guidelines for the crime of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender.

The Criminal History Worksheet should indicate the officer's source of information for each prior conviction listed, and copies of any verifying documents available to the officer should be attached, including criminal history worksheets prepared in prior cases in which sentencing occurred after July 1, 1993, and in which the worksheet was prepared in accordance with the requirements of the KSGA.

A PSI report that has been prepared in accordance with the requirements of the KSGA after its effective date of July 1, 1993, can be the subject of judicial notice by a sentencing court in any subsequent felony proceeding. See K.S.A. 2015 Supp. 21-6814(f).

Each PSI prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1993, shall be limited to the following information:

- A summary of the factual circumstances of the crime or crimes of conviction.
- If the defendant desires to provide one, a summary of the defendant's version of the crime.
- When there is an identifiable victim, a victim report. To the extent possible, the report shall include a complete listing of restitution for damages suffered by the victim.
- An appropriate classification of each crime of conviction on the crime severity scale.
- A listing of prior adult convictions or juvenile adjudications for felony or misdemeanor crimes or violations of county resolutions or city ordinances comparable to any misdemeanor defined by state law. Such listing shall include an assessment of the appropriate classification of the criminal history on the criminal history scale, the source of information regarding each listed prior conviction and

copies of any available source of journal entries or other documents through which the listed convictions may be verified, including any prior criminal history worksheets.

- Proposed grid block classification for each crime, or crimes of conviction and the presumptive sentence for each crime, or crimes of conviction.
- If the proposed grid block classification is a grid block that presumes imprisonment, the presumptive prison term range and the presumptive duration of postrelease supervision as it relates to the crime severity.
- If the proposed grid block classification does not presume prison, the presumptive prison term range and the presumptive duration of the nonprison sanction as it relates to the crime severity scale and the court services officer's professional assessment as to recommendations for conditions to be included as part of the nonprison sanction.
- For defendants who are being sentenced for a conviction of a felony violation of K.S.A. 2015 Supp. 21-5706, and meet the requirements of K.S.A. 2015 Supp. 21-6824 (2003 Senate Bill 123), the drug abuse assessment package as provided in K.S.A. 2015 Supp. 21-6824.

The PSI will become part of the court record and is accessible to the public, except that the official version, defendant's version, victim's statement, any psychological reports, drug and alcohol reports and assessments shall be accessible only to the parties, the sentencing judge, the department of corrections, and if requested, the Kansas Sentencing Commission. If the offender is committed to the custody of the secretary of corrections, the report shall be sent to the secretary and the warden of the state correctional institution to which the defendant is conveyed in accordance with K.S.A. 2015 Supp. 75-5220. K.S.A. 2015 Supp. 21-6813(c).

If the offense requires the offender to register under the Kansas Offender Registration Act (K.S.A. 2015 Supp. 22-4901 *et seq.*), the PSI Offender Registration Supplement should be completed.

The criminal history worksheet will not substitute as a presentence investigation report. K.S.A. 2015 Supp. 21-6813(d).

The PSI will not include optional report components, which would be subject to the discretion of the sentencing court in each district except for psychological reports and drug and alcohol reports. K.S.A. 2015 Supp. 21-6813(e).



## CHAPTER V: SENTENCING

### SENTENCING RANGE

Each grid block states the presumptive sentencing range, in months, for an offender whose crime of conviction and criminal history place such offender in that grid block. The middle number in the grid block is the “standard” number of months, the upper number in the grid block is the “aggravated” number of months, and the lower number in the grid block is the “mitigated” number of months.

The sentencing court may impose any sentence within the presumptive sentencing range. The sentencing court should select the midpoint or standard term of months in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure.

A sentence to any term, including an aggravated term, within the range in a Kansas sentencing guideline presumptive grid box is constitutional. Because a sentence that falls within a grid box is a presumptive sentence, appellate courts lack jurisdiction to consider a challenge to such sentence under K.S.A. 2015 Supp. 21-6820(c). Appellate courts lack jurisdiction even if the sentence is to the longest term in the presumptive grid box for a defendant’s convictions. *State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).

While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may impose a durational or dispositional departure when substantial and compelling circumstances exist. See K.S.A. 2015 Supp. 21-6804 and K.S.A. 2015 Supp. 21-6815.

### **PRESUMPTIVE IMPRISONMENT**

If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. In presumptive imprisonment cases, the sentencing court must pronounce the prison sentence, the maximum potential good time reduction to such sentence and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision will not negate the period of postrelease supervision. K.S.A. 2015 Supp. 21-6804(e)(2) and 21-6805(c)(2).

### **PRESUMPTIVE NONPRISON**

If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonprison. In a presumptive nonprison case, the sentencing court shall pronounce the duration of the nonprison sanction AND the underlying prison sentence. See K.S.A. 2015 Supp. 21-6804(e)(3), 21-6805(c)(3) and K.S.A. 2015 Supp. 21-6806(b).

### **BORDER BOXES**

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 4-E, 4-F, 4-G, 4-H or 4-I and 5-C, or 5-D of the drug grid, the sentence is presumed imprisonment, but the court may impose an optional nonprison sentence upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or
- The nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6804(f) and 21-6805(d).

## **SENTENCING OPTIONS**

### **AUTHORIZED DISPOSITIONS**

Whenever a person has been convicted of a crime, the sentencing court has several sentencing options available that may be imposed either alone or in combination. K.S.A. 2015 Supp. 21-6604.

The court may:

- Commit the defendant to the custody of the Secretary of Corrections if the current crime is a felony and the sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment;
- Commit the defendant to jail for the term provided by law if confinement is for a misdemeanor or a nongrid felony;
- Release the defendant on probation, under the supervision of a court services officer, if the defendant's crime and criminal history place such defendant in a presumptive nonprison category or, through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include the imposition of a jail term of not more than 60 days;
- Impose fines applicable to the offense that may be paid in installments if authorized by the court. The court may order performance of community service in lieu of payment of any fine imposed. The credit on the fine imposed will be applied at a rate of \$5 for each full hour of community service performed;
- Assign the defendant to a community correctional services program pursuant to K.S.A. 2015 Supp. 75-5291, or through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include full or partial restitution;
- \*Assign to a conservation camp for a period not to exceed 6 months as a condition of the probation followed by a 6 month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program;  
\* This program is currently unavailable as a sentencing option.
- Assign the defendant to house arrest pursuant to K.S.A. 2015 Supp. 21-6609;
- Order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by K.S.A. 2015 Supp. 21-6602(c);
- Order the defendant to repay the amount of any reward paid to aid in defendant's apprehension, any costs and expenses incurred by law enforcement to recapture defendant due to defendant's crime of escape, expenses incurred by firefighting agencies due to defendant's crime of arson, any public funds used by law enforcement to purchase controlled substances from the defendant during the investigation, any medical costs and expenses incurred by law enforcement;
- Order the defendant to pay the administrative fee authorized by K.S.A. 2015 Supp. 22-4529 unless waived by the court;
- Order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20-369;

- Order the defendant to a work release program, outside the control of the Department of Corrections, if the defendant is convicted of a felony, under K.S.A. 2015 Supp. 21-6804(i), or a misdemeanor. If work release is imposed for a second or third and subsequent DUI, the offender shall be required to serve a total of 120 or 240 hours of confinement, respectively. Such hours shall be a mandatory 48 consecutive hours confinement followed by confinement hours at the end of and continuing to the beginning of the offender's work day;
- Order the defendant to pay the full amount of unpaid costs associated with the conditions of release of the appearance bond under K.S.A. 2015 Supp. 22-2802;
- Order the defendant to pay restitution, including but not limited to, damages or loss caused by the defendant's crime unless the court finds a restitution plan unworkable due to compelling circumstances and states such on the record;
- Order the defendant to submit to and complete an alcohol and drug evaluation and pay a fee for such evaluation when required by K.S.A. 2015 Supp. 21-6602(d);
- Order the defendant to reimburse the county general fund for expenditures by the county to provide counsel and other defense services to the defendant, after any order for restitution has been paid in full;
- Order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigent's defense services to provide counsel and other defense services to the defendant;
- Decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty pursuant to any other Kansas statute; and
- For Jessica's Law cases, in addition to any other penalty or disposition imposed by law, for any defendant sentenced to imprisonment pursuant to K.S.A. 21-4643, prior to its repeal, or K.S.A. 2015 Supp. 21-6627, and amendments thereto, for crimes committed on or after July 1, 2006, the court shall order that the defendant be electronically monitored upon release from imprisonment for the duration of the defendant's natural life and that the defendant shall reimburse the state for all or part of the cost of such monitoring as determined by the prisoner review board.

## **U.S. ARMED FORCES SERVICE TREATMENT**

K.S.A. 2015 Supp. 21-6630 allows a defendant to assert that their offense was committed as a result of an injury from service in a combat zone while in the armed forces of the United States. If the court determines the defendant has met the criteria established by the statute and the defendant's current crime and criminal history fall within a presumptive non-prison category under the sentencing guidelines, the court may order the defendant to undergo inpatient or outpatient treatment or a program operated by the United States department of defense, the United States department of veterans affairs or the Kansas national guard, if the defendant is eligible for and consents to such treatment. More information, including forms for the certification of status, can be found on the KSC website at <http://www.sentencing.ks.gov/hb-2170/veterans-treatment>.

## **FINES**

Felony, misdemeanor and infraction fines are as follows in K.S.A. 2015 Supp. 21-6611:

Off-grid and drug severity level 1 or drug severity level 1 or 2 if committed on or after July 1, 2012	≤ \$500,000
Nondrug severity level 1 through 5 and drug severity level 3 and 4 or drug severity level 3 or 4 if committed on or after July 1, 2012	≤ \$300,000
Nondrug severity level 6 through 10 and drug severity level 4 or drug severity level 5 if committed on or after July 1, 2012	≤ \$100,000
Class A misdemeanor	≤ \$2,500
Class B misdemeanor	≤ \$1,000
Class C misdemeanor	≤ \$500
Traffic infraction	≤ \$500
Cigarette or Tobacco infraction	\$25

As an alternative to any of the above fines, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender. K.S.A. 2015 Supp. 21-6611(c). In addition, certain offenses have particular fines that are specified by statute.

### **DUI**

The range of mandatory DUI fines is as follows:

- 1<sup>st</sup> DUI: not less than \$750 nor more than \$1,000
- 2<sup>nd</sup> DUI: not less than \$1,250 nor more than \$1,750
- 3<sup>rd</sup> DUI: not less than \$1,750 nor more than \$2,500
- 4<sup>th</sup> or subsequent DUI: \$2,500

### **Test Refusal**

The range of Test Refusal Fines is as follows:

- 1<sup>st</sup> Offense: not less than \$1,250 nor more than \$1,750
- 2<sup>nd</sup> Offense: not less than \$1,750 nor more than \$2,500
- 3<sup>rd</sup> or Subsequent Offense: \$2,500

For DUI and Test Refusal cases, \$250 from each fine imposed for violations of K.S.A. 2015 Supp. 8-2,144, 8-1025 and 8-1567 shall be remitted to the state treasurer for deposit into the Community Corrections Supervision Fund. K.S.A. 2015 Supp. 8-2,144(p), 8-1025(n) and 8-1567(p)(2).

### **Human Trafficking Crimes**

Offenders who are convicted of Promoting the Sale of Sexual Relations or Commercial Sexual Exploitation of a Child shall pay a fine of not less than \$2500 nor more than \$5000, and upon a second or subsequent offense, shall be fined not less than \$5000. Offenders who are convicted of Buying Sexual Relations shall pay a fine of \$2500 for a first offense, and not less than \$5000 upon a second or subsequent offense. All such fines will be remitted state treasurer for deposit into the Human Trafficking Victim Assistance Fund. K.S.A. 2015 Supp. 21-6420, 21-6421 and 21-6422.

## **FEES**

### **DNA Database Fee**

K.S.A. 75-724. (a) Any person convicted or adjudicated of an offense that, pursuant to K.S.A. 21-2511, and amendments thereto, requires submission of a DNA sample shall pay a separate court cost of \$200 as a Kansas bureau of investigation DNA database fee upon conviction or adjudication.

**Domestic Violence Program Fee**

If a judicial district creates a local fund, the court may impose a fee against any defendant for crimes involving a family or household member as provided in K.S.A. 2015 Supp. 21-5414 and against any defendant found to have committed a domestic violence offense pursuant to K.S.A. 2015 Supp. 22-4616. The chief judge of each judicial district where such fee is imposed shall set the amount of such fee by rules adopted in such judicial district in an amount not to exceed \$100 per case. K.S.A. 20-369.

**Drug/Alcohol Evaluation Fee**

Offenders who are convicted of a first or second violation of K.S.A. 8-2,144 (commercial DUI), a first violation of 8-1025 (test refusal) or a first or second violation of 8-1567 (DUI) are required to undergo a drug evaluation and pay a fee of \$150. K.S.A. 8-1008.

Juveniles or adults convicted or adjudicated of having committed, while under 21 years of age, a misdemeanor under K.S.A. 8-1599, 41-719 or 41-727 or K.S.A. 2015 Supp. 21-5701 through 21-5717, shall be ordered to submit to an alcohol and drug evaluation and pay a fee of \$150. If the court finds that the person is indigent, the fee may be waived. K.S.A. 2015 Supp. 21-6602(d).

If the person is 18 or older but less than 21 and is convicted of a violation of K.S.A. 41-727 involving cereal malt beverage, the evaluation and fee are permissive and not mandatory. K.S.A. 2015 Supp. 21-6602(e).

**KBI Lab Fee**

The court shall order any person convicted or diverted of a misdemeanor or felony contained in chapters 21, 41 or 65 of the Kansas Statutes Annotated, or a violation of K.S.A. 8-2,144 (Commercial DUI) or 8-1567 (DUI), or a violation of a municipal ordinance or county resolution prohibiting the acts prohibited by such statutes, unless the municipality or county has an agreement with the laboratory providing services that sets a restitution amount to be paid by the person that is directly related to the cost of laboratory services, to pay a separate court cost of \$400 for every individual offense if forensic science or laboratory services, forensic computer examination services or forensic audio and video examination services are provided in connection with the investigation by the Kansas bureau of investigation; the Sedgwick county regional forensic science center; the Johnson county sheriff's laboratory; the heart of America regional computer forensics laboratory; the Wichita-Sedgwick county computer forensics crimes unit or the Garden City police department computer, audio and video forensics laboratory. Such fees shall be in addition to and not in substitution for any and all fines and penalties otherwise provided for by law for such offense. K.S.A. 28-176.

**Correctional Supervision Fee**

The court shall order, as a condition of probation, suspension of sentence or assignment to a community corrections program, the offender to pay a correctional supervision fee of \$60 if the person was convicted of a misdemeanor, or a fee of \$120 if the person was convicted of a felony. In any case the amount of the correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount. K.S.A. 21-6607(c)(3).

**BIDS Attorney Fees**

Pursuant K.S.A. 2015 Supp. 21-6604(i) and K.S.A. 22-4513, the court shall order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who

has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment. The amount of attorney fees to be included in the court order for reimbursement shall be the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less.

