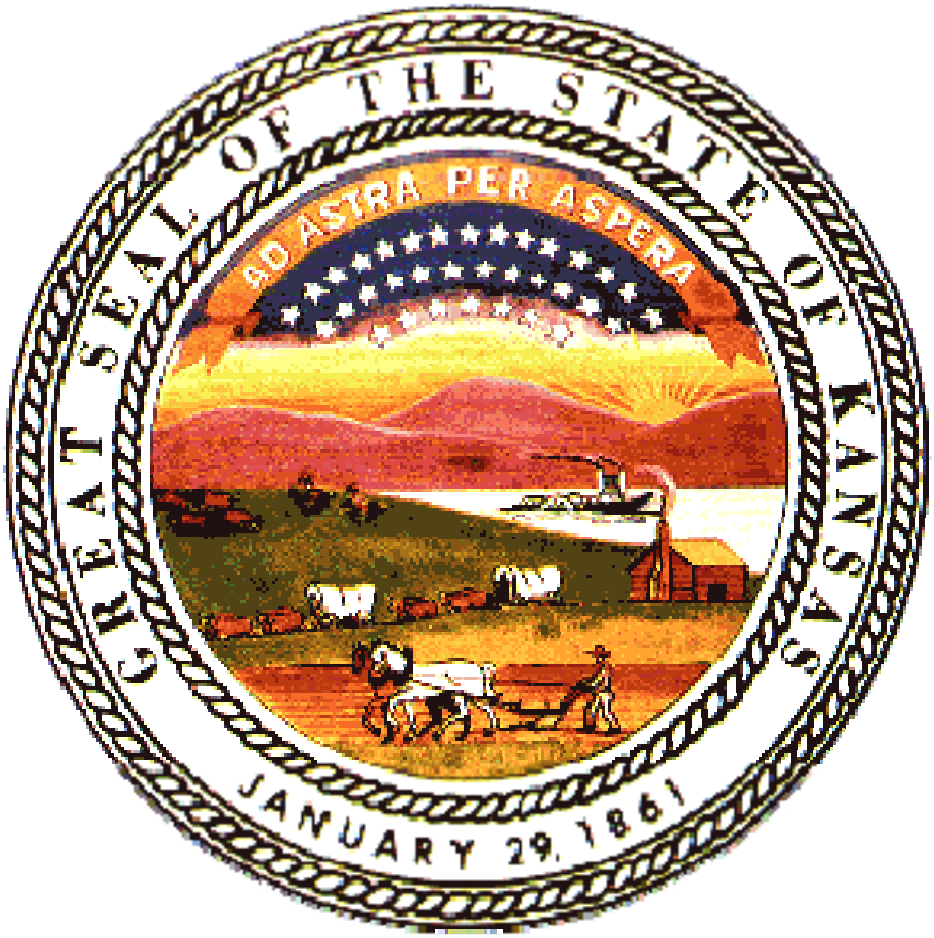
KANSAS

SENTENCING GUIDELINES



DESK REFERENCE MANUAL

2008

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INTRODUCTION

The 2008 Kansas Sentencing Commission Desk Reference Manual ("Manual") provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21-4701 *et seq*. The Manual contains features that we hope will not only inform users of the latest developments in the Sentencing Guidelines but also help to facilitate more efficient use of the Manual and guidelines application.

In order to reduce the size of the Manual and hopefully make it more manageable, the Time Line of Selected Events Related to the KSGA has been removed from the printed version of the Manual and is now posted, along with other Appendices, on the Kansas Sentencing Commission (KSC) website at www.kansas.gov/ksc. All of the 2008 legislative changes relative to the sentencing guidelines remain in the manual and are summarized in the first section. The case law updates formerly located in Appendix A have been reformatted and posted on the KSC website under the "Case Law Updates" link. These updates are now organized by topic area and posted with the most recent cases at the top of the page. Finally, the chart contained in Appendix C outlining non-statutory departure reasons that have been approved or disapproved by the Kansas appellate courts has been updated to reflect the most recent published decisions through June 30, 2008 and has been posted on our website. Both Appendix B and C may be found by clicking the "Agency Publications" link and then selecting the 2008 Desk Reference Manual. Posting these documents on our website rather than publishing them in the Manual will allow us to easily update the material as new information becomes available.

The statutory listings of felonies and misdemeanors in Appendix E and F have also been modified to reflect the specific statutory violations based upon the 2008 Legislative Changes. Due to the costs of printing, only the alphabetical sort of the felonies and misdemeanor statutes have been included in the printed manual. The numerical, severity level, and class sorts are now only available for download from the KSC website. The complete versions of both the felony and misdemeanor statute files are posted with the Desk Reference Manual under the "Agency Publications" link.

The Kansas Sentencing Commission encourages criminal justice professionals to contact our staff for further information and assistance regarding related questions concerning the Manual or the Kansas Sentencing Guidelines Act. Questions may be directed to our Staff at (785) 296-0923, or by the e-mail link found on the Kansas Sentencing Commission website.

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense(s) of conviction. Amendments to statutes are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

Changes to the penalties and/or statutory language, and newly enacted legislation listed within the 2008 Legislative Changes to the Kansas Sentencing Guidelines Act and Related Criminal Law are effective on the date listed below the change(s).

ADDITIONAL COPIES

Requests for additional copies of the 2008 Manual may be obtained from the Kansas Sentencing Commission at a cost of ten dollars each for a bound hard copy document and five dollars each for a computer disk. This Manual may also be accessed free of charge via the Kansas Sentencing Commission website at www.kansas.gov/ksc.

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 2008 Desk Reference Manual should always be used in consultation with the applicable Kansas statutes, the language of which are always controlling.

2008 LEGISLATIVE CHANGES TO THE KANSAS SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW

Changes affecting the Kansas Sentencing Guidelines Act (K.S.A. 21-4701 et seq.,) and other related criminal statutes were made by the Kansas Legislature during the 2008 Legislative Session. These changes are summarized below under the headings of the Bills which the changes were included.

FELONY OFFENSES

Senate Bill 46

Senate Bill 46 as amended would allow persons who were in compliance with the National Firearms Act (28 USC 5801 et seq.) to possess silencers for firearms, shotguns with barrels less than 18 inches long, and automatic weapons. Senate Bill 46 as amended would allow a licensed dealer, manufacturer, or importer to deal in these types of firearms as well as any person to possess such firearms under federal restrictions. The bill would amend current law to **increase the penalty for the crime of defacing identification marks of a firearm, K.S.A. 2007 Supp. 21-4205, from a class B nonperson misdemeanor to a severity level 10 nonperson felony.**

Defacing identification marks of a firearm is intentionally changing, altering, removing or obliterating the name of the maker, model, manufacturer's number or other mark of identification of any firearm.

This act shall take effect and be in force from and after its publication in the statute book.

Senate Bill 411

Senate Bill 411 as amended would expand current law by adding three parole suitability factors to the list of factors considered by the Kansas Parole Board when making determinations regarding parole suitability. The three new factors are **risk factors revealed by any risk assessment** of the inmate and **recommendations by the staff of the facility** where the inmate is incarcerated, and **proportionality of the time the inmate has served to the sentence a person would receive under the Kansas Sentencing Guidelines** for the conduct that resulted in the inmate's incarceration.

Senate Bill 411 as amended would also extend the sentencing pilot program regarding the use of the LSI-R assessment tool in Johnson County for two years until July 1, 2010.

This act shall effect and be in force from and after its publication in the statute book.

House Substitute for Senate Bill 414

House Substitute for Senate Bill 414 would amend the crime of stalking, K.S.A. 21-3438 (The stalking provisions were originally contained in House Bill 2850). The amended crime of stalking to now include the following: Intentionally or recklessly engaging in a course of conduct that targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear; Intentionally engaging in a course of conduct targeted at a specific person which the individual knows will place the targeted person in fear for such person's safety or the

safety of a member of such person's immediate family; or after being served with, or otherwise provided notice of , any protective order that prohibits contact with a targeted person, intentionally or recklessly engaging in at least one act that violates the provisions of the order and would cause a reasonable person to fear for safety, or the safety of a member of the person's immediate family and the targeted person is actually placed in such fear.

The severity levels for stalking would be increased as follows:

Upon a first conviction, stalking as described in the first part above would be **a class A person misdemeano**r. Upon a second or subsequent conviction, stalking as described in the first part above would be **a severity level 7 person felony**.

Upon a first conviction, stalking as described in the second part above would be **a class A person misdemeanor**. Upon a second or subsequent conviction, stalking as described in the second part above would be **a severity level 5 person felony.**

Upon a first conviction, stalking as described in the third part above would be **a severity level 9 person felony**. Upon a second or subsequent conviction, stalking as described in the third part above would be **a severity level 5 person felony**.

A person served with a protective order or a person who engaged in stalking after having been advised against the stalking activities by uniformed law enforcement officers would be presumed to have acted intentionally.

The bill **defines course of conduct** to mean two or more acts over a period of time, however short, which evidences a continuity of purpose. A course of conduct would not include constitutionally protected activity or conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person. A course of conduct would include, but not be limited to, any of the following acts or a combination thereof: threatening the safety of the targeted person or a member of such person's immediate family; following, approaching or confronting the targeted person or a member of such person's immediate family; appearing in close proximity to, or entering the targeted person's residence, place of employment, school or other place where such person can be found, or the residence, place of employment or school of a member of such person's immediate family; causing damage to the targeted person's residence or property or that of a member of such person's immediate family; placing an object on the targeted person's property or the property of a member of such person's immediate family, either directly or through a third person; causing injury to the targeted person's pet or a pet belonging to a member of such person's immediate family; and any act of communication.

No protective order shall be construed to prohibit an attorney, or person acting on behalf of an attorney who is representing the defendant in a civil or criminal proceeding from contacting the protected party for a legitimate purpose within the scope of a civil or criminal proceeding.

Further the bill inserts the provision that in a criminal proceeding a person who claims an exemption, exception or exclusion would have the burden of going forward with the asserted claim; and add the provision that present incarceration of a person who violates stalking elements would not be a bar to prosecution.