Include the BIDS Attorney Fee ordered and check the box if the fee was waived. See *State v. Phillips*, 289 Kan. 28, 210 P.3d 93 (2009).

**Booking/Fingerprint Fee**

Any person convicted or diverted, or adjudicated or diverted under a preadjudication program, pursuant to K.S.A. 22-2906 *et seq.*, K.S.A. 2015 Supp. 38-2346 *et seq.*, or 12-4414 *et seq.*, of a misdemeanor or felony where fingerprints are required pursuant to K.S.A. 21-2501, shall pay a separate court cost, not exceed \$45, if the board of county commissioners or by the governing body of a city, where a city operates a detention facility, votes to adopt such a fee as a booking or processing fee for each complaint.

Such fee shall be in addition to and not in substitution for any and all fines and penalties otherwise provided for by law for such offense. K.S.A. 12-16,119.

**Children’s Advocacy Center Fund Fee**

On and after July 1, 2013, any defendant convicted of a crime under chapter 21 of the Kansas Statutes Annotated in which a minor is a victim, shall pay an assessment fee in the amount of \$400 to the clerk of the district court. All moneys received pursuant to this section shall be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the children's advocacy center fund. K.S.A. 20-370.

**SB 123 Assessment and Program Fees**

Each offender who receives an SB 123 assessment should be ordered to pay the \$175 SB 123 assessment fee, regardless of whether they undergo SB 123 treatment. If SB 123 treatment is ordered, the SB 123 Assessment Fee and the \$125 SB 123 Reimbursement should be ordered together for a total of \$300. Changes in treatment cost necessitated a change in the form to reflect the accurate average reimbursement cost of an assessment. Reimbursement fees increased \$25 to maintain a requested total fee of \$300. See K.S.A. 75-52,144.

**PROBATION**

**Duration of Probation for Felonies**

For all crimes committed on or after July 1, 1993, the duration of probation in felony cases sentenced for the following severity levels is as follows (K.S.A. 2015 Supp. 21-6608(c)):

Severity Level	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	36	24	24	≤ 18	≤ 12	≤ 12

Drug (prior to July 1, 2012)	36	36	≤ 18	* ≤ 12						
Drug	36	36	36	≤ 18	* ≤ 12					

\* Except for SB 123 sentences, where the standard probation term is up to 18 months. K.S.A. 2015 Supp. 21-6608(c)(4).

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7, on the drug grid for severity levels 1 and 2 prior to July 1, 2012 and on the drug grid for severity levels 1 through 3 committed on or after July 1, 2012.

With three exceptions, the total period in all cases shall not exceed 60 months or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2015 Supp. 21-6608(c).

- The first exception is that the sentencing court may modify or extend the period of supervision, pursuant to a modification hearing and a judicial finding of necessity, up to a maximum of 5 years or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2015 Supp. 21-6608(c)(8).
- Second, if the defendant is convicted of nonsupport of a child, the period may be extended as long as the responsibility for support continues. K.S.A. 2015 Supp. 21-6608(c)(7).
- Third, if the defendant is ordered to pay full or partial restitution, the period may be extended as long as the amount of restitution ordered has not been paid. K.S.A. 2015 Supp. 21-6608(c)(7). Other unpaid assessments, such as costs, BIDS fee reimbursements, and lab fees are not restitution, and thus the fact that such may remain unpaid does not justify a probation extension under the statute. *State v. Hoffman*, 45 Kan. App. 2d 272, 246 P.3d 992 (2011).

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid, severity levels 3 and 4 on the drug grid prior to July 1, 2012 and severity levels 4 and 5 on the drug grid committed on or after July 1, 2012. For crimes at these severity levels, the sentencing court may impose a longer period of probation if the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4) of K.S.A. 2015 Supp. 21-6608. K.S.A. 2015 Supp. 21-6608(c)(5).

**Duration of Probation for Misdemeanors**

The period of suspension of sentence, probation or assignment to community corrections fixed by the court shall not exceed two years in misdemeanor cases, subject to renewal and extension for additional fixed periods of two years. K.S.A. 2015 Supp. 21-6608(a).

**Multiple Probation Sentences**

In cases of multiple nonprison sentences, the nonprison (probation) terms shall not be aggregated or served consecutively. If the underlying prison sentences for a nonprison sentence are ordered to run consecutively and the nonprison term is revoked, the offender will serve the prison terms consecutively. K.S.A. 2015 Supp. 21-6819(b)(8).

**Termination and Presumptive Discharge**

A nonprison sentence may be terminated by the court at any time. K.S.A. 2015 Supp. 21-6608(a). In addition, a probationer who has compliant with all terms of probation for a period of 12 months, has paid all restitution and has a risk assessment level of low risk is eligible for presumptive discharge from probation. The court shall grant such discharge unless the court finds clear and

convincing evidence that denial of discharge will serve community safety interests. K.S.A. 2015 Supp. 21-6608(d).

### **Conditions of Probation**

Court services and community corrections officers may recommend conditions of probation for offenders who receive a nonprison sentence. A felony offender may be sentenced to up to 60 days in county jail as a condition of probation. K.S.A. 2015 Supp. 21-6604(a)(3).

In addition to any other conditions, the court shall order the defendant to comply with each of the following conditions:

- obey all laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject;
- make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefore;
- pay a correctional supervision fee of \$60 if the person was convicted of a misdemeanor or a fee of \$120 if the person was convicted of a felony. In any case the amount of the correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount;
- reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant;
- be subject to searches of the defendant's person, effects, vehicle, residence and property by a court services officer, a community correctional services officer and any other law enforcement officer based on reasonable suspicion of the defendant violating conditions of probation or criminal activity; and
- be subject to random, but reasonable, tests for drug and alcohol consumption as ordered by a court services officer or community correctional services officer.

The court may impose any conditions that the court deems proper, including, but not limited to, requiring that the defendant:

- avoid such injurious or vicious habits, as directed by the court, court services officer or community correctional services officer;
- avoid such persons or places of disreputable or harmful character, as directed by the court, court services officer or community correctional services officer;
- report to the court services officer or community correctional services officer as directed;
- permit the court services officer or community correctional services officer to visit the defendant at home or elsewhere;
- work faithfully at suitable employment insofar as possible;
- remain within the state unless the court grants permission to leave;
- pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court;
- support the defendant's dependents;
- reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs;



- perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;
- perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days, determined by the court on the basis of ability to pay, standard of living, support obligations and other factors;
- participate in a house arrest program pursuant to K.S.A. 2015 Supp. 21-6609, and amendments thereto;
- order the defendant to pay the administrative fee authorized by K.S.A. 22-4529, and amendments thereto, unless waived by the court; or
- in felony cases, except for violations of K.S.A. 8-1567, and amendments thereto, be confined in a county jail not to exceed 60 days, which need not be served consecutively.

### **COMMUNITY CORRECTIONS TARGET POPULATION (2000 SENATE BILL 323)**

K.S.A. 2015 Supp. 75-5291(a)(2) defines the target population of offenders for placement in a community correctional services program. This target population consists of adult offenders convicted of felony offenses who meet one of the following criteria:

- Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;
- Who, on or after July 1, 2014, are determined to be moderate risk, high risk or very high risk by use of a statewide, mandatory, standardized risk assessment tool or instrument which shall be specified by the Kansas Sentencing Commission. The LSI-R has been approved by the KSC as the official risk assessment tool;
- Offenders whose severity level and criminal history classification designate a presumptive prison sentence on either grid but receive a nonprison sentence as the result of a dispositional departure;
- Offenders convicted of a sex offense as defined in K.S.A. 22-4902, classified as a severity level 7 or higher, and who receive a nonprison sentence, regardless of the manner in which the sentence is imposed;
- Offenders who are placed in a community correctional services programs as a condition of supervision following the successful completion of a conservation camp program;
- Offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 2015 Supp. 21-6824, SB 123 Drug Treatment.
- Offenders who have been placed in a community correctional services program for supervision by the court for DUI pursuant to K.S.A. 2015 Supp. 8-1567;
- Juvenile offenders may be placed in community corrections programs if the local community corrections advisory board approves. However, grants from the community corrections fund administered by the Secretary of Corrections cannot be used for this service. K.S.A. 2015 Supp. 75-5291(a)(4).
- A public safety provision also allows direct revocation to prison from supervision by court services for offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established, as provided in K.S.A. 2015 Supp. 22-3716, if the sentencing court sets forth with particularity why placement in community corrections would jeopardize public safety or would not be in the best interest of the offender. K.S.A. 2015 Supp. 75-5291(a)(5).

## **\*CORRECTIONAL CONSERVATION CAMP**

The court shall consider placement of a defendant in the Labette Correctional Conservation Camp, conservation camps established by the secretary of corrections pursuant to K.S.A. 75-52,127, and amendment thereto, or a community intermediate sanction center under the following circumstances:

- prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid;
- prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or, in grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 4-E, 4-F, 4-G, 4-H or 4-I of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012;
- prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 5-C, 5-D, 5-E or 5-F of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012, and whose offense does not meet the requirements of K.S.A. 2015 Supp. 21-6824, and amendments thereto;
- prior to revocation of a nonprison sanction of a defendant whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 5-C, 5-D, 5-E or 5-F of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012, and whose offense does not meet the requirements of K.S.A. 2015 Supp. 21-6824, and amendments thereto; or
- prior to revocation of a nonprison sanction of a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or, in grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 4-E, 4-F, 4-G, 4-H or 4-I of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012.

The defendant shall not be sentenced to imprisonment if space is available in a conservation camp or a community intermediate sanction center and the defendant meets all of the conservation camp's or a community intermediate sanction center's placement criteria unless the court states on the record the reasons for not placing the defendant in a conservation camp or a community intermediate sanction center. K.S.A. 2015 Supp. 21-6604(g).

*\*In practice, all the nonprison alternatives provided in K.S.A. 2015 Supp. 21-6604(g) are no longer viable placement alternatives. The Kansas Court of Appeals, in State v. Johnson, 42 Kan. App. 2d 356, 211 P.3d 861 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 21-6604(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections.*

## **GOOD TIME**

The prison sentence represents the time an offender actually serves, subject to a maximum reduction of:

- 20% good time for crimes committed on or after July 1, 1993 and prior to April 20, 1995;
- 15% good time for crimes committed on or after April 20, 1995;

- 20% good time for crimes of nondrug severity level 7-10 committed on or after January 1, 2008, crimes of drug severity level 3 or 4 committed on or after July 1, 2008, but prior to July 1, 2012, or crimes of drug severity level 3 through 5 committed on or after July 1, 2012. K.S.A. 2015 Supp. 21-6806(a) and K.S.A. 2015 Supp. 21-6821(b).

Good time credit is specific to the crime of conviction. Offenders convicted of multiple counts will earn good time at the applicable rate for the sentence they are serving.

Good time credit shall not be applied to Jessica's Law sentences. See K.S.A. 2015 Supp. 21-6623.

### **AGGRAVATED HABITUAL SEX OFFENDERS**

Aggravated habitual sex offenders are offenders convicted of a sexually violent crime who have previously been convicted of two or more sexually violent crimes. K.S.A. 2015 Supp. 21-6626. Such offenders will be sentenced to imprisonment for life without the possibility of parole.

### **EXTENDED JURISDICTION JUVENILE CASES**

See Special Rule #11. Under K.S.A. 2015 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2015 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. **An adult felony Journal Entry of Judgment form must be completed for these cases.** A box is located in the "Special Rule Applicable" section of the adult Journal Entry of Judgment form labeled "Extended Jurisdiction Juvenile Imposed," to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases. Full description of the extended jurisdiction prosecution may be found at K.S.A. 2015 Supp. 38-2347.

## **SPECIAL SENTENCING RULES**

### **PUBLIC SAFETY OFFENSES / FIREARMS FINDING**

#### **1. Person Felony Committed With a Firearm**

When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6804(h).

#### **2. Aggravated Battery Against a Law Enforcement Officer**

The sentence for the violation of K.S.A. 21-3415, prior to its repeal (aggravated battery against a law enforcement officer), if committed prior to July 1, 2006, which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6804(g).

### **3. Aggravated Assault Against a Law Enforcement Officer**

The sentence for the violation of K.S.A. 2015 Supp. 21-5412(d) (aggravated assault of a law enforcement officer), which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6804(g).

### **34. Battery on a Law Enforcement Officer**

A special sentencing rule exists for a violation of K.S.A. 2015 Supp. 21-5413(c)(2), battery on a law enforcement officer where **bodily harm occurs**. The sentence shall be presumptive imprisonment and shall be served consecutively to any other terms imposed. A law enforcement officer shall include a: uniformed or properly identified university campus police; state, county, or city law enforcement officer, other than a state correctional officer; judge; attorney; community corrections officer; or court services officer. K.S.A. 2015 Supp. 21-6804(r).

### **32. Drug Felony Committed - Firearm Carried or Possessed**

If the trier of fact makes a finding that the offender carried a firearm to commit a drug felony, or possessed a firearm in furtherance of a drug felony, the sentence imposed shall be enhanced by an additional 6 months imprisonment and such additional sentence shall be presumptive imprisonment. K.S.A. 2015 Supp. 21-6805(g)(1)(A).

This special rule **DOES NOT** apply to crimes sentenced on the nondrug grid: K.S.A. 2015 Supp. 21-5705(d)(6)(B), 21-5707, 21-5708, 21-5713, 21-5714, 21-5710(e)(3)(A), (e)(4)(B), and K.S.A. 2015 Supp. 21-5706 and 21-5713 on the drug grid.

### **33. Drug Felony Committed - Firearm Discharged**

If the trier of fact makes a finding that the offender discharged a firearm when committing a drug felony, the sentence imposed shall be enhanced by an additional 18 months imprisonment and such additional sentence shall be presumptive imprisonment. K.S.A. 2015 Supp. 21-6805(g)(1)(B).

This special rule **DOES NOT** apply to crimes sentenced on the nondrug grid: K.S.A. 2015 Supp. 21-5705(d)(6)(B), 21-5707, 21-5708, 21-5713, 21-5714, 21-5710(e)(3)(A), (e)(4)(B), and K.S.A. 2015 Supp. 21-5706 and 21-5713 on the drug grid.

### **4. Crime Committed for the Benefit of a Criminal Street Gang**

If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence and such nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6804(k).

### **11. Extended Jurisdiction Juvenile Imposed**

If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall; (1) impose one or more juvenile sentences under K.S.A. 2014 Supp. 38-2361 and, (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. **An adult felony Journal Entry of Judgment must be completed for these cases.** K.S.A. 2015 Supp. 38-2364.

### **35. Aggravated Endangering a Child**

The sentence for violation of K.S.A. 2015 Supp. 21-5601(b) (aggravated endangering of a child), is a

nondrug severity 9, person felony, and shall be served consecutively to any other term or terms of imprisonment imposed by the court. Such sentence is not a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-5601(c)(2).

### **36. Ballistic Resistant Material**

If the trier of fact makes a finding that an offender wore or used ballistic resistant material during the commission of, attempt to commit, or flight from any felony, the sentence shall be enhanced by an additional 30 months imprisonment. Such additional sentence shall be presumptive prison and shall be served consecutively to any other term or terms of imprisonment imposed. K.S.A. 2015 Supp. 21-6804(t).