This bill shall take effect and be in force from and after its publication in the statute book.

House Substitute for Senate Bill 414 amending the crime of stalking, K.S.A. 21-3438:

21-3438(a)(1)	21-3438(a)(2)	21-3438(a)(3)	21-3438(c) (establishes a presumption)
Intentionally or recklessly engaging in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear.	Intentionally engaging in a course of conduct targeted at a specific person which the individual knows will place the targeted person in fear for such person's safety or the safety of a member of such person's immediate family;	After being served with or otherwise provided notice of, any protective order included in K.S.A. 21-3843, and amendments thereto, that prohibits contact with a targeted person, intentionally or recklessly engaging in at least one act listed in subsections (f)(1) that violates the provision of the order and would cause a reasonable person to fear for such person's safety or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear.	For the purposes of section (c), a person served with a protective order as defined by K.S.A. 21-3843, and amendments thereto, or a person who engaged in acts which would constitute stalking, after having been advised by a uniformed law enforcement officer, that such person's actions were in violation of this section, shall be presumed to have acted intentionally as to any like future act targeted at the specific person or persons named in the order or as advised by the officer.
Upon a first conviction, stalking as described in subsection (a)(1) is a class A person misdemeanor;	Upon a first conviction, stalking as described in subsection (a)(2) is a class A person misdemeanor.	Upon a first conviction, stalking as described in subsection (a)(3) is a severity level 9 person felony.	
Upon a second or subsequent conviction, stalking as described in subsection (a)(1) is a severity level 7 person felony.	Upon a second or subsequent conviction, stalking as described in subsection (a)(2) is a severity level 5 person felony.	Upon a second or subsequent conviction, stalking as described in subsection (a)(3) is a severity level 5 person felony	

Senate Bill 419

Senate Bill 419 establishes the judgment form record and contents of Journal Entry of Judgment for use by the sentencing court when a judgment is rendered for felony crimes or if defendant is sentenced to imprisonment in the custody of the secretary of corrections. Amending K.S.A. 22-3426.

This bill shall take effect and be in force from and after its publication in the statute book.

Senate Bill 430

Senate Bill 430 makes the crime of **aggravated criminal threat, K.S.A.2007 Supp. 21-3419a, a severity level 5 person felony, regardless of economic loss.**

Aggravated criminal threat is a criminal threat, K.S.A. 2007 Supp. 21-3419, which causes the evacuation of a public, commercial or industrial building, place of assembly, or a facility of transportation. Under current law, the crime of aggravated criminal threat is a severity level 4, 5, or 6 person felony, depending on the economic loss.

This bill shall be effective upon publication in the Kansas Register.

Senate Bill 435

Senate Bill 435 requires the Kansas Sentencing Commission to annually produce, subject to appropriations, Juvenile Justice Authority correctional projection figures following its receipt of data from the JJA and to develop bed impact predictions regarding legislation that may affect juvenile correctional facility population. Amending K.S.A. 2007 Supp. 74-9101(b)(20).

This bill shall take effect and be in force from and after its publication in the statute book.

Senate Bill 477

Senate Bill 477, as amended, would amend current law to add electronic solicitation to the list of sexually violent crimes requiring registration pursuant to the Kansas Offender Registration Act, K.S.A. 22-4901 et seq.

This bill shall be effective upon publication in the Kansas Register.

Senate Bill 481

Senate Bill 481, concerning substances included in the list of controlled substances, schedule I, amends current law to add the hallucinogenic drugs salvia divinorum (salvinorum A) and datura stramonium (gypsum weed or jimson weed) to the schedule I of the Kansas Controlled Substances Act. The bill would make it illegal to possess, use, or sell these drugs. Amending K.S.A. 65-4105 (d) (30) and (31).

The bill shall be effective upon its publication in the Kansas Register.

Substitute for House Bill 2207

Substitute for House Bill 2207 amends two statutes that are part of the Pharmacy Act of the State of Kansas and one statute that is a part of an act under which out-of-state-entities that dispense contact lenses to Kansans are regulated by the Board of Healing Arts.

K.S.A. 65-1657, the statute that concerns nonresident pharmacies would be amended to change the penalty for violation of the statute from a class C misdemeanor to severity level 10, nonperson felony. See Section 2. Amending K.S.A. 65-1657 (l) and (h), part of and supplemental to the pharmacy act of the state of Kansas.

Substitute for House Bill 2207 shall be effective on publication in the Kansas Register.

House Bill 2359

House Bill 2359 requires an individual to disclose any arrest, conviction, or diversion that has been expunged on an application for a license to carry a concealed weapon. Under House Bill 2359, if the applicant had arrests, convictions, or diversions expunged, and the applicant has been eligible for expungement for five years or more immediately preceding the date the application for licensure is submitted, then the applicant would not be disqualified from being issued a license to carry a concealed weapon. In addition, if the applicant has been convicted or placed on diversions for a felony and the felony has been expunged or is expugnable and the applicant has not been convicted of a felony that is not subject to expungement or adjudicated as a juvenile for an act that would be a felony, if committed by an adult, a license would be issued.