### **38. Unlawful Sexual Relations**

The sentence for a violation of K.S.A. 2015 Supp. 21-5512, and amendments thereto, shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2015 Supp. 21-6804(s).

## **HABITUAL OR REPEAT OFFENSES**

### **5. Persistent Sex Offender**

The sentence for any persistent sex offender, as defined in K.S.A. 2015 Supp. 21-6804(j), whose current crime of conviction carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. However, the provisions of this subsection shall not apply to any person whose current crime of conviction is a severity level 1 or 2 nondrug felony, unless such current conviction is for the crime of rape, K.S.A. 2015 Supp. 21-5503, and the offender has at least one prior conviction for rape in this state or a comparable felony from another jurisdiction. K.S.A. 2015 Supp. 21-6804(j).

### **12. Second or Subsequent Conviction for Manufacture of a Controlled Substance**

The sentence for a second or subsequent conviction for the manufacture of a controlled substance under K.S.A. 2015 Supp. 21-5703, IF the prior conviction was for manufacture of methamphetamine, shall be double the presumptive sentence length. However, the sentencing court may reduce the sentence in an amount not to exceed 50 percent of the special sentence length increase if mitigating circumstances exist. Any decision made by the sentencing court regarding the reduction is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6805(e).

- 1) If both the current and prior convictions do not involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule does not apply.
- 2) If the prior conviction involved methamphetamine but the current conviction does not, the crime is a drug severity level 2 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.
- 3) If the prior conviction did not involve methamphetamine but the current conviction does, the crime is a drug severity level 1 felony and the special sentencing rule does not apply.
- 4) If both the current and prior convictions involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.

### **26. Third or Subsequent Conviction for Drug Possession**

The sentence for a third or subsequent felony conviction of K.S.A. 2015 Supp. 21-5706 shall be presumed imprisonment.

Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2015 Supp. 21-6805(f)(1).

**13. Residential Burglary with One Prior Residential, Non-Residence, or Aggravated Burglary Conviction**

The sentence for the violation of burglary of a residence, K.S.A. 21-3715(a), prior to its repeal, K.S.A. 2015 Supp. 21-5807(a)(1), or an attempt or conspiracy to commit such, when the offender has a prior conviction for residential or nonresidential burglary, K.S.A. 21-3715(a) or (b), prior to its repeal; K.S.A. 2015 Supp. 21-5807(a)(1) or (a)(2) (automobile burglary is not included); aggravated burglary, K.S.A. 21-3716, prior to its repeal, K.S.A. 2015 Supp. 21-5807(b); or an attempt or conspiracy to commit such, shall be presumed imprisonment. K.S.A. 2015 Supp. 21-6804(l).

**27. Burglary with Two or More Prior Convictions for Theft, Burglary or Aggravated Burglary**

The sentence for a violation of burglary, K.S.A. 2015 Supp. 21-5807(a), when the offender has any combination of two or more prior convictions of theft, (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2015 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2015 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2015 Supp. 21-6804(p).

**29. Felony Theft with Three or More Prior Convictions for a Felony Theft, Burglary, or Aggravated Burglary**

The sentence for a violation of theft of property, K.S.A. 2015 Supp. 21-5801, when the offender has any combination of three or more prior felony convictions for theft (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2015 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2015 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. K.S.A. 2015 Supp. 21-6804(p).

**30. Substance Abuse Underlying Factor**

The court may make findings that substance abuse is the underlying factor in the commission of crimes under special rules #27 and #29 above and place the offender in an intensive treatment program for at least 4 months if the state substance abuse facility is likely to be more effective than prison in reducing the risk of offender recidivism, serve community safety interests and promote offender reformation; return to court upon successful completion. K.S.A. 2015 Supp. 21-6804(p).

*\*While this option is authorized by statute, it has never been funded and is not, therefore, an available option.*

**31. Third or Subsequent Criminal Deprivation of a Motor Vehicle**

The sentence for a third or subsequent violation of criminal deprivation of property that is a motor vehicle pursuant to K.S.A. 2015 Supp. 21-5803(b) shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2015 Supp. 21-6804(n).

**16. Second Forgery**

The crime of forgery is a severity level 8, nonperson felony on the nondrug grid. The sentence for a felony violation of K.S.A. 2015 Supp. 21-5823(b)(3) shall be as provided by the specific mandatory sentencing requirements of that statute unless the new conviction places the offender in the criminal history category A or B. In such case, the sentence shall be as for a severity level 8, nonperson felony. K.S.A. 2015 Supp. 21-6804(i)(1) and (2).

The specific mandatory sentencing provisions of K.S.A. 2015 Supp. 21-5823 provide that upon a first conviction for forgery, the offender is to be fined the lesser of the amount of the forged instrument or \$500. For a second conviction of forgery the offender is required to serve at least 30 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$1,000. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 30 or 45 day sentences as provided herein. K.S.A. 2015 Supp. 21-5823(b).

*State v. Luttig*, 40 Kan. App. 2d 1095, 199 P.3d 793 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty could not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31, 223 P.3d 774 (2010). However, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 2015 Supp. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction. *State v. Pearce*, 51 Kan. App. 2d 116, 342 P.3d 963 (2015).

#### **17. Third or Subsequent Conviction for Forgery**

Upon a third or subsequent conviction of forgery the offender is required to serve at least 45 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$2,500. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 45 day sentence as provided herein. K.S.A. 2015 Supp. 21-5823(b).

*State v. Luttig*, 40 Kan. App. 2d 1095, 199 P.3d 793 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty may not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31, 223 P.3d 774 (2010). As noted above however, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 2015 Supp. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction. *State v. Pearce*, 51 Kan. App. 2d 116, 342 P.3d 963 (2015).

#### **9. Crime Committed While Incarcerated and Serving a Felony Sentence, or While on Probation, Parole, Conditional Release, or Postrelease Supervision for a Felony**

Under any of these conditions, a new sentence shall be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2015 Supp. 21-6606 AND if the new crime of conviction is a felony, the sentencing court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. K.S.A. 2015 Supp. 21-6604(f)(1), and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001). See also K.S.A. 2015 Supp. 21-6606(e)(2) (serving indeterminate sentence).

#### **40. Felony Committed after Early Discharge where Offender would have been on Probation or Postrelease Supervision for a Felony**

On and after July 1, 2013, an offender who receives presumptive discharge from probation pursuant to K.S.A. 2015 Supp. 21-6608(d) or is granted early discharge from postrelease supervision pursuant to K.S.A. 2015 Supp. 22-3717(d)(2), and commits a felony during the time in which the offender would have been under supervision had it not been for discharge, may be sentenced to prison for the

new felony even if the sentence for such felony is presumptive nonprison. K.S.A. 2015 Supp. 21-6604(f)(2)

**28. Crime Committed While Incarcerated in a Juvenile Correctional Facility for an Offense Which if Committed by an Adult Would be a Felony**

A special rule pertains to juveniles who commit a new felony while incarcerated in a juvenile correctional facility for a crime which if committed by an adult would be a felony. In such instances, the court shall sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. The conviction shall operate as a full and complete discharge from any obligations, except for an order of restitution, imposed on the offender arising from the offense for which the offender was committed to a juvenile correctional facility. K.S.A. 2015 Supp. 21-6604(f)(3).

**10. Crime Committed While the Offender is on Release for a Felony Bond**

When a new felony is committed while the offender is on release pursuant to article 28 of chapter 22 (Conditions of Release) of the Kansas Statutes Annotated, or similar provisions of the laws of another jurisdiction, a new sentence may be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2015 Supp. 21-6606 and the sentencing court may sentence an offender to imprisonment for the new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. K.S.A. 2015 Supp. 21-6604(f)(4). However, K.S.A. 2015 Supp. 21-6606(d) indicates that any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released. Because of this conflict, a court imposing a consecutive sentence should clarify that consecutive sentencing was done in the exercise of discretion, not because it was mandated.

**37. Second or Subsequent Identity Theft or Identity Fraud**

The sentence for a violation of identity theft or identity fraud as defined in K.S.A. 2015 Supp. 21-6107, or any attempt or conspiracy to commit such offense, shall be presumptive prison when the offender has a prior conviction for a violation of identity theft under K.S.A. 21-4018, prior to its repeal, or identity theft or identity fraud under this statute, or any attempt or conspiracy to commit such offense. Such sentence is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6804(u).

**41. Leaving the Scene of an Accident**

If the current crime of conviction is leaving the scene of an accident when the accident involves great bodily harm or the death of any person, K.S.A. 8-1602(b)(3) through (5), the following prior convictions for offenses committed on or after July 1, 2011, shall count as a person felony for criminal history purposes:

- 8-235, driving a vehicle without a license;
- 8-262, driving while license is canceled, suspended, or revoked;
- 8-287, driving while one's privileges are revoked for being a habitual violator;
- 8-291, violating restrictions on driver's license or permit;
- 8-1566, reckless driving;
- 8-1567, driving under the influence of alcohol or drugs;
- 8-1568, fleeing or attempting to elude a police officer;
- 8-1602, leaving the scene of an accident resulting in injury, great bodily harm, or death;



- 8-1605, failing to contact the owner of vehicle following an accident causing damage to unattended property;
- 40-3104, failing to obtain motor vehicle liability insurance coverage;
- Subsection (a)(3) of K.S.A. 2015 Supp. 21-5405, involuntary manslaughter committed while DUI;
- K.S.A. 2015 Supp. 21-5406, vehicular homicide; or
- A violation of a city ordinance or law of another state which would also constitute a violation of such sections. K.S.A. 2015 Supp. 21-6811(i).

#### **42. Involuntary Manslaughter by DUI**

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 2015 Supp. 21-5405(a)(3), each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for any violation of K.S.A. 2015 Supp. 8-1567 (DUI) or K.S.A. 2015 Supp. 8-2,164 (Commercial DUI) or K.S.A. 2015 Supp. 8-1025 (Test Refusal), or a violation of a law of another state or an ordinance of any city, or resolution of any county which prohibits these acts shall count as one person felony for criminal history purposes. K.S.A. 2015 Supp. 21-5405(a)(3) and K.S.A. 2015 Supp. 21-6811(c)(2).

#### **43. Third or Subsequent Flee and Attempt to Elude**

The sentence for a third or subsequent violation of fleeing or attempting to elude a police officer, K.S.A. 8-1568, shall be presumptive imprisonment and shall be imposed consecutive to any other term of imprisonment imposed. Such sentence is not considered a departure and is not subject to appeal. K.S.A. 2015 Supp. 21-6804(v).

#### **44. Aggravated Battery by DUI**

If current conviction is for K.S.A. 21-5413(b)(3), the first prior conviction, adjudication or diversion of K.S.A. 8-1567 (DUI), K.S.A. 8-2,144 (Commercial DUI), K.S.A. 8-1025 (Test Refusal), or comparable law of a different jurisdiction, shall count as a nonperson felony for criminal history purposes. Each second and subsequent prior adult conviction, diversion or juvenile adjudication of these offenses shall count as a person felony for criminal history purposes.

#### **45. Aggravated Criminal Damage to Property**

K.S.A. 21-5813(b) (Scrap Metal) and amendments thereto, when such person being sentenced has a prior conviction for any nonperson felony shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal.

#### **46. Kansas Offender Registration Act**

K.S.A. 2015 Supp. 21-6804(m) provides that the sentence for a violation of K.S.A. 22-4903 or K.S.A. 2015 Supp. 21-5913(a)(2), and amendments thereto, shall be presumptive imprisonment. If an offense under such sections is classified in grid blocks 5-E, 5-F, 5-G, 5-H or 5-I, the court may impose an optional nonprison sentence as provided in K.S.A. 2015 Supp. 21-6804(q).

### **NONGRID OFFENSES**

#### **6. Felony DUI**

Felony driving under the influence as defined in K.S.A. 2015 Supp. 8-1567 is a nongrid crime with no guidelines severity level or other connection to the KSGA. Instead, the specific sentencing provisions of the DUI statute determine the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2015 Supp. 21-6804(i). However, for a third or subsequent DUI, an offender is required to serve a mandatory post-imprisonment supervision period of one year under the supervision of community correctional services or court

services, as determined by the court. Any violation of the conditions of such supervision may subject the person to revocation and imprisonment in jail for the remainder of the period of imprisonment, supervision period, or any combination or portion thereof. K.S.A. 2015 Supp. 8-1567(b)(3).

### **39. Felony DUI Test Refusal**

Felony DUI Test Refusal as defined in K.S.A. 2015 Supp. 8-1025 is an unclassified felony crime that is scored as a severity level 10 nonperson offense. Despite its classification on the grid, the specific sentencing provisions contained within the DUI Test Refusal statute determine the sentence. As with felony DUI, the offender cannot be sent to a state correctional facility to serve the sentence imposed. However, for a second or subsequent conviction for DUI Test Refusal, an offender is required to serve a mandatory post-imprisonment supervision period of one year under the supervision of community correctional services or court services, as determined by the court. Any violation of the conditions of such supervision may subject the person to revocation and imprisonment in jail for the remainder of the period of imprisonment, supervision period, or any combination or portion thereof. K.S.A. 2015 Supp. 8-1025(b)(3).

### **8. Felony Domestic Battery**

Felony domestic battery, as defined in K.S.A. 2015 Supp. 21-5414(b)(3), is a nongrid person felony with no guidelines severity level or other connection to the KSGA. The specific sentencing provision of the domestic battery statute determines the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2015 Supp. 21-6804(i).

### **21. Animal Cruelty**

Felony animal cruelty, as defined in K.S.A. 2015 Supp. 21-6412(a)(1), (a)(6) or (b)(2)(B), is a nongrid, nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2015 Supp. 21-6412(b)(1) or (b)(2)(B). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2015 Supp. 21-6412 and K.S.A. 2015 Supp. 21-6804(i).

Felony animal cruelty involving a working or assistance dog, as defined in K.S.A. 2015 Supp. 21-6416(a), is a nongrid, nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty of a working or assistance dog shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2015 Supp. 21-6416(b). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2015 Supp. 6804(i).

## **FINANCE OFFENSES**

### **25. Fraudulent Insurance Act**

A fraudulent insurance act shall constitute a severity level 6, nonperson felony if the amount involved is \$25,000 or more; a severity level 7, nonperson felony if the amount involved is at least \$5,000 but less than \$25,000; a severity level 8, nonperson felony if the amount involved is at least \$1,000 but less than \$5,000; and a class C nonperson misdemeanor if the amount is less than \$1,000. Any combination of fraudulent acts occurring within a period of six consecutive months which involves \$25,000 or more shall have a presumptive prison sentence of imprisonment regardless of its location on the sentencing grid block. K.S.A. 2015 Supp. 40-2,118(e).

### **15. Kansas Uniform Securities Act**

Any violation of the Kansas Uniform Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of \$25,000 or more, shall have a presumptive sentence of imprisonment regardless of the offender's presumptive sentence as located on the nondrug grid. K.S.A. 2015 Supp. 17-12a508(a)(5).