This act shall take effect and be in force from and after its publication in the statute book.

Substitute for House Bill 2545

Substitute for House Bill 2545 adds specific hallucinogenic drugs to the list of substances that are illegal to possess or have under one's control. A second conviction under the provisions of the bill is a drug severity level 4 felony. For instance, the drug MDMA, (Ecstasy)(3,4-methylendedioxymethamphetamine) has been added to the list of substances that are illegal to possess or have under one's control; a first conviction is a class A misdemeanor and the second conviction under the provisions of the bill would be a drug severity level 4 felony. Amending K.S.A 65-4162(b).

This act shall take effect and be in force from and after its publication in the statute book.

House Bill 2617

House Bill 2617 amends the implied consent law in order to require DUI mandatory implied consent to alcohol and drug testing in the event of traffic fatality or near fatality, the law regarding forensic examinations and testing, information, immunity, and costs.

The act shall take effect and be in force from and after its publication in the statute book.

Section 1. Amending K.S.A. 2007 Supp. 8-1001 (b) through (i); (k)(10) and (w)

K.S.A. 2007 Supp. 8-1001(b), as amended, requires a law enforcement officer to request a person to submit to a blood test or urine test for alcohol or drugs, or both, when the law enforcement officer has probable cause to believe:

- The person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs; OR

- The person was driving a commercial motor vehicle while having alcohol or other drugs in such person's system; OR

- The person was under the age of 21 years while having alcohol or other drugs in such person's system; AND

- The person was operating or attempting to operate the vehicle under the influence of alcohol or drugs, or both, and was involved in a vehicle accident or collision resulting in serious injury or death and such person could be cited for any traffic offense. The traffic offense violation shall constitute probable cause for a request for alcohol or drug testing.

K.S.A. 2007 Supp. 8-1001(w) as amended defines serious injury as a physical injury to a person, as determined by law enforcement, which has the effect of, prior to the request for testing:

- Disabling a person from the physical capacity to remove themselves from the scene;

- Rendering a person unconscious;

- Suffering the immediate loss or absence of the normal use of at least one limb;

- Determining, by a physician, of the need for surgery; and/or

- Indicating the person may die or be permanently disabled.

- However, the test would not be required if the law enforcement officer has reasonable grounds to believe the actions of the operator did not contribute to the accident or collision.

K.S.A. 2007 Supp. 8-1001(c), as amended, authorizes a law enforcement officer to direct a medical professional, including a licensed physician's assistant, to draw a blood sample (d)(1) as amended if the person has given consent; or (d)(2) as amended if medically unable to consent or (d)(3) as amended refuses to consent, when the person was operating or attempting to operate the vehicle while under the influence of alcohol or drugs, or both, and was involved in a vehicle accident or collision resulting in the immediate or likely death of any person and such person could be cited for any traffic offense.

K.S.A. 2007 Supp. 8-1001(e) as amended provides that when directed by a law enforcement officer, the medical professional would be required to withdraw the sample as soon as practical as long as the collection of the sample does not jeopardize the person's medical health assessment, care, or treatment. Further, the medical professional and the medical care facility where the blood is drawn would be acting on good faith that the prerequisites have been met by the law enforcement officer when the officer directs the blood draw.

K.S.A. 2007 Supp. 8-1001(f) as amended requires that the sample would be independent of the sample collected for medical purposes.

K.S.A. 2007 Supp. 8-1001(g) as amended provides that if a person needs to be restrained to collect the sample, law enforcement would be responsible for applying any such restraint.

K.S.A. 2007 Supp. 8-1001 (i) as amended provides that if the person is medically unable to provide a urine sample due to the injuries or treatment of the injuries, the same authorization and procedure as used for the collection of blood in subsections (d) and (e) shall apply to the collection of the urine sample.

K.S.A. 2007 Supp. 8-1001 (k)(10) as amended provides that after the completion of the testing, the person has the right to secure additional testing which if desired should be done as soon as possible and is customarily available from medical care facilities willing to conduct such testing.

The act shall take effect and be in force from and after its publication in the statute book.

House Bill 2707

Section 1. Amending K.S.A. 21-3702(a)(5),(6)

Expands the current law regarding theft of property to include a leased, rented or loaner motor vehicle that had not been returned after notice has been given to the person who leased, rented or was loaned the vehicle. A three (3) day limit starts to run upon receipt or refusal of the demand letter for return of the vehicle. The lessor would be allowed to notify the local law enforcement agency which would be able to enter any such motor vehicle into any appropriate state and local computer system listing stolen motor vehicles.

Section 2. Amending K.S.A. 21-3705 (b)(1),(2) criminal deprivation of property that is a motor vehicle, as defined in K.S.A. 8-1437 and amendments thereto.

The penalty for a first or second conviction under the above provisions would be a class A nonperson misdemeanor subject to a sentence of not less than 30 days and up to a year's imprisonment and a fine of $100 for a first conviction and a sentence of not less than 60 days nor more than a year's imprisonment and a fine of $200 for a second conviction. A third or subsequent conviction is now a severity level 9, nonperson felony. The sentence for the felony is presumptive imprisonment (See Section 4, K.S.A. 21-4704)

Section 3. Amending K.S.A. 21-4608(e)(2)

The period of post incarceration supervision shall be based on the longest term of post incarceration supervision imposed for all crimes upon which sentence was imposed or until discharge from supervision by the Kansas Parole Board. The term of post incarceration supervision imposed by this paragraph shall apply retroactively to crimes committed prior to the effective date of this act.

"Post incarceration supervision" includes parole and postrelease supervision.

Section 4. Amending K.S.A. 21-4704 (o)(1)(2)(3), (p)(1)(2)(3)

Theft with no prior conviction for theft or burglary,

Theft with one or two prior convictions for theft, burglary or aggravated burglary, or
Burglary with one prior conviction for theft, burglary, or aggravated burglary:
Optional nonprison sentence to participate in drug treatment program

The sentence for a felony theft or burglary when the offender being sentenced has no prior conviction for theft or burglary, or the sentence for theft when such offender has one or two prior felony convictions for theft, burglary or aggravated burglary; or the sentence for burglary when such offender has one prior felony conviction for theft, burglary, or aggravated burglary shall be the sentence as provided by the sentencing guidelines except that the court may order an optional nonprison sentence for a defendant to participate in a drug treatment program, including but not limited to, an approved after-care plan, if the court finds on the record that substance abuse was an underlying factor in the commission of the crime(s); substance abuse treatment in the community is likely to be more effective than a prison term in reducing the risk of offender recidivism; and participation in an intensive substance abuse treatment program will serve community safety interests. A defendant sentenced to an optional nonprison sentence under this subsection shall be supervised by community correctional services. The provisions of subsection (f)(1) of K.S.A. 21-4729 (2003 Senate Bill 123) shall apply.

Theft with any combination of three or more convictions for theft, burglary or aggravated burglary, or burglary with any combination of two or more convictions for theft, burglary or aggravated burglary: Presumptive Imprisonment with possible court recommendation to participate in KDOC intensive 4 month substance abuse treatment program.

The sentence for a felony theft when such offender has any combination of three or more prior felony convictions for theft, burglary or aggravated burglary, or the sentence for felony burglary when such offender has any combination of two or more prior convictions for theft, burglary and aggravated burglary shall be presumed imprisonment and the defendant shall be sentenced to prison, except that the court may recommend that such defendant be placed in the custody of the secretary of corrections, in a facility designated by the secretary to participate in an intensive substance abuse treatment program, if the court finds on the record that substance abuse was an underlying factor in the commission of the crime(s); substance abuse treatment in the community is likely to be more effective than a prison term in reducing the risk of offender recidivism; and participation in an intensive substance abuse treatment program with the possibility of an early release from imprisonment will serve community safety interests by promoting offender reformation.

This intensive substance abuse treatment program shall be determined by the secretary of corrections, but shall be for a period of at least four months. Upon successful completion of such intensive treatment program, the offender shall be returned to the court and the court may modify the sentence by directing that a less severe penalty be imposed. If the offender's term of imprisonment expires, the offender shall be placed under the applicable period of postrelease supervision. This sentence shall not be considered a departure and shall not be subject to appeal.

Section 5. Amending K.S.A. 21-4705(f)(1),(2)

Third or subsequent conviction of K.S.A. 65-4160 or 65-4162:
Presumptive Imprisonment with intensive substance abuse treatment; exceptions

The sentence for a third or subsequent felony conviction of K.S.A. 65-4160 or 65-4162, and amendments thereto, shall be a presumptive term of imprisonment and the defendant shall be sentenced to prison. Such term of imprisonment shall be served in a facility designated by the secretary of corrections to

participate in an intensive substance abuse treatment program. The intensive substance abuse treatment program shall be determined by the secretary of corrections, but shall be for a period of at least four months. Upon successful completion of such intensive treatment program, the offender shall be returned to the court and the court may modify the sentence by directing that a less severe penalty be imposed. If the offender's terms of imprisonment expires, the offender shall be placed under the applicable period of postrelease supervision.

If the defendant has previously completed a certified drug abuse treatment program, has been discharged or refused to participate in a certified drug abuse treatment program, has completed an intensive substance abuse treatment program or has been discharged or refused to participate in an intensive substance abuse treatment program, such defendant's term of imprisonment shall not be subject to modification.

Section 6. Amending K.S.A. 21-4714(b)(10)

Pre-sentence investigation reports (PSIs) for a third or subsequent felony conviction of drug possession shall include substance abuse assessment as provided in K.S.A. 21-4729.

Section 7. Amending K.S.A. 21-4719(a)

Provides that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; further provides that 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.

Section 8. Amending K.S.A. 22-3716 (a)

Provides that any court service officer or community correctional services officer may deputize any other officer with power of arrest to do so by giving the officer a verbal statement setting forth that the defendant has, in the judgment of the court services officer or community correctional services officer, violated the conditions of the defendant's release or a nonprison sanction.