### **19. Mortgage Business Act**

Any person who willfully or knowingly violates any of the provisions of this act, any rule, and regulation adopted or order issued under this act commits a severity level 7 nonperson felony. A second or subsequent conviction of this act, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2015 Supp. 9-2203(d).

### **20. Loan Brokers Act**

Any person who willfully violates any provision of this act or knowingly violates any cease and desist order issued under this act commits a severity level 7, nonperson felony. Any violation of this act committed on or after July 1, 1993 and resulting in a loss of \$25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2015 Supp. 50-1013(a).

## **MULTIPLE CONVICTIONS**

When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively at the discretion of the sentencing court. The sentencing judge may consider the need to impose an overall sentence that is proportionate to the harm and culpability and shall state on the record if the sentence is to be served concurrently or consecutively. K.S.A. 2015 Supp. 21-6606 and 21-6819(b). If the sentencing court is silent as to whether multiple sentences are to run consecutively or concurrently, the sentences shall run concurrently except as provided by K.S.A. 2015 Supp. 21-6606(c), (d) and (e).

### **CONCURRENT AND CONSECUTIVE SENTENCES**

Consecutive sentencing is mandatory in certain circumstances if it will not result in a manifest injustice. K.S.A. 2015 Supp. 21-6819(a). Consecutive sentencing is generally required when imposing a sentence for:

- a felony committed while the offender was on probation, assigned to a community corrections services program, on parole, conditional release, postrelease supervision, or serving time for a felony; K.S.A. 2015 Supp. 21-6606(c),
- a felony committed while the offender was on felony bond; K.S.A. 2015 Supp. 21-6606(d), (Special Rule #10);
- a knowing or reckless violation of battery against a law enforcement officer; K.S.A. 2015 Supp. 21-6804(r), (Special Rule #34);
- aggravated endangering a child, K.S.A. 2015 Supp. 21-5601, (Special Rule #35)
- a finding that the offender wore ballistic resistant materials, in which the offender shall serve an additional 30 months' imprisonment consecutive to any other sentence, K.S.A. 2015 Supp. 21-6804(t), (Special Rule #36); and
- a felony committed while the offender was incarcerated and serving a sentence for a felony in any place of incarceration. K.S.A. 2015 Supp. 21-6606(e)(1), (Special Rule #9).

## **DETERMINING THE BASE SENTENCE AND PRIMARY CRIME**

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. 2015 Supp. 21-6819(b)(2) as follows:

- The primary crime is generally the crime with the highest severity ranking. However, an off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences. The primary on-grid offense shall be sentenced with full criminal history and forms the base sentence for the guidelines sentence. The off-grid sentence remains primary overall, but is added to the guidelines sentence or concurrent to the guidelines sentence, as determined by the court.
- In situations where more than one crime is classified in the same category, the sentencing judge must designate which crime will serve as the primary crime.
  - A presumptive imprisonment crime is primary over a presumptive nonimprisonment crime.
  - When the offender is convicted of crimes sentenced on nondrug and drug grids, the primary crime is the one that carries the longest prison term. Therefore, in sentencing with the drug grid and nondrug, both crimes having the same presumption of probation or imprisonment, the primary crime shall be the crime with the longest sentence term.

For the “base” sentence, the offender’s full criminal history is to be applied to determine the presumptive range for that crime. However, non-base sentences will not have criminal history scores applied and shall be calculated in the criminal history I (far right) column of the grid according to the severity level of the crime. K.S.A. 2015 Supp. 21-6819(b)(3) and (b)(5).

## **WHEN PRIMARY CRIME IS PRISON**

If the sentence for the primary crime is prison, the entire imprisonment term of the consecutive sentences will be served in prison, even if the additional crimes are presumptive nonprison. K.S.A. 2015 Supp. 21-6819(b)(6).

## **“DOUBLE” RULE**

When consecutive sentences are imposed, the total prison sentence imposed cannot exceed twice the base sentence. This is referred to as the “double rule.” K.S.A. 2015 Supp. 21-6819(b)(4). This means that the sentencing court is not required to shorten the length of any of the individual non-base sentences given to an offender, as long as the court orders that the total sentence given to the offender is adjusted so that it does not exceed twice the base sentence. The term “base sentence” applies to the base sentence actually imposed, not to the maximum base sentence that could have been imposed according to the sentencing grid. *State v. Snow*, 282 Kan. 323, 341-42, 144 Kan. 729 (2006). The sentencing judge shall have the discretion to impose a consecutive term of imprisonment for a crime other than the primary crime of any term of months not to exceed the nonbase sentence. K.S.A. 2015 Supp. 21-6819(b)(1). This allows the court the discretion to impose less than the full sentence for each additional offense ordered to run consecutively to the primary offense.

## **ON-GRID AND OFF-GRID CONVICTIONS**

If sentences for off-grid and on-grid (sentencing guidelines) convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease period will be based on the off-grid crime. K.S.A. 2015 Supp. 21-6819(b)(2).

#### **NONPRISON SENTENCES RUN CONCURRENT**

In cases of multiple nonprison sentences, the nonprison (probation) terms shall not be aggregated or served consecutively. If the underlying prison sentences for a nonprison sentence are ordered to run consecutively and the nonprison term is revoked, the offender will serve the prison terms consecutively. K.S.A. 2015 Supp. 21-6819(b)(8).

#### **CRIMES COMMITTED PRIOR TO JULY 1, 1993**

If an offender is sentenced to prison for a crime committed on or after July 1, 1993, while the offender was imprisoned for an offense committed prior to July 1, 1993, and the offender is not eligible for the retroactive application of the KSGA, the new sentence begins when the offender is paroled or reaches the conditional release date on the old sentence, whichever is earlier.

If the offender was past the offender's conditional release date at the time the new offense was committed, the new sentence begins when the offender is ordered released by the Prisoner Review Board or reaches the maximum sentence date on the old sentence, whichever is earlier.

The new sentence is then served as otherwise provided by law. The period of postrelease supervision will be based on the new sentence. K.S.A. 2015 Supp. 21-6606(e)(2).

#### **POSTRELEASE SUPERVISION**

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term, including off-grid crimes, will determine the period of postrelease supervision. K.S.A. 2015 Supp. 22-3717(d)(1)(F). Postrelease supervision periods will not be aggregated.

#### **CONSOLIDATION**

Orders of consolidation should be completed in both cases. PSIs should be prepared for both cases wherein the primary offense is indicated by case and count number, as well as subsequent counts. A separate Journal Entry of Judgment form (JE) must be used for each separate case number that is consolidated with the primary case. All cases should have their own JE, including misdemeanor cases, with felony PSIs and criminal history included with felony offenses. All counts other than the primary offense in the primary case will use criminal history I.

### **DEPARTURES AND DEPARTURE FACTORS**

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Any party filing a motion to depart must state in its motion the type of departure sought and the reasons relied upon. Both the prosecution and defense shall have a reasonable time to prepare for a departure hearing, and the sentencing court shall transmit to both parties, copies of the presentence investigation report prior to the hearing. The State must provide notice of a departure hearing to any victim or the victim's family, and the sentencing court shall review the victim impact statement. Parties may brief the

sentencing court in writing and make oral arguments to the court at the hearing. K.S.A. 2015 Supp. 21-6817(a)(1) and (a)(3).

At the conclusion of the departure hearing or within 21 days thereafter, the sentencing court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties, and shall enter an appropriate order. K.S.A. 2015 Supp. 21-6817(a)(2). Whenever the sentencing court departs from the presumptive guidelines sentence, the court must make findings of fact as to the reasons for departure regardless of whether a hearing is requested. K.S.A. 2015 Supp. 21-6817(a)(4). If a factual aspect of the current crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, that factual aspect may be used as an aggravating or mitigating factor to justify a departure from the presumptive sentence only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime. K.S.A. 2015 Supp. 21-6815(c)(3).

In determining aggravating or mitigating circumstances, the sentencing court shall consider:

- any evidence received during the proceeding, including the victim impact statement;
- the presentence investigation report;
- written briefs and oral arguments of either the State or counsel for the defendant; and
- any other evidence relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable. K.S.A. 2015 Supp. 21-6815(d)(1) through (d)(4).

## **MITIGATING FACTORS**

The following nonexclusive list of statutorily enumerated factors may be considered in determining whether substantial and compelling reasons for a downward dispositional departure exist:

- The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction;
- The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense;
- The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor;
- The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse; or
- The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.
- The offender committed such crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder or traumatic brain injury, connected to service in a combat zone in the armed forces of the United States of America. K.S.A. 2015 Supp. 21-6815(c)(1)(A) through (F).

K.S.A. 2015 Supp. 21-6815(e) provides additional mitigating factors to be considered. It provides that, upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist. In considering this mitigating factor, the court may consider the following:

- the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the prosecutor's evaluation of the assistance rendered;
- the truthfulness, completeness and reliability of any information or testimony provided by the defendant;
- the nature and extend of the defendant's assistance;
- any injury suffered, or any danger or risk of injury to the defendant or the defendant's family resulting from such assistance; and
- the timeliness of the defendant's assistance. K.S.A. 2015 Supp. 21-6815(e).

For Jessica's Law departures, the sentencing judge may rely on the same mitigating factors to find substantial and compelling reasons for a departure from the mandatory minimum of Jessica's Law, and to support an additional departure from the default prison sentence pursuant to the sentencing guidelines act. *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

#### **AGGRAVATING FACTORS**

The following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

- The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity that was known or should have been known to the offender;
- The defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense;
- The offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim, whether or not the defendant's belief or perception was correct;
- The offense involved a fiduciary relationship which existed between the defendant and the victim;
- The defendant, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation to commit any person felony regardless of whether the defendant knew the age of the individual was under 16 years of age;
- The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender as defined by this section;
- The defendant was incarcerated at the time the crime was committed; or
- The crime involved two or more participants in the criminal conduct, and the defendant played a major role in the crime as the organizer, leader, recruiter, manager, or supervisor. K.S.A. 2015 Supp. 21-6815(c)(2)(A) through (H).

#### **DRUG GRID CRIMES - ADDITIONAL AGGRAVATING FACTORS**

In addition to the factors listed above, the following aggravating factors which apply to drug felonies committed on or after July 1, 1993, may be considered in determining whether substantial and compelling reasons for departure exist:

- The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. Two or more of the following nonexclusive factors constitute evidence of major organized drug manufacture, production, cultivation or delivery activity:
  - The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity;

- The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity;
  - The presence of drug transaction records or customer lists that indicate a drug sale activity of major size;
  - The presence of manufacturing or distribution materials such as, but not limited to, drug recipes, precursor chemicals, laboratory equipment, lighting, irrigation systems, ventilation, power-generation, scales or packaging material;
  - Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense;
  - Possession of large amounts of illegal drugs, or substantial quantities of controlled substances;
  - A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation, or delivery of controlled substances.
- The offender possessed illegal drugs:
    - With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
    - With the intent to sell, deliver or distribute, or which were sold, or offered for sale in the immediate presence of a person under 18 years of age;
  - The offender, 18 or more years of age, employs, hires, uses, persuades, induces, entices, coerces any individual under 16 years of age to violate or assist in avoiding detection or apprehension for violation of any provision of the uniform controlled substances act, or any attempt, conspiracy or solicitation to commit a violation of any provision of the uniform controlled substances act, regardless of whether the offender knew the individual was under 16 years of age;
  - The offender was incarcerated at the time the crime was committed. K.S.A. 2015 Supp. 21-6816(a)(1) through (a)(4).
  - In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement. K.S.A. 2015 Supp. 21-6816(b).

### **DURATIONAL DEPARTURES**

When imposing a departure sentence, the sentencing court should begin with the grid block corresponding to the severity level of the crime of conviction and the offender's criminal history. A sentence that is an upward durational departure cannot exceed twice the maximum presumptive sentence. There is no limit on a downward durational departure. K.S.A. 2015 Supp. 21-6818(b).

### **DISPOSITIONAL DEPARTURES**

The sentencing court may also depart from the presumptive disposition in the case by sentencing an offender for whom the presumptive sentence is probation to prison (upward dispositional departure), or by sentencing an offender for whom the presumptive sentence is prison to a nonprison sanction (downward dispositional departure). See K.S.A. 2015 Supp. 21-6818(c) and (d). When the sentencing judge imposes a prison sentence as a dispositional departure, the term of imprisonment shall not exceed the maximum duration of the presumptive imprisonment term. If an upward dispositional departure is combined with an upward durational departure, the sentencing court must define separate substantial and compelling reasons for both departures. See K.S.A. 2015 Supp. 21-6818(c)(2). However, this requirement does not apply in the case of a downward dispositional and durational departure combination.



## **JESSICA’S LAW OFFENSES**

When the court finds substantial and compelling reasons to impose a downward departure, the court may impose the guidelines sentence in lieu of the mandatory minimum sentence. K.S.A. 2015 Supp. 21-6627(c).

A downward departure from an off-grid Jessica’s Law sentence must first depart to a guidelines sentence within the grid box reflecting the offender’s criminal history and the severity level of the crime when the victim’s age and the offender’s age are not considered. If the sentencing judge wishes to depart from the presumptive guidelines sentence, the court must also consider whether substantial and compelling factors exist to justify a second departure from the presumptive sentence. *State v. Jolly*, 291 Kan. 842, 249 P.3d 421 (2011) and *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

## **CRIMES OF EXTREME SEXUAL VIOLENCE**

No downward dispositional departure shall be imposed for any crime of extreme sexual violence, as defined in K.S.A. 2015 Supp. 21-6815 and the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to less than 50% of the center of the range of the sentence for such crime. K.S.A. 2015 Supp. 21-6818(a).

## **POSTRELEASE SUPERVISION DEPARTURE FOR SEXUALLY MOTIVATED OFFENSES**

If an offender is convicted of a sexually motivated crime, as defined in 2015 Supp. K.S.A. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2015 Supp. 22-3717(d)(1)(D)(i) and (ii).

## **JURY TRIAL PROCEDURES FOR UPWARD DURATIONAL DEPARTURE**

- If the State seeks an upward durational departure sentence, the aggravating factor(s) must first be stipulated to by defendant or proven to a unanimous jury beyond a reasonable doubt. In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), the Supreme Court held that facts (aggravators) that would increase the penalty beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. The Legislature then amended K.S.A. 21-4716 [now K.S.A. 2015 Supp. 21-6815(b)] to provide a statutory framework for such a jury proceeding.
- Under *State v. Horn*, 291 Kan. 1, 238 P.3d 238 (2010), the Supreme Court identified a defect in the statutory language in K.S.A. 21-4718. The issue concerned the submission of aggravating fact evidence to a jury impaneled only for that purpose, where defendant had only waived his right to trial by jury by his guilty plea, but did not waive his right to trial by jury on the upward departure factors. The Court held that the statutory language as enacted did not enable a court to impanel a jury only to hear aggravating fact evidence. K.S.A. 21-6817 allows the court to conduct a separate jury proceeding on upward durational departure sentencing factors even if the defendant has waived a jury trial on the issue of guilt by entering a guilty or no contest plea. The defendant can waive the right to have such a jury trial on the aggravating factors. The defendant must be informed of the right to have aggravating departure factors determined by a jury in order for such waiver to be valid. *State v. Duncan*, 291 Kan. 467, 243 P. 3d 338 (2010).