Section 9. Amending K.S.A. 2007 Supp. 74-9501(9)(A)

Establishes the Substance Abuse Policy Board, and extends the sunset provisions for the Sex Offender Policy Board to June 30, 2011.

Section 10. Amending K.S.A. 2007 Supp. 75-5210(b)

Provides that inmates sentenced to a state facility designated by the secretary to participate in an intensive substance abuse treatment program, shall have a presumption of minimum security status. These presumptions of minimum security status shall be applied to the initial security custody upon readmission into a correctional facility or admission into a state facility to participate in an intensive substance abuse treatment program, unless the security custody status is increased pursuant to policies adopted by the secretary. The security custody status designed by the department shall not be subject to judicial review.

Section 11. Amending K.S.A. 2007 Supp. 75-5217(a)

Provides any parole officer may deputize others by a verbal statement to assist in the arrest of a released inmate who has violated the conditions of release.

Section 12. Amending K.S.A. 2007 Supp. 75-5220(e)

Provides that any offender sentenced to a facility designated by the secretary of corrections to participate in an intensive substance abuse treatment program shall not be transferred to the state reception and diagnostic center but directly to such facility, unless otherwise directed by the secretary. The secretary may transfer the housing and confinement of any offender sentenced to a facility to participate in an intensive substance abuse treatment program to any institution or facility to K.S.A. 75-5206 and amendments thereto.

The act shall take effect and be in force from and after its publication in the statute book.

House Bill 2726

House Bill 2726 prohibits law enforcement personnel from requesting or requiring an alleged victim of sex offenses including incest or aggravated incest to submit to a polygraph examination or similar truth-telling device.

The act shall take effect and be in force from and after its publication in the statute book.

House Bill 2780

House Bill 2708 amends the law regarding the following provisions:

- Cruelty to animals fine is increased, on a second or subsequent conviction, to not less than $500 nor more than $2,500; Amending K.S.A. 21-4310(d)(2).

- Aggravated endangering a child is an offense that shall not be expunged; Amending K.S.A. 21-4619 (c)(11).

- An offender, whose non-prison sanction is revoked and whose crime was sexually motivated, is required to serve post-release supervision; Amending K.S.A. 22-3716(e).

- Domestic battery fines are increased from $1,000 to $7,500; Amending K.S.A. 21-3412a(b)(3): and

- Adds the Heart of America Regional Computer Forensics Laboratory to the list of facilities that can perform and charge for criminalistic laboratory services; Amending K.S.A. 2007 Supp. 28-176 (e)

This act shall take effect and be in force from and after its publication in the statute book.

House Bill 2845

House Bill 2845 amends the crime of aiding escape, K.S.A. 21-3811. Aiding escape by an employee or volunteer of the Kansas Department of Corrections (KDOC), or employee or volunteer of a contractor of KDOC would be punishable as a severity level 4, nonperson felony.

This bill shall take effect and be in force from and after its publication in the statute book.

MISDEMEANOR OFFENSES

Senate Bill 21

Intentional disclosure of the applicant employment information compiled and submitted for nomination or appointments to state office requiring appointing authority and subject to Senate confirmation is a class A nonperson misdemeanor

Senate Bill 21, New Section 1(g), provides that all such information except conviction information will be confidential and that intentional disclosure of the information will be a class A nonperson misdemeanor. Information may be disposed of in a manner provided by K.S.A. 75-3501 et seq. if the nomination is withdrawn or the appointment is denied.

This act shall take effect and be in force from and after its publication in the statute book.

Senate Bill 46

Defacing identification marks of a firearm is amended from a class B nonperson misdemeanor to a severity level 10, nonperson felony

Senate Bill 46, amending K.S.A. 21-4205, increases the penalty for the crime of defacing identification marks of a firearm from a class B nonperson misdemeanor to a severity level 10, nonperson felony.

This act shall take effect and be in force from and after its publication in the statute book.

House Substitute for Senate Bill 226

Funeral Picketing is a class B misdemeanor; each day a violation occurs is a separate offense

House Substitute for Senate Bill 226, repealing K.S.A. 21-4015, as amended by section 1 of chapter 111 of the 2007 Session Laws of Kansas, and K.S.A. 2007 Supp. 75-702a, creates the Kansas Funeral Privacy Act prohibiting a public demonstration within 150 feet of any entrance to any cemetery, church, mortuary, or other location where a funeral is held or conducted. The prohibition would commence within one hour prior to the scheduled commencement of the funeral. In addition, the act prohibits knowingly obstructing, hindering, impeding or blocking a person's entry to or exit from a funeral or knowingly impeding vehicles which are part of the funeral procession. Violations of these provisions would be a class B person misdemeanor. Each day a violation occurs would constitute a separate offense.

This Act took effect upon its publication in the Kansas Register on April 10, 2008.

Senate Bill 267

Failure to Comply with a Wildlife and Parks Citation is a class C misdemeanor

Senate Bill 267, amending K.S.A. 2007 Supp. 32-1054, creates the new crime of failure to comply with a wildlife and parks citation. The new crime would be defined as failure to:

- Appear before a district court in response to a citation and to pay any fine, court costs, assessments, or fees imposed in full;

- Fully pay or satisfy all fines, court costs, assessments, or fees imposed as part of a sentence of any district court for violation of the Kansas wildlife and parks laws; or

- Comply with a wildlife and parks citation as provided in law.