- A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or, within 7 days from the date of the arraignment if the trial is to take place in less than 30 days from the date of the arraignment. K.S.A. 2015 Supp. 21-6817(b)(1). The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in the jury proceeding following the trial. K.S.A. 2015 Supp. 21-6817(b)(2).
- The jury shall determine, based on the reasonable doubt standard, whether aggravating factors exist that may serve to enhance the maximum sentence. If one or more aggravating factors are found to exist, by a unanimous jury vote, such factors shall be reported to the court on a special jury verdict form. K.S.A. 2015 Supp. 21-6817(b)(4) and (b)(7).

## **DEPARTURE AND CONSECUTIVE SENTENCING COMBINATION**

The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:

- The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively. K.S.A. 2015 Supp. 21-6819(c)(1).
- When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime. K.S.A. 2015 Supp. 21-6819(c)(2).
- The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation. This, referred to as the “double-double rule”, means that the total prison term of the consecutive sentences must not be more than twice the upward departure sentence. K.S.A. 2015 Supp. 21-6819(c)(3).

### **Examples**

An offender is convicted of kidnapping (severity level 3), aggravated burglary (severity level 5), and theft with a loss of at least \$1,000 but less than \$25,000 (severity level 9). The offender has one prior person felony conviction placing him in criminal history Category D. If the jury determines, based on the reasonable doubt standard, that substantial and compelling reasons exist to impose an upward durational departure sentence for the kidnapping, that departure may be imposed in conjunction with the imposition of consecutive sentences for the remaining convictions of aggravated burglary and theft. Both the limits on the total consecutive term and the limits applicable to upward durational departure sentences apply.

The sentencing court begins by establishing a base sentence for the primary sentence. In this fact pattern, the most serious crime of conviction is the kidnapping, with a presumed imprisonment sentence of 94 months, which becomes the base sentence. The two remaining convictions at criminal history Category I have presumptive sentences of 32 and 6 months respectively. (If the sentencing court wished only to sentence these offenses consecutively, the total sentence could not aggregate to a sum greater than two times the base without a durational departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be 2 x 94, or 188 months. Here, the total sum of 94 + 32 + 6 would be 132 months, a consecutive sentence clearly within the limit of twice the base sentence.)

Assume that the jury establishes a finding for an upward durational departure sentence for the kidnapping conviction based on the presence of an aggravating factor and the court imposes three consecutive sentences for the three offenses in this case.

Base sentence: Kidnapping at Maximum Presumptive Sentence = 100 months  
(Kidnapping at severity level 3, criminal history D on the nondrug grid)

Other sentences: Aggravated Burglary and Theft = 32 and 6 months.

(Aggravated Burglary at severity level 5, criminal history I and Theft at severity level 9, criminal history I on the nondrug grid)

The base sentence may be enhanced to a maximum departure length of up to 200 months, or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the total imprisonment term of the consecutive sentences, including the departure term, shall not exceed twice the departure of the enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed  $2 \times 200$ , or 400 months. The sum of  $200 + 32 + 6$ , or 238 months is well within the limit of 400 months.

The sentencing court may choose to depart and impose a longer sentence for the aggravated burglary and theft if independent substantial and compelling reasons exist to justify those departures. The aggregate consecutive sentence becomes  $200 + 64 + 12$ , or 276 months, which is still within the limit of 400 months. This sentence would represent a durational departure sentence within a consecutive sentence context, and the limits on the total duration of such a sentence are sometimes referred to as the "double-double rule." The application of the "double-double rule" allows a sentencing court considerable discretion in fashioning a sentence for exceptional cases that warrant both an upward durational departure and consecutive sentencing. See *State v. Snow*, 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan. App.2d 747, 195 P.3d 282 (2008).

### **REPORTING DISPOSITIONS TO THE KANSAS SENTENCING COMMISSION**

The sentencing guidelines Journal Entry of Judgment form approved by the Kansas Sentencing Commission must be completed for each felony conviction for a crime committed on or after July 1, 1993. K.S.A. 2015 Supp. 22-3426(d). The court shall forward a signed copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2015 Supp. 21-6813 to the Kansas Sentencing Commission within 30 days after sentencing. K.S.A. 2015 Supp. 22-3439(a).

For crimes committed on or after July 1, 1993, when a convicted person is revoked for a probation violation, a Journal Entry of Probation Violation form as approved by the Kansas Sentencing Commission shall be completed by the court. K.S.A. 2015 Supp. 22-3426a. For probation revocations that result in the defendant's imprisonment in the custody of the Department of Corrections, the court shall forward a signed copy of the Journal Entry of Probation Violation to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 2015 Supp. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Violation, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2015 Supp. 74-9101(b)(5).

The Kansas Sentencing Commission staff will also review felony journal entries and notify the sentencing court in writing when a possible illegal sentence has been identified. The information

gathered from the sentencing guidelines forms provides a database to assess the impact of the sentencing guidelines on state correctional resources, the impact of proposed revisions to the sentencing guidelines, and improves the availability and reliability of criminal history record information.

### **REPORTING DISPOSITIONS TO THE KANSAS BUREAU OF INVESTIGATION**

The court shall insure that information concerning dispositions for all other felony probation revocations based upon crimes committed on or after July 1, 1993, and for all class A and B misdemeanor crimes and assault as defined in K.S.A. 2015 Supp. 21-5412, committed on or after July 1, 1993, is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of that final disposition. K.S.A. 2015 Supp. 22-3439(c). All district courts shall be required to electronically report all case filings and dispositions for violations of K.S.A. 2015 Supp. 8-1567 and 8-1025, 21-5426, 21-6419, 21-6420, 21-6421 and 21-6422. K.S.A. 2015 Supp. 22-4704.

Likewise in the municipal courts, the municipal judge shall ensure that information concerning dispositions of city ordinance violations that result in convictions comparable to offenses under Kansas criminal statutes is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of final disposition. K.S.A. 12-4106(e). In all cases alleging a violation of K.S.A. 2015 Supp. 8-2,144, 8-1567, 32-1131, 8-1025, 21-6419 or 21-6241, reports of the filing and disposition of such case must be submitted electronically to the KBI central repository. K.S.A. 2015 Supp. 12-4106(f).

### **DNA SAMPLE COLLECTION**

Offenders who are convicted of certain crimes, or adjudicated of certain juvenile offenses, shall be required to submit a DNA or biological sample to the Kansas Bureau of investigation. The details of this procedure are provided K.S.A. 2015 Supp. 21-2511.

## CHAPTER VI: DRUG TREATMENT – SB 123 PROGRAM

### TARGET POPULATION

K.S.A. 2015 Supp. 21-6604(n) provides a mandatory nonprison sanction of certified drug abuse treatment under community corrections supervision for certain drug possession offenders.

This target population shall be required to undergo a criminal risk-need and drug abuse assessment:

Adult offenders convicted of drug possession, (K.S.A. 2015 Supp. 21-5706) who:

- (1) have NO felony conviction(s) of drug manufacturing (K.S.A. 2015 Supp. 21-5703), drug cultivation (K.S.A. 2015 Supp. 21-5705(c)), drug distribution (K.S.A. 2015 Supp. 21-5705(a)) or unlawful use of proceeds of a drug crime (K.S.A. 2015 Supp. 21-5716);  
-AND-
- (2) (A) whose offense is in the 5-C, 5-D, 5-E, 5-F, 5-G, 5-H or 5-I grids blocks of the drug grid  
-OR-  
(B) whose offense is in the 5-A or 5-B grids blocks of the drug grid if:
  - (i) the offender's prior person felony conviction(s) were severity level 8, 9, or 10 or nongrid offenses; AND
  - (ii) the sentencing court finds and sets forth with particularity the reasons for finding that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program. See K.S.A. 2015 Supp. 21-6824(a).

Offenders who have been convicted of a third or subsequent violation of K.S.A. 2015 Supp. 21-5706 (or K.S.A. 65-4160 or 65-4162, prior to their repeal, or K.S.A. 2010 Supp. 21-36a06, prior to its transfer) shall not be eligible for SB 123, but shall be sentenced to prison pursuant to K.S.A. 2015 Supp. 21-6805(f).

Offenders convicted of *attempted* possession are not eligible for SB 123. *State v. Perry-Coutcher*, 45 Kan. App. 2d 911, 254 P.3d 566 (2011). Likewise, offenders convicted of conspiracy and solicitation to commit drug possession will not be eligible for SB 123 treatment.

Offenders who are residents of another state and are returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision, or who are not lawfully present in the United States and being detained for deportation, are not eligible for treatment under SB 123 and shall be sentenced as otherwise provided by law. K.S.A. 2015 Supp. 21-6824(h).

### CRIMINAL RISK-NEED AND DRUG ABUSE ASSESSMENTS

As part of the presentence investigation, offenders who meet the requirements of K.S.A. 2015 Supp. 21-6824(a), unless otherwise specifically ordered by the court, shall be subject to a drug abuse assessment and a criminal risk-need assessment. Both assessments must be completed prior to sentencing. However, those offenders who score Low or Low/Moderate on the LSI-R criminal risk-need assessment need not be subject to a drug abuse assessment unless otherwise ordered by the court.

The Kansas Sentencing Commission has adopted the use of the LSI-R (Level of Service Inventory –

Revised) as the mandatory criminal risk-need assessment and the SASSI (Substance Abuse Subtle Screening Inventory) as the mandatory drug abuse assessment.

The presentence criminal risk-need assessment shall be conducted by a court services officer or a community corrections officer. Offenders shall be assigned a risk status based on the results of the assessment. K.S.A. 2015 Supp. 21-6824(b).

The presentence drug abuse assessment shall be conducted by a drug abuse treatment program certified by the secretary of corrections to provide assessment and treatment services and shall include a clinical interview and a recommendation concerning drug abuse treatment for the offender. See K.S.A. 2015 Supp. 75-52,144(b).

The risk-need assessment and drug abuse assessment are only available to the parties, the sentencing judge, the department of corrections and if requested, the Kansas Sentencing Commission. K.S.A. 2015 Supp. 21-6813(c).

### **QUALIFICATION FOR TREATMENT**

As of July 1, 2012, participation in SB 123 treatment has been limited to include only those offenders who have both moderate to high criminal risk-need and high drug abuse assessment scores. Those offenders who score Low or Low/Moderate on the LSI-R criminal risk-need assessment need not be subject to a drug abuse assessment unless otherwise ordered by the court.

If the offender is assigned a high risk status as determined by the drug abuse assessment performed pursuant to subsection (b)(1) and a moderate or high risk status as determined by the criminal risk-need assessment performed pursuant to subsection (b)(2), the sentencing court shall commit the offender to treatment in a drug abuse treatment program, under community corrections supervision, until the court determines the offender is suitable for discharge by the court. The term of treatment shall not exceed 18 months. K.S.A. 2015 Supp. 21-6824(c) and (d)(1). Even if the offender's criminal history places them in a border box on the drug grid (5C and 5D), SB 123 treatment is mandatory if the offender meets the criteria outlined in K.S.A. 2015 Supp. 21-6824. *State v. Swazey*, 51 Kan. App. 2d, 357 P.3d 893 (2015).

If the offender's risk-need assessment and drug abuse assessment scores do not qualify the offender for treatment, the offender will be supervised by either court services or community corrections, depending on the results of the criminal risk-need assessment. K.S.A. 2015 Supp. 21-6824(d)(2).

The court may order an offender who otherwise does not meet the assessment score requirements of subsection (c) to undergo one additional drug abuse assessment while such offender is on probation. Such offender may be ordered to undergo drug abuse treatment pursuant to subsection (a) if such offender is determined to meet the requirements of subsection (c). The cost of such assessment shall be paid by such offender. K.S.A. 2015 Supp. 21-6824(i).

### **PAYMENT OF FEES**

All offender assessments, regardless of whether the offender is sentenced for SB 123 treatment, will initially be paid by the Kansas Sentencing Commission. K.S.A. 2015 Supp. 75-52-144(d).

The sentencing court shall determine the extent, if any, that such person is able to pay for such assessment and treatment. Such payments shall be used by the supervising agency to offset costs to the

state. If such financial obligations are not met or cannot be met, the sentencing court shall be notified for the purpose of collection or review and further action on the offender's sentence. K.S.A. 2015 Supp. 75-52,144(d). For those assessed but not eligible for treatment, it is requested that a \$200 assessment fee be ordered at sentencing. For those sentenced to SB 123 treatment, a \$200 assessment fee and a \$100 reimbursement fee for treatment costs continues to be requested to be ordered by the court at sentencing along with other fees and court costs. If the court determines that the offender has the ability to pay a larger portion of the SB 123 treatment cost, the court may order such offender to do so.

In a plea agreement situation, the court may direct the defendant to undergo the assessments at any time in order to determine SB 123 eligibility. The defendant will still be responsible for payment of all assessment fees imposed by the court at sentencing.

### **LENGTH OF TREATMENT**

The term of treatment shall not exceed 18 months, beginning upon the date the offender initially begins treatment. The term of treatment may not exceed the term of probation. K.S.A. 2015 Supp. 21-6824(c). The court may extend the term of probation, pursuant to K.S.A. 2015 Supp. 21-6608(c)(3).

### **CONDITION VIOLATIONS**

#### **VIOLATION SANCTIONS**

Offenders who violate a condition of the drug treatment program shall be subject to a nonprison sanction of up to 60 days in county jail, fines, community service, intensified treatment, house arrest or electronic monitoring. K.S.A. 2015 Supp. 22-3716(g).

In addition, an offender in SB 123 may be subject to sanctions for probation violations pursuant to K.S.A. 2015 Supp. 22-3716(c)(1). For more information on Probation Violations, see Chapter VIII.

#### **REVOCAION OF PROBATION**

If the defendant fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding, the defendant shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 2015 Supp. 21-6805. K.S.A. 2015 Supp. 21-6604(n) and 21-6824(f).

Offenders in SB 123 may also be revoked pursuant to the provisions of K.S.A. 22-3716(c). Condition violations may result in discharge from the mandatory drug abuse treatment. See *State v. Gumfory*, 281 Kan. 1168, 135 P.3d 1191 (2006).

The amount of time spent participating in the SB 123 program shall not be credited as service on the underlying prison sentence. K.S.A. 2015 Supp. 21-6604(n).

### **POSTRELEASE SUPERVISION**

Offenders who complete SB 123 treatment and do not have their probation revoked will not be subject to postrelease supervision.

Offenders in the SB 123 program whose crime of conviction was committed prior to July 1, 2013 and who have their probation revoked, shall not be subject to a period of postrelease supervision upon completion of the underlying prison sentence. K.S.A. 2015 Supp. 21-6604(n)(2)(A).

Offenders in the SB 123 program whose crime of conviction was committed on or after July 1, 2013, shall serve a period of postrelease supervision if their probation is revoked or their underlying prison term expires while serving a 120/180-day prison sanction pursuant to subsection (c)(1)(C) or (c)(1)(D) of K.S.A. 2015 Supp. 22-3716. K.S.A. 2015 Supp. 21-6604(n)(2)(B).

### **\*CONSERVATION CAMP**

Offenders whose offense is classified in the 4-E or 4-F drug grid blocks prior to July 1, 2012, or on and after July 1, 2012, grid blocks 5-C, 5-D, 5-E or 5-F, but does not qualify for the SB 123 drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. K.S.A. 2015 Supp. 21-6604(g).

The Secretary of Corrections may also make direct placement to Labette Correction Conservation Camp for offenders whose offense is classified in the 5-C, 5-D, 5-E or 5-F drug grid blocks if those offenders do not otherwise meet the requirements of K.S.A. 2015 Supp. 21-6824. K.S.A. 2015 Supp. 21-6604(l).

*\*In practice, all the nonprison alternatives provided in K.S.A. 2015 Supp. 21-6604(g) are no longer viable placement alternatives. The Kansas Court of Appeals, in State v. Johnson, 42 Kan. App. 2d 356, 211 P.3d 861 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2015 Supp. 21-6604(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections.*



## **CHAPTER VII: OFFENDER REGISTRATION**

For a listing of offenses that require registration, please refer to the statutory crime listing in Appendix D. Offenses requiring registration are marked with an “**R**”.

### **LENGTH OF REGISTRATION REQUIREMENT**

The Kansas Offender Registration Act requires offenders who are convicted of certain crimes to register as an offender for a duration of either 15 years, 25 years or for the lifetime of the offender. The length of registration for each crime is provided in K.S.A. 2015 Supp. 22-4906, and on page two of the Offender Registration Supplement of the Journal Entry of Judgment.

Any person who has been declared a sexually violent predator pursuant to K.S.A. 2015 Supp. 59-29a01 *et seq.* shall be required to register for life. K.S.A. 2015 Supp. 22-4906(e).

An offender who is convicted of two or more offenses requiring registration shall be required to register for life. K.S.A. 2015 Supp. 22-4906(c).

Convictions or adjudications which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction or adjudication. A conviction or adjudication from any out of state court shall constitute a conviction or adjudication for purposes of the act. K.S.A. 2015 Supp. 22-4902(g).

### **OFFENDER REGISTRATION TYPE**

Offenders will be required to register as either a sex offender, violent offender or drug offender, depending on their crime of conviction. See K.S.A. 2015 Supp. 22-4902 and page 1 of the Offender Registration Supplement of the Journal Entry of Judgment. An offender who commits multiple crimes may be required to register as multiple types of offender simultaneously.

### **DUTIES OF THE SENTENCING COURT**

At the time of conviction or adjudication for an offense requiring registration, the court is required to inform the offender, on the record, of the procedure to register and the duties of the offender pursuant to the act. K.S.A. 2015 Supp. 22-4904(a)(1)(A).

In addition, if the offender is being released, the court shall:

- Complete a notice of duty to register, which shall include title and statute number of conviction or adjudication, date of conviction or adjudication, case number, county of conviction or adjudication, and the following offender information: Name, address, date of birth, social security number, race, ethnicity and gender;
- require the offender to read and sign the notice of duty to register, which shall include a statement that the requirements provided in this subsection have been explained to the offender;
- order the offender to report within 3 business days to the registering law enforcement agency in the county or tribal land of conviction or adjudication and to the registering law enforcement agency in any place where the offender resides, maintains employment or attends school, to complete the registration form with all information and any updated information required for registration as provided in K.S.A. 2015 Supp. 22-4907, and

- provide one copy of the notice of duty to register to the offender and, within three business days, send a copy of the form to the law enforcement agency having initial jurisdiction and to the Kansas bureau of investigation. K.S.A. 2015 Supp. 22-4904(a)(1)(B).

At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 2015 Supp. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication. K.S.A. 2015 Supp. 22-4902(a)(2).

### **VIOLATION OF THE ACT**

Offenders who fail to comply with the provisions of the offender registration act shall be subject to the penalties provided in K.S.A. 2015 Supp. 22-4903. Upon a first offense, violation of the act is a severity level 6 person felony, and upon a second offense, a level 5 person felony. Offenses which continue for more than 30 consecutive days shall constitute a new and separate offense every 30 days thereafter. K.S.A. 2015 Supp. 22-4903(a).

An act which continues for more than 180 consecutive days is an aggravated offense, which is a severity level 3 person felony. Any aggravated violation of the Kansas offender registration act which continues for more than 180 consecutive days shall, upon the 181st consecutive day, constitute a new and separate offense, and shall continue to constitute a new and separate violation of the Kansas offender registration act every 30 days thereafter, or a new and separate aggravated violation of the Kansas offender registration act every 180 days thereafter, for as long as the violation continues. K.S.A. 2015 Supp. 22-4903(b).

### **CRIMINAL HISTORY CALCULATION**

An element of the crime of violating requires that an offense requiring registration be committed. Therefore, the offense giving rise to the registration requirement may not be counted in the offender's criminal history when the current crime of conviction is violation of the offender registration act. See K.S.A. 2015 Supp. 21-6810(d)(9).

However, all other prior convictions, including other convictions for offenses requiring registration, may be counted and scored unless otherwise prohibited. If an offender is required to register due to a prior case with multiple counts, and the offender was convicted of more than one count of crimes requiring registration, then one count will serve as an element of the crime of failure to register and the other count(s) may be scored as part of the criminal history. *State v. Deist*, 44 Kan. App. 2d 655, 239 P.3d 896 (2010).

## CHAPTER VIII: PROBATION VIOLATIONS AND REVOCATION

Please note the change in the terminology of the word “revoke.” Under the framework imposed by 2013 House Bill 2170 and further amendments thereafter, a court may no longer revoke and subsequently reinstate probation. Rather, the court may now impose sanctions, lengthen the period of probation and modify the conditions of probation without revocation. “Revocation” now means that the offender is being sent to prison to serve the underlying sentence and will no longer be eligible for reinstatement. For all instances in which the court wants to impose a quick dip or 120/180-day prison sanction, extend the length of probation or modify the conditions or probation, the court should not revoke probation.

### PROBATION SANCTIONS

2013 House Bill 2170 created graduated sanctions that require a probation violator to be incarcerated for a period of time determined in part by the number of previous probation violations the offender has committed. 2014 Senate Substitute for House Bill 2448 went into effect on July 1, 2014 and amended these provisions further. Please see <http://www.sentencing.ks.gov/hb-2170/s-sub-for-hb-2448> for more information on these changes.

### **QUICK DIPS**

An offender who commits a probation violation may be subject to a “quick dip” sanction of 2 or 3 days in the county jail. 2 or 3-day “quick dip” sanctions may be used by the court or a supervising officer for offenders on probation for misdemeanor, nongrid felony and felony convictions. This sanction may also be imposed for multiple subsequent violations, not to exceed 18 total days during the offender’s term of supervision, including all quick dip sanctions imposed by both the court and all supervising officers. K.S.A. 2015 Supp. 21-3716(b)(3)(B)(ii) and (c)(1)(B).

### **Supervising Officer Quick Dip Authority**

K.S.A. 2015 Supp. 22-3716(b)(4)(A) gives court services officers, and (b)(4)(B) gives community corrections officers, the authority to impose a ‘quick dip’ sanction if the offender waives the right to a revocation hearing on an alleged probation violation. If the offender does not waive the right to a revocation hearing, the supervising officer may not impose a quick dip, but at the revocation hearing the court may impose any of the sanctions provided by statute in K.S.A. 2015 Supp. 22-3716(b)(3)(B) for nongrid felonies and misdemeanors, and K.S.A. 2015 Supp. 22-3716(c)(1) for felonies.

The sentencing court may choose to withhold this authority from the court services or community corrections officer at sentencing. The Journal Entry of Sentencing in 2013 and all subsequent years include a check box where this authority may be specifically withheld.

The total of all sanctions imposed by supervising officers and the court must not exceed 18 total days during the offender’s term of supervision.

The supervising officer must have the concurrence of their chief court services officer or community corrections director, respectively, and must not have had the authority to impose such sanction withheld by the sentencing court. See also K.S.A. 2015 Supp. 21-6604(s) and (t).

### **COURT SANCTIONS IN MISDEMEANOR AND NONGRID FELONY PROBATION CASES**

The court may order an offender who commits a probation violation while on probation for a misdemeanor or nongrid felony to:

- Continuation or modification of probation and a county jail sanction of up to 60 days;
- a “quick dip” sanction of 2 or 3 days in a county jail, not to exceed 18 total days (including quick dips imposed by supervising officers) during the term of supervision; or
- revocation of probation and requiring the offender to serve the sentence imposed or any lesser sentence. See K.S.A. 2015 Supp. 22-3716(b)(3)(B).

### **COURT SANCTIONS IN FELONY PROBATION CASES**

#### **Quick Dips**

The court may sentence an offender who commits a probation violation to a “quick dip” sanction of 2 or 3 days in county jail. This sanction may also be imposed for multiple subsequent violations, not to exceed 18 total days during the offender’s term of supervision, including all quick dip sanctions imposed by both the court and all supervising officers. K.S.A. 2015 Supp. 22-3716(c)(1)(B).

#### **120 or 180-day Prison Sanctions**

If a felony offender who has previously received a “quick dip” sanction from either the court or a supervising officer commits another violation of the terms of their probation, the court may impose a sanction of 120 or 180 days to be served in the custody of the secretary of corrections. The secretary shall have the discretion to reduce the length of such sanction by up to half. K.S.A. 2015 Supp. 21-3716(c)(1)(C) and (c)(1)(D).

120 or 180-day sanctions shall begin upon pronouncement of such sanction by the court. Prior incarceration time, such as the time an offender spends awaiting a probation violation hearing, shall not be counted towards service on the prison sanction. However, time spent in county jail awaiting transport to a DOC facility after imposition of the sanction may be counted. K.S.A. 2015 Supp. 21-3716(c)(1)(C) and (c)(1)(D).

Probation condition violators are required to be placed in a community corrections program at least once prior to placement in a state correctional facility pursuant to K.S.A. 2015 Supp. 22-3716(c)(2), unless the offender has committed a new crime, has absconded from supervision, or the court finds that the safety of the members of the public will be jeopardized or the welfare of the inmate will not be served by such assignment to community corrections. K.S.A. 2015 Supp. 22-3716(c)(4), (c)(8) and (c)(9).

Upon completion of a prison sanction, the offender shall be returned to community corrections supervision. K.S.A. 2015 Supp. 22-3716(c)(6).

## **Revocation of Probation**

If the offender has previously received a 120 or 180-day prison sanction, the court may revoke probation and require the offender to serve their underlying prison sentence, or a portion thereof, in the custody of the secretary of corrections. K.S.A. 2015 Supp. 21-3716(c)(1)(E).

The court may revoke the probation of an offender who commits a new crime or absconds from supervision, and require them to serve their underlying prison sentence regardless of previous graduated sanctions, or lack thereof. K.S.A. 2015 Supp. 22-3716(c)(8).

The court may revoke a probation violator's probation by finding and setting forth with particularity the reasons why public safety will be jeopardized or the offender's welfare will not be served, regardless of previous graduated sanctions, or lack thereof. K.S.A. 2015 Supp. 22-3716(c)(9).

## **60-Day County Jail Sanction**

County jail sanctions of up to 60 days may be imposed for a violation, however they do not count towards the graduated sanction scheme and may not be imposed at the same time as any other sanction. K.S.A. 2015 Supp. 22-3716(c)(11).

## **No Imposition of Consecutive Sanctions While On Concurrent Probation Terms**

If an offender is serving multiple probation terms concurrently, any violation sanctions imposed pursuant to subsection (c)(1)(B), (c)(1)(C) or (c)(1)(D), or any sanction imposed pursuant to subsection (c)(11), shall be imposed concurrently. K.S.A. 2015 Supp. 22-3716(c)(10).

## **Retroactivity of Sanction Authority**

2014 Senate Sub. for House Bill 2448 added new language to clarify that graduated sanctions may be used for any felony probation violation occurring after July 1, 2013, regardless of the date the crime was committed or sentenced. K.S.A. 2015 Supp. 22-3716(c)(12).

## **New Felony Committed During Probation or Presumptive Discharge Period**

When an offender is sentenced for a crime committed while the offender was on felony probation or other felony nonprison status, a consecutive sentence is mandated by K.S.A. 2015 Supp. 21-6606(c). If the new offense is a felony, the sentencing court may sentence the offender to prison, even if such offense otherwise presumes a nonprison sentence. K.S.A. 2015 Supp. 21-6604(f).

On and after July 1, 2013, an offender who receives presumptive discharge from probation pursuant to K.S.A. 2015 Supp. 21-6608(d) and commits a felony during the time in which the offender would have been under supervision had it not been for the early discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison (Special Rule #40). K.S.A. 2015 Supp. 21-6604(f)(2).

## **POSTRELEASE SUPERVISION**

Offenders who successfully complete probation or a nonprison sanction are not required to serve a period of postrelease supervision.

For crimes committed on and after July 1, 2013, an offender who is revoked from a nonprison sanction and ordered to serve their underlying prison sentence or completes their underlying prison term while serving a 120 or 180-day graduated sanction, the offender shall be required to complete a period of postrelease supervision. K.S.A. 2015 Supp. 22-3716(f).

For crimes committed prior to July 1, 2013, notwithstanding any law to the contrary, an offender whose nonprison sanction is revoked shall not serve a period of postrelease supervision upon the completion of the prison portion of such sentence. However, offenders who have received a nonprison sanction as a result of a dispositional departure, a border box offense conviction, or a sexually motivated or sexually violent crime conviction, may be required to serve a period of postrelease upon revocation of the nonprison sanction. K.S.A. 2012 Supp. 22-3716(e). This section was repealed by 2013 House Bill 2170.

## CHAPTER IX: APPEALS

### **APPELLATE REVIEW PRINCIPLES – K.S.A. 2015 SUPP. 21-6820**

A departure sentence can be appealed by the defendant or the state to the appellate courts in accordance with rules adopted by the Supreme Court. K.S.A. 2015 Supp. 21-6820(a). Pending review of the sentence, the sentencing court, or the appellate court may order the defendant confined or placed on conditional release, including bond. K.S.A. 2015 Supp. 21-6820(b). On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

- Any sentence within the presumptive range in the appropriate grid block of the sentencing grid; or
- Any sentence resulting from a plea agreement between the state and the defendant as accepted by the sentencing court on the record. K.S.A. 2015 Supp. 21-6820(c).

Appellate review for a departure sentence is limited to whether the court's findings of fact and reasons justifying departure are supported by evidence on the record and constitutes substantial and compelling reasons for departure. K.S.A. 2015 Supp. 21-6820(d). A defendant's allegation that there was a constitutional error in an individual presumptive sentence does not grant the appellate court jurisdiction to review the sentence. *State v. Huerta*, 291 Kan. 831, 247 P.3d 1043 (2011). In any appeal, the appellate court may review a claim that:

- A departure sentence resulted from partiality, prejudice, oppression or corrupt motive;
- The sentencing court erred in including or excluding a prior conviction or juvenile adjudication for criminal history scoring purposes; or
- The sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes. K.S.A. 2015 Supp. 21-6820(e).