Failure to comply with a wildlife and parks citation is a class C misdemeanor, regardless of the disposition of the original charge.

This act shall take effect and be in force from and after its publication in the statute book.

House Substitute for Senate Bill 273

Illegally obtaining or communicating confidential child support debtor information is a class B nonperson misdemeanor

House Substitute for SB 273 amends K.S.A. 39-759 prohibiting the illegal obtaining or communication of confidential information about absent parents to include information obtained under the provisions applying to support debtors. Any person who either illegally obtains or communicates confidential information is guilty of a class B nonperson misdemeanor.

This act shall take effect and be in force from and after its publication in the statute book

Senate Bill 410

Penalty for assisting or harboring an escaped juvenile repealed

Senate Bill 410 repeals K.S.A 76-2111 that finds any individual convicted of assisting or harboring an escaped juvenile from a juvenile correctional facility guilty of a misdemeanor.

House Substitute for Senate Bill 414

Stalking, upon a first conviction, as described in subsections (a)(1) and (a)(2) is a class A person misdemeanor

House Substitute for Senate Bill 414 provides the crime of stalking upon a first conviction as described in both the first subsection and second subsection of the statutory provision, K.S.A. 21-3438, is a class A person misdemeanor.

Subsection (a)(1) includes the following actions:

- Intentionally or recklessly engaging in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person are actually

placed in such fear.

Subsection (a)(2) includes the following actions:

- Intentionally engaging in a curse of conduct targeted at a specific person which individual knows will place the targeted person in fear for such person's safety or the safety of a member of such person's immediate family.

This act shall take effect and be in force from and after its publication in the statute book.

Senate Bill 562

Electioneering is a class C misdemeanor

Senate Bill 562, amending K.S.A. 2007 Supp. 25-2430, authorizes the county election officer to contact the operator at each adult care home and hospital based/long term care unit not less than 60 days before any election to request that the registered voters in the facility be offered the opportunity to vote according to the procedures outlined in this section. The provisions of this section shall not apply to mail ballot elections conducted pursuant to K.S.A. 25-4301 et seq. and amendments thereto.

This act shall take effect and be in force from and after **January 1, 2010, and** its publication in the statute book.

House Bill 2186

Violation of adoption requirements are punishable as an unclassified misdemeanor with a fine of up to $1,000 for each violation

House Bill 2186, amended K.S.A. 59-2123, the law regarding adoptions, to ensure that persons who advertise to adopt, find an adoptive home for a child or otherwise place a child for adoption are subject to regulation. A person advertising to assist in an adoption process shall state in the advertisement whether or not such person is licensed in any profession and, if licenses, under what authority the license is issued and in what profession. This requirement shall not apply to the Department of Social and Rehabilitation Services or to an individual seeking to adopt a child. In addition, the bill makes violation of these requirements to be punishable as an unclassified misdemeanor with a fine of up to $1,000 for each violation.

This act shall take effect and be in force from and after its publication in the statute book.

Substitute for House Bill 2207

Pharmacy and contact lens dispensing; nonresident pharmacy violation raised from a class C misdemeanor to a severity level 10 nonperson felony

Substitute for House Bill No. 2207, amending K.S.A. 2007 Supp. 65-1657, makes it unlawful for any nonresident pharmacy which is not registered under Pharmacy and Contact Lens Dispensing Act to advertise its services in this state, or for any person who is a resident of this state to advertise the pharmacy services of a nonresident pharmacy which has not yet registered with the board. Violation of this provision is raised from a class C misdemeanor to a severity level 10 nonperson felony.

This act became effective on publication in the Kansas Register on April 17, 2008.

House Bill 2315

Home inspectors; conducting home inspections for compensation without registration pursuant to Act requirements is a class A misdemeanor

House Bill 2315 requiring home inspector registration and certification under the Kansas Home Inspectors Professional Competence and Financial Responsibility Act makes a violation of this section a class A nonperson misdemeanor.

This act shall take effect and be in force from and after its publication in the statute book.

Senate Substitute for House Bill 2504

Amusement rides inspection and regulation; violating safety rules for amusement rides are class B and class C misdemeanors

Senate Substitute for House Bill 2504 provides for the inspection and regulation of amusement rides; including penalties and remedies for violations, specifically Section 10(a) provides for a class B misdemeanor for any knowing violation of the safety rules by an owner or operator of an amusement ride and Section 10(b) provides it is a class C misdemeanor to violate section 8 requiring any person contracting with an owner for the amusement ride's operations must ensure that inspection certificate as well as maintenance and inspections records are available, and that safety instructions for rides are posted. Each day a violation continues shall constitute a separate offense.

This act shall take effect and be in force from and after January 1, 2009 and its publication in the statute book.