The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. K.S.A. 2015 Supp. 21-6820(f). In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case, the court shall follow all of the provisions of K.S.A. 2015 Supp. 21-6819 concerning the sentencing of multiple conviction cases. K.S.A. 2015 Supp. 21-6819(b)(5).

The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors. K.S.A. 2015 Supp. 21-6820(i).

## CHAPTER X: POSTRELEASE SUPERVISION

Upon completion of the prison portion of the sentence, all inmates who committed their crime of conviction on or after July 1, 2013 will be released to serve a term of postrelease supervision.

For crimes committed on and after July 1, 2013, if an offender is revoked from a nonprison sanction and ordered to serve their underlying prison sentence or completes the underlying prison term while serving a 120/180 day graduated sanction, such offender shall be required to complete a period of postrelease supervision. K.S.A. 2015 Supp. 22-3716(e).

For crimes committed prior to July 1, 2013, notwithstanding any law to the contrary, an offender whose nonprison sanction is revoked shall not serve a period of postrelease supervision upon the completion of the prison portion of such sentence. However, offenders who have received a nonprison sanction as a result of a dispositional departure, a border box offense conviction, or a sexually motivated or sexually violent crime conviction, may be required to serve a period of postrelease upon revocation of the nonprison sanction. K.S.A. 2012 Supp. 22-3716(e) (section repealed by 2013 House Bill 2170).

### LENGTH OF SUPERVISION

The Prisoner Review Board reviews release plans. However, the Board is unable to make any changes regarding prison release dates for offenders sentenced under the KSGA. K.S.A. 2015 Supp. 22-3717(i).

CRIME	LENGTH OF POSTRELEASE
NONDRUG Level 1,2,3 or 4 DRUG Level 1, 2 or *3	36 MONTHS, except that offenders sentenced for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, for crimes committed prior to April 20, 1995 may receive a postrelease supervision period of 24 months. K.S.A. 22-3717(d)(1)(A).
NONDRUG Level 5 or 6 DRUG Level ^3 or *4	24 MONTHS K.S.A 22-3717(d)(1)(B)
NONDRUG Level 7, 8, 9 or 10 DRUG Level ^4 or *5	12 MONTHS K.S.A 22-3717(d)(1)(C)
Sexually Motivated Crime	Up to 60 months K.S.A. 22-3717(d)(1)(D)(i)

\*= for crimes committed on and after July 1, 2012 only

= for crimes committed prior to July 1, 2012 only

### GOOD TIME CREDIT

On after July 1, 2013 offenders, other than offenders whose term of imprisonment includes a sentence for a sexually violent crime, a sexually motivated crime, electronic solicitation or unlawful sexual relations, will not have their good time and program credit earned while incarcerated added to the end of their period of postrelease supervision. K.S.A. 2015 Supp. 22-3717(d). Sex offenders will still be required to serve any good time and program credit earned while in prison under postrelease supervision. K.S.A. 2015 Supp. 22-3717(d)(1)(D).



K.S.A. 2015 Supp. 22-3717(s) states that all modifications to the period of postrelease as provided in subsection (t) shall be applied retroactively. K.S.A. 2015 Supp. 22-3717(t) requires the department of corrections to modify the periods of postrelease supervision of offenders who were sentenced prior to July 1, 2013 in order to apply the new rule that good time and program credit will no longer be required to be added on to the offender's period of postrelease supervision.

### **REDUCTION OF POSTRELEASE SUPERVISION PERIOD**

Offenders sentenced to a 36 or 24-month period of postrelease supervision may have their period of supervision reduced by up to 12 months, and offenders sentenced to a period of 12 months may have their period of supervision reduced by up to 6 months, based on the offender's compliance and overall performance while on postrelease supervision. K.S.A. 2015 Supp. 22-3717(d)(1)(E).

The Prisoner Review Board may grant an offender early discharge from their period of postrelease supervision if such offender petitions the Board for early release and has paid all restitution. K.S.A. 2015 Supp. 22-3717(d)(2).

### **MULTIPLE CONVICTION CASES**

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term, including off-grid crimes, will determine the period of supervision. Postrelease supervision periods will not be aggregated. K.S.A. 2015 Supp. 22-3717(d)(1)(F).

### **SEXUALLY MOTIVATED CRIME DEPARTURES**

If an offender is convicted of a sexually motivated crime, as defined in K.S.A. 2015 Supp. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2015 Supp. 22-3717(d)(1)(D)(i) and (ii).

The Prisoner Review Board may, in its discretion, grant early discharge from this extended postrelease supervision period upon completion of any treatment programs, payment of all restitution and completion of the longest presumptive postrelease supervision period associated with any of the crimes for which the prison sentence was being served. K.S.A. 2015 Supp. 22-3717(d)(1)(D)(vi).

### **JESSICA'S LAW AND SEXUALLY VIOLENT OFFENSE SUPERVISION**

Offenders convicted of certain Jessica's Law offenses as provided in K.S.A. 2015 Supp. 21-6627, wherein the offender was 18 years of age or older and the victim was less than 14 years of age, committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Prisoner Review Board. When the Prisoner Review Board orders the parole of an inmate, the Board shall also order that the inmate be electronically monitored for the duration of the inmate's natural life. K.S.A. 2015 Supp. 22-3717(u).

The court shall order that any defendant sentenced pursuant to K.S.A. 2015 Supp. 21-6627 (Jessica's Law) shall, upon release from imprisonment, be electronically monitored for the duration of the

defendant's life. K.S.A. 2015 Supp. 21-6604(r).

An offender who is given a downward departure from the mandatory minimum to the guidelines sentence, shall, upon completion of the prison sentence, be subject to postrelease supervision.

An offender convicted of any sexually violent crime, as defined in K.S.A. 2015 Supp. 22-3717(d)(5), committed on or after July 1, 2006, other than a Jessica's Law offense, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life. K.S.A. 2015 Supp. 22-3717(d)(1)(G).

#### **OTHER OFF-GRID OFFENSES**

In the discretion of the Prisoner Review Board, offenders convicted of an off-grid crime may be granted parole after the offender has served the mandatory minimum prison sentence. The Prisoner Review Board may not discharge an offender from parole within a period of less than one year after release from prison. K.S.A. 2015 Supp. 22-3722.

For more information on parole and off-grid offenses, see the Off-grid Crimes section of Chapter I.

#### **VIOLATIONS OF POSTRELEASE SUPERVISION CONDITIONS**

For crimes committed before April 20, 1995, a finding of a technical violation of the conditions of postrelease supervision will result in imprisonment for a period not to exceed 90 days from the date of the final revocation hearing; for crimes committed on or after April 20, 1995, a technical violation will result in imprisonment for six months and such time may be reduced by not more than 3 months based upon the inmate's conduct, work and program participation during the imprisonment period. K.S.A. 2015 Supp. 75-5217(b). If the violation results from a conviction of a new felony or misdemeanor, upon revocation of postrelease supervision, the offender will serve a period of confinement, to be determined by the Prisoner Review Board. K.S.A. 2015 Supp. 75-5217(c) and (d).

On and after July 1, 2013, an offender who is granted early discharge from postrelease supervision pursuant to K.S.A. 2015 Supp. 22-3717(d)(2), and commits a felony during the time in which the offender would have been under supervision had it not been for discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison. K.S.A. 2015 Supp. 21-6604(f)(2).

## **CHAPTER XI: RETROACTIVITY OF SENTENCING GUIDELINES**

The retroactive provision of the KSGA applies to incarcerated offenders who would have been considered presumptive probation candidates had they been sentenced as if their crimes occurred on or after July 1, 1993, or who would have been placed in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, had they been sentenced as if their crimes occurred on or after July 1, 1993. K.S.A. 21-4724(b)(1). For offenders sentenced before July 1, 1993, the Kansas Department of Corrections (KDOC) was required to assess each offender's possible eligibility for retroactive application of the KSGA by determining the severity level of the crime(s) of conviction as if the crime(s) had occurred on or after July 1, 1993, and the offender's criminal history. K.S.A. 21-4724(c)(1).

Once an offender was determined to be eligible for the retroactive application of the sentencing guidelines, the KDOC was to issue a report indicating such to the offender, prosecutor, and the sentencing court. K.S.A. 21-4724(c). The criminal history classification determined by KDOC was to be deemed correct unless an objection was filed by either the offender or the prosecution within the 30 days provided to request a hearing. K.S.A. 21-4724(c)(4). If a hearing was requested within the 30 days, the parties could challenge the KDOC's determination of the crime severity or the criminal history, or seek a departure sentence if the offender was eligible for conversion of the sentence to a guidelines sentence. K.S.A. 21-4724(d).

If no hearing was requested, the sentence was converted and the offender was released after serving the midpoint sentence of the range in the applicable sentencing guidelines grid block. K.S.A. 21-4724(d)(1). If a hearing was requested, the sentencing court determined whether the offender was eligible for conversion to a guidelines sentence and the appropriate duration of that sentence, within the limits imposed by the sentencing guidelines. K.S.A. 21-4724(d)(2). The presence of the offender in person at the hearing was not required but counsel had to be appointed. K.S.A. 21-4724(d)(4), (5). No sentence could be increased through retroactive application of the guidelines. K.S.A. 21-4724(e).

For those offenders who committed crimes prior to July 1, 1993, but who were sentenced after that date, the sentencing court was to impose a sentence pursuant to the law in effect before July 1, 1993. However, the sentencing court was also required to compute the appropriate sentence had the offender been sentenced pursuant to the KSGA. K.S.A. 21-4724(f).

### **CONVERSION OF SENTENCE FOR A CRIME COMMITTED BETWEEN JULY 1, 1993, AND MARCH 24, 1994**

Prior to March 24, 1994, if an offender was sentenced to prison for a crime committed after July 1, 1993, and while the offender was on parole or conditional release for a crime committed prior to July 1, 1993, the old sentence was to be converted into a determinate sentence to run consecutive to the new sentence as follows:

- Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
- Thirty-six months for class A or B felonies or the conditional release date whichever is shorter.

The converted sentence for crimes committed prior to July 1, 1993, was to be aggregated with the new consecutive guidelines sentence. See K.S.A. 1993 Supp. 22-3717(f)(1) and (2).

## CHAPTER XII: POINTS OF INTEREST ABOUT THE GUIDELINES

### SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT

#### **CRIME SEVERITY AND CRIMINAL HISTORY CONSTRAIN SENTENCING DECISIONS**

The KSGA provides a grid-based sentencing scheme dependent on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids indicate the range of sentence lengths (duration) presumed by statute to be appropriate for an offender. Further, they indicate whether the defendant should be presumed by statute to be granted probation or remanded to prison (disposition). The sentencing court has discretion to grant a sentence other than that presumed by the grid box in the form of a departure sentence if the court finds substantial and compelling reasons to do so. If the offender's case falls in a border box, the length of sentence is still presumed under the KSGA, but the sentencing court, without finding substantial and compelling reasons, can grant an optional nonprison sentence of probation. An "optional nonprison sentence" is a sentence which the court may impose, in lieu of the presumptive sentence, upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and
- the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or
- the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

#### **GUIDELINES LEAVE ROOM FOR PROPERLY JUSTIFIED EXERCISE OF DISCRETION**

The KSGA offers an objective approach to sentencing without placing undue limitations on the discretion of the sentencing court. The guidelines establish presumptive rather than mandatory sentences. Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines. The sentencing court may similarly depart upward or downward from the presumptively appropriate duration of any prison term established by the sentencing guidelines. Such departures must be supported on the record by substantial and compelling reasons, which may include aggravating or mitigating circumstances specifically enumerated in non-exclusive lists of departure factors found within the sentencing guidelines provisions.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face" for the imposition of upward durational departure sentences. Both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were subsequently amended to correct the problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. K.S.A. 2015 Supp. 6815(b) [formerly K.S.A. 21-4716]. Evidence of aggravating circumstances is either presented during the trial of the matter or in a bifurcated jury proceeding following the trial or plea. K.S.A. 2015 Supp. 21-6817(b)(2).

Certain offenses (i.e., those that fall into border boxes on the guidelines grids) allow the sentencing court the option to impose a nonprison sentence without making a departure. However, the sentencing court also has the discretion to decide whether sentences should run concurrently or consecutively. K.S.A. 2015 Supp. 21-6819.

### **PRESENTENCE INVESTIGATION REPORT IS MANDATORY**

Another benefit of the KSGA for the sentencing court is the fact that a Presentence Investigation Report is mandatory, which ensures that the court will be in possession of the most complete criminal history information involving the offender. K.S.A. 2015 Supp. 21-6813(a).

### **PLEA AGREEMENTS**

The sentencing court remains free to accept or reject any plea agreement reached by the parties that is otherwise authorized by the KSGA. However, the court may impose up to the maximum sentence provided in the applicable grid box, even if the parties have recommended a lesser sentence. While plea bargaining may not be used to exact a promise from the prosecutor not to allege prior convictions that will enhance the crime severity level of the offense, or will affect the determination of the offender's criminal history category, plea bargaining is otherwise permissible. K.S.A. 2015 Supp. 21-6807(b)(4) and 21-6812.

The offender may enter a plea to the charged offense, or to a lesser or related charge in return for the dismissal of other charges or counts, a recommendation for a particular sentence within the appropriate sentencing range on the grid, a recommendation for a departure sentence where departure factors exist and are stated on the record, an agreement that a particular charge or count will or will not be filed, or any other promise not prohibited by law. K.S.A. 2015 Supp. 21-6807(b)(4) and 21-6812 and K.S.A. 2015 Supp. 22-3210.

Whether the sentencing court accepts or rejects any proposed plea agreement, the court will often be making a decision whether to accept a plea of guilty or no contest from the offender before coming into possession of all criminal history information that is required for imposition of sentence. Nevertheless, the sentencing court is still able to advise the offender of the sentencing consequences of the plea by simply informing the offender of the entire range of sentences provided by the grid for the severity level of the crime to which the plea is being entered. K.S.A. 2015 Supp. 21-6807 and K.S.A. 2015 Supp. 22-3210(a)(2).

While subsequently discovered prior convictions cannot then be used to enhance the severity level of the crime to which a plea has been accepted, they can be counted in the offender's criminal history. K.S.A. 2015 Supp. 21-6807(c)(4).

## SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA

**1. ANNOUNCE THE CASE.**

**2. HAVE COUNSEL STATE THE APPEARANCES FOR THE RECORD.**

**3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.**

- Guilty plea
- No contest plea
- Bench trial
- Jury trial

**4. CONFIRM THAT EACH PARTY HAS BEEN SUPPLIED WITH A COPY OF THE PRESENTENCE INVESTIGATION REPORT (PSI).**

**5. ASK EACH PARTY IF THERE IS A CHALLENGE TO THE CRIMINAL HISTORY.**

- Require the parties to answer on the record.
- Address the defendant personally and ask whether he acknowledges the accuracy of the criminal history set out in the Criminal History Worksheet. K.S.A. 2015 Supp. 21-6814.
- If there are challenges to the criminal history, take up each challenge and rule on each challenge. The offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet.
  - Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.
  - A certified or authenticated copy of a Journal Entry is sufficient proof of a prior offense unless the defendant denies he or she is the person named. See *State v. Staven*, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).
  - If time to challenge the criminal history was not available prior to the sentencing hearing, additional time must be provided. See *State v. Hankins*, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994).
  - Burden is on prosecution when defendant objects to criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, and the offender later challenges the established criminal history, the burden shifts to the defendant pursuant to 2009 Legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, now at K.S.A. 2015 Supp. 21-6814.
- If changes are made to the defendant's criminal history, the court should also make the changes on the Criminal History Worksheet.
- If the defendant's criminal history score is modified as the result of a challenge, confirm that the parties are prepared for sentencing and, if so, proceed.

**6. STATE THE PRIMARY OFFENSE OF CONVICTION, THE CRIMINAL HISTORY SCORE, THE RANGE OF IMPRISONMENT SENTENCE LENGTHS (AGGRAVATED, STANDARD, MITIGATED) IN THE APPLICABLE GRID BOX, ANY GRID BOX PRESUMPTION (IMPRISONMENT, PROBATION, BORDER BOX), ANY SPECIAL RULE THAT AFFECTS THE GRID BOX PRESUMPTION, THE PERIOD OF POSTRELEASE SUPERVISION FOLLOWING RELEASE FROM IMPRISONMENT, THE APPLICABLE**

**PERCENTAGE OF GOOD TIME CREDIT THAT CAN BE EARNED, THE LENGTH OF THE PERIOD OF PROBATION, IF GRANTED, AND THE AGENCY TO SUPERVISE SUCH PROBATION.**

**7. IF THERE ARE ADDITIONAL FELONY OFFENSES, FOR EACH SUCH OFFENSE, IN ORDER OF DECREASING SEVERITY, APPLY CRIMINAL HISTORY “I” TO THE ADDITIONAL OFFENSES AND STATE THE INFORMATION IN PARAGRAPH 6 APPLICABLE TO THE ADDITIONAL OFFENSES.**

**8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.**

- There is no prescribed proceeding for a departure hearing under K.S.A. 2015 Supp. 21-6817.
- A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.
- If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, “or within 21 days thereafter.” K.S.A. 2015 Supp. 21-6817(a)(2).

**9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.**

This is not required by statute but it is the safest practice. In the event the PSI is not available in a timely manner, or other reasons arise which do not allow adequate time to prepare and present arguments regarding the issues of “departure sentencing,” a continuance must be granted. K.S.A. 2015 Supp. 21-6817(a)(1).

**10. IF A DEPARTURE IS SOUGHT, CONDUCT A HEARING ON THE DEPARTURE MOTION(S). ALLOW COUNSEL TO ADDRESS THE COURT AND ALSO ALLOW THE WITNESSES FOR EITHER PARTY TO TESTIFY.**

**11. ASK EACH ATTORNEY FOR THE ATTORNEY’S SENTENCING SUGGESTIONS. THIS IS RELEVANT WHETHER OR NOT THE PARTIES HAVE AGREED TO RECOMMEND A PARTICULAR SENTENCE.**

**12. ASK IF ANY VICTIM(S) OR OTHERS WISH TO SPEAK CONCERNING THE SENTENCE(S) TO BE IMPOSED.**

Following the rule in *State v. Parks*, 265 Kan. 644, 962 P.2d 486 (1998), non-victims and non-family members may also be permitted to submit written statements and/or speak.

**13. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION UNDER K.S.A. 2015 SUPP. 22-3422 AND 22-3424.**

Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow such statements or evidence.

**14. ASK THE DEFENDANT WHETHER HE HAS ANY LEGAL CAUSE TO SHOW WHY SENTENCE SHOULD NOT BE PRONOUNCED.**

**15. ANNOUNCE THE GRANTING OR DENIAL OF ANY REQUESTED DEPARTURE, CITING THE SUBSTANTIAL AND COMPELLING REASONS FOR THE DEPARTURE IF GRANTED.**

- If a departure is denied there is generally no need to state the reasons for the denial. However, in denying a Jessica’s Law departure back to a guidelines sentence, the record should be clear that the judge reviewed the defendant’s asserted mitigating circumstances. See K.S.A. 2015 Supp. 21-6628(d).
- Statutory mitigating and aggravating factors may be found at K.S.A. 2015 Supp. 21-6815 (non-drug) and K.S.A. 2015 Supp. 21-6816 (drug).
- Sentencing courts must provide separate reasons based upon facts in the record for each durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).
- Reasons for departure must be “substantial and compelling.” See K.S.A. 2015 Supp. 21-6815(a), 21-6816(a) and 21-6818(c)(2).
- Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. K.S.A. 2015 Supp. 21-6817(a)(4).
- For sex offenders, a postrelease supervision period of up to 60 months may be ordered. K.S.A. 2015 Supp. 22-3717(d)(1)(D)(i). When imposing a durational postrelease supervision departure under K.S.A. 2015 Supp. 22-3717(d), state specifically on the record the substantial and compelling reasons to impose a departure. See *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002).

**16. IF A SPECIAL RULE APPLIES, WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED.**

See listing of special rules in Chapter V.

**17. ANNOUNCE THE SENTENCE FOR THE PRIMARY OFFENSE.**

Suggestion: Follow the information layout for the offense in the PSI. Example: Mr. Doe, for the primary offense of theft, a level 9 nonperson felony, with your criminal history of B, I sentence you to the standard term of 14 months in the custody of the secretary of corrections. Your departure request for probation is granted. The court finds substantial and compelling reasons for the departure as follows: the two person felonies in your criminal history arose from the same incident, a bar fight, which occurred twenty years ago; you have no convictions since you served those sentences; the victim of the theft, your mother, is convinced you stole from her to buy oxycodone to self-medicate the pain from back problems and you need drug treatment, not prison; a drug treatment program is available to you in the community; and, the State has joined in the request for a departure to probation. You are granted probation to be supervised by Community Corrections for 12 months. If your probation is revoked, you will be remanded to DOC to serve the time left on your sentence, after credit for time served, but you can earn up to 20% maximum good time credit. Upon your release from prison you would then be placed on postrelease supervision for 12 months.

**18. ANNOUNCE ALL OTHER SENTENCES, STATING WHETHER EACH ADDITIONAL SENTENCE IS CONCURRENT OR CONSECUTIVE TO THE PRIMARY OFFENSE SENTENCE.**

The Court *must state on the record* if the sentence is concurrent or consecutive, otherwise it becomes a concurrent sentence by default except as provided by K.S.A. 2015 Supp. 21-6606(c), (d) and (3). K.S.A. 2015 Supp. 21-6606(a).

As of July 1, 2012, when the Court imposes multiple sentences consecutively, the consecutive sentences shall consist of an imprisonment term which may not exceed the sum of the consecutive imprisonment terms, and a supervision term. The sentencing judge shall have the discretion to impose a consecutive term of imprisonment for a crime other than the primary crime of any term of months not to exceed the



nonbase sentence. K.S.A. 2015 Supp. 21-6819(b)(1). This allows for consecutive sentencing for a count other than the primary offense up to the maximum sentence rather than requiring the full nonbase sentence. This change is reflected and may be entered in the Journal Entry of Judgment, Additional Offenses.

The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The “double rule” and “double-double rule” are found at K.S.A. 2015 Supp. 21-6819. The “double-double rule” applies to cap the total length of consecutive upward durational departure sentences. See *State v. Snow*, 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan. App. 2d 747, 195 P.3d 282 (2008).

**19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING, IF THIS IS IN DISPUTE. ASSESS, OR DECLINE TO ASSESS, WITH PARTICULARITY, COSTS, FEES AND EXPENSES.**

**20. ESTABLISH THE NUMBER OF DAYS OF JAIL CREDIT TO WHICH THE DEFENDANT IS ENTITLED AND THE DEFENDANT’S “SENTENCE BEGINS DATE.”**

See K.S.A. 2015 Supp. 21-6615.

**21. ADVISE THE DEFENDANT THAT HE OR SHE MAY HAVE RIGHTS OF EXPUNGEMENT.**

See K.S.A. 2015 Supp. 21-6614.

**22. ADVISE THE DEFENDANT OF HIS OR HER RIGHT TO APPEAL BY FILING THE NOTICE WITHIN 14 DAYS, UNDER K.S.A. 2015 SUPP. 22-3608, AND THE RIGHT TO COUNSEL.**

Even if defendant’s jury trial counsel was retained, advise the defendant that he has the right to appeal his conviction and sentence, and, if he is indigent, counsel and the costs of the appeal will be afforded him. K.S.A. 2015 Supp. 22-3424(b). Likewise, when a defendant has been sentenced on a conviction resulting from a guilty or no contest plea, even if defendant’s plea counsel was retained, advise the defendant that, if he is indigent and wants to appeal the sentence, counsel and the costs of the appeal will be afforded him. *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982).

**23. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.**

See K.S.A. 2015 Supp. 21-6304(a)(1) through (a)(3).

**24. ADVISE THE OFFENDER OF THE LOSS OF CERTAIN CIVIL RIGHTS SUCH AS THE RIGHT TO VOTE UNTIL THE OFFENDER’S SENTENCE IS FULLY DISCHARGED.**

See K.S.A. 2015 Supp. 21-6613. Anyone convicted of a felony on or after July 1, 2002 may not vote until his or her sentence is completed. This specifically includes a sentence of probation.

**25. IF DEFENDANT IS REQUIRED TO REGISTER UNDER THE KANSAS OFFENDER REGISTRATION ACT (K.S.A. 2015 SUPP. 22-4901 *ET SEQ.*), ENSURE THE AGE OF THE VICTIM IS INCLUDED ON THE JOURNAL ENTRY OF JUDGMENT.**

At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 2015 Supp. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication. K.S.A. 2015 Supp. 22-4904(a)(2).

**26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF THE SECRETARY OF CORRECTIONS OR THE SHERIFF, OR ESTABLISH A DATE TO REPORT IF A STAY OF EXECUTION IS GRANTED AND IF THE DEFENDANT IS NOT IN CUSTODY. ESTABLISH AN APPEAL BOND AMOUNT, IF REQUESTED. IF PROBATION IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND TO WHAT SUPERVISING AGENCY HE/SHE IS TO REPORT.**

**27. IF PROBATION IS ORDERED AND THE COURT WISHES TO WITHHOLD THE AUTHORITY OF COURT SERVICES OR COMMUNITY CORRECTIONS TO IMPOSE A 2-3 DAY JAIL SANCTION FOR PROBATION CONDITION VIOLATIONS, ENSURE THAT THE JOURNAL ENTRY FORM IS MARKED ACCORDINGLY.**

## **SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION**

### **EMPHASIS OF GUIDELINES IS ON CRIMINAL HISTORY AND CRIME SEVERITY**

The KSGA places the emphasis of the sentencing phase of a criminal prosecution on the two factors that are generally of greatest concern to the prosecutor, the criminal history of the offender and the crime severity. The prosecution can focus its efforts on establishing by a preponderance of the evidence any challenged aspect(s) of the criminal history information provided in the presentence investigation report and presenting to the sentencing court any aggravating or mitigating circumstances which may provide substantial and compelling reasons for the court to consider imposing a departure sentence. Properly authenticated copies of journal entries of convictions or the mandatory presentence investigation reports prepared in conjunction with the prosecution of cases for crimes occurring on or after July 1, 1993, generally will be sufficient. Other properly authenticated documents that may be of use in proving criminal history include plea transcripts and charging documents such as an information, complaint, or indictment. The prosecution is entitled to reasonable time to obtain the necessary proof of prior convictions. K.S.A. 2015 Supp. 21-6814.

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, or K.S.A. 2015 Supp. 21-6814.

### **PROVING THE AGE OF JESSICA'S LAW OFFENDERS**

Imposition of an off-grid mandatory sentence of imprisonment under K.S.A. 2015 Supp. 21-6627 requires a factual finding that the offender was 18 years of age or older at the time of the offense. Unless the offender has stipulated to the offender's age, that age is a fact question that must be submitted to a jury and proved beyond a reasonable doubt. *State v. Brown*, 291 Kan. 646, 244 P.3d 267 (2011). The Kansas Judicial Council has suggested that the jury's factual finding on the offender's age be included under a separate question on the verdict form. See the Notes on Use under the various PIK-Criminal elements instructions for offenses subject to Jessica's Law enhancements.

## **SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE**

### **IMPORTANCE OF ACCURATE, VERIFIED CRIMINAL HISTORY**

Because the KSGA focuses so heavily on the criminal history of the offender as a determining factor of the sentence that will be imposed, the defense will be provided with a copy of the mandatory presentence investigation report, including the criminal history worksheet, and have an opportunity to challenge any errors contained in the report. Immediately upon receipt of the report the defense may file written notice to the prosecution and the sentencing court alleging errors in the proposed criminal history worksheet. The burden will then fall to the State to verify and establish by a preponderance of the evidence the accuracy of any disputed portions of the alleged criminal history, and the sentencing court is authorized to correct any errors. Consequently, the defense has an important role in ensuring that the sentence is based on an accurate criminal history that has been properly verified. See K.S.A. 2015 Supp. 21-6814.

In addition, because a sentencing court may take judicial notice of a prior criminal history worksheet as an accurate reflection of criminal history for use in a subsequent case, the offender may waive the right to challenge any errors contained in the worksheet by failing to do so when the worksheet is initially prepared and served on the parties. Failure to challenge any errors in the criminal history worksheet at a hearing on the proposed conversion of a sentence for a crime committed prior to July 1, 1993, to a KSGA sentence pursuant to the retroactivity provisions of the guidelines may also operate as a waiver of that opportunity in future cases. See K.S.A. 2015 Supp. 21-6813. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. See K.S.A. 2015 Supp. 21-6814.

### **CAN ADVISE THE OFFENDER ABOUT TIME TO BE SERVED IN DEFINITE TERMS**

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of definite duration, defense counsel will be able to advise the offender of the exact amount of time which the sentence will require the offender to serve once the criminal history is known.

## **SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS**

### **COPIES OF REQUIRED DOCUMENTS SENT TO THE KSC**

A copy of the Journal Entry of Judgment and the Presentence Investigation Report, including the Criminal History Worksheet, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. K.S.A. 2015 Supp. 21-6813(g) and K.S.A. 2015 Supp. 22-3439(a).

A copy of the Journal Entry of Probation Violation must be sent to the Kansas Sentencing Commission, along with a copy of the original Journal Entry of Judgment, the Presentence Investigation Report, and the Criminal History Worksheet within 30 days of the final disposition. K.S.A. 2015 Supp. 22-3439(b).

### **PROVIDING DOCUMENTATION OF PRIOR CONVICTIONS**

Because of the importance of an accurate criminal history under the KSGA and the need to verify prior convictions that are counted in criminal history scoring, Clerks of the Courts may receive requests for certified copies of journal entries and other documents, including requests from other jurisdictions.

### **PRESENTENCE INVESTIGATION REPORT IS PUBLIC RECORD**

The Presentence Investigation Report (PSI), with the exception of the sections containing the official version, the defendant's version, victim comments, and psychological (including drug and alcohol) evaluations of the defendant, will be public record and may be kept in the court file. K.S.A. 2015 Supp. 21-6813.