House Bill 2657

Motorboat noise abatement; failure to comply with a request or direction of an officer authorized to enforce the noise standard is a class C misdemeanor

HB 2657, amending K.S.A. 2007 Supp. 32-1120(c), allows an officer who is authorized to enforce the noise standard and who has caused to suspect a motorboat is not in compliance to direct the operator to submit the boat to an on-site test. The owner of a motorboat that is in violation of the noise standard would have 60 days from the date of the violation to bring the vessel into compliance. It would be the owner's responsibility to have the motorboat tested by the Department of Wildlife and Parks after taking action to bring it into compliance, and, if the test is failed, to keep the motor boat moored until the Department certifies compliance. Failure to comply with a request or direction of an officer who is authorized to enforce the noise abatement standard for motorboats operated on Kansas waters pursuant to K.S.A. 2007 Supp. 32-1120(c) is a class C misdemeanor.

This act shall take effect and be in force from and after its publication in the statute book.

House Bill 2707

Criminal deprivation of a motor vehicle is a class A misdemeanor for a first or second conviction

House Bill 2707 amending K.S.A. 21-3705 provides that a first or second conviction of criminal deprivation of a motor vehicle as described in K.S.A. 8-1437 is a class A misdemeanor.

This act shall take effect and be in force from and after its publication in the statute book.

House Bill 2721

Violations of the Body Arts Act are class A misdemeanors

House Bill 2721, amending K.S.A. 65-1942, makes additions to the list of violations that can result in a disciplinary action under the act which tattoo artists, permanent color technicians, and persons engaged in body piercing are licensed. A violation of any of the following restrictions constitutes a class A misdemeanor.

- Producing an indelible mark or figure on the body of another by scarring, using scalpels or other related equipment;

- Producing an indelible mark or figure on the body of another by branding, using a hot iron other instrument; and

- Using any instrument, other than a needle, for the purpose of tattooing, cosmetic tattooing or body piercing.

K.S.A. 65-1953 as amended also states it is a class A misdemeanor offense to violate either the prohibition against either body piercing, cosmetic tattooing or tattooing on or to any person under 18 years of age without prior written and notarized parental consent together with the parent or guardian giving consent physically present, or the requirement that such written documentation be retained for a period of five (5) years.

This act shall take effect and be in force from and after its publication in the statute book.

House Bill 2772

Real estate appraisers and sales contracts; violations of license/certification provisions amended from a class B misdemeanor to a class A nonperson misdemeanor

Senate Substitute for House Bill No. 2772 amending K.S.A. 58-4103, provides that no person other than a state certified or licensed appraiser shall advertise or otherwise represent in any manner that such person is a state certified or licensed appraiser. Violation of this section is amended from a class B misdemeanor to a class A nonperson misdemeanor.

This act shall take effect and be in force from and after its publication in the statute book.

CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES

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. The sentencing court is free to choose an appropriate sentence, or combination of sentences, for each case. See K.S.A. 21-4603d.

Sentencing Guidelines

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. Two grids, containing the sentencing range for drug crimes and nondrug crimes, were developed for use as a tool in sentencing. The sentencing guidelines grids provide practitioners in the criminal justice system with an overview of presumptive felony sentences. 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 where the severity level of the crime and the offender's total criminal history score intersect is the presumed sentence, stated in months. See K.S.A. 21-4704.

Off-Grid Crimes

The crimes of capital murder (K.S.A. 21-3439), murder in the first degree (K.S.A. 21-3401), treason (K.S.A. 21-3801) and several specific sex offenses involving victims less than 14 years of age and offenders 18 years of age or older are designated as off-grid person crimes and for such crimes, the term of imprisonment shall be imprisonment for life. K.S.A. 21-4706. However, in most cases, such sentences do not actually mean that the offender will remain imprisoned for the remainder of the offender's life. Generally, an offender will become eligible for parole after serving a mandatory term of years in confinement. The exceptions are for convictions of capital murder wherein the death penalty is not imposed and for convictions as an aggravated habitual sex offender.

A person convicted of premeditated first-degree murder will be eligible for parole after serving 25 years in confinement unless the court finds that aggravating circumstances exist and such aggravating circumstances are not outweighed by any mitigating circumstances. In that case, the person shall serve 40 or 50 years pursuant to K.S.A. 21-4638 before becoming eligible for parole. See K.S.A. 22-3717(b)(1), 21-4635(b), (d), and 21-4638(hard 40 for crimes committed prior to July 1, 1999, hard 50 for crimes committed on or after July 1, 1999). For crimes committed on or after July 1, 2006 where a hard 50 sentence could be imposed, such sentence will not be imposed if the offender's criminal history would result in a guidelines sentence in excess of 600 months. In that case, the mandatory minimum will be the 600+ months as provided by the guidelines grid. K.S.A. 21-4638.

Felony murder and treason carry a term of life imprisonment with eligibility for parole 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. See K.S.A. 22-3717(b)(2).

In 2006, Senate Substitute for House Bill 2576 was passed 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 K.S.A. 21-4643 unless the offender is determined to be an aggravated habitual sex offender. K.S.A. 21-4706(d). If the offender is determined to be an aggravated habitual sex offender, the sentence would be imprisonment for life without the possibility of parole. K.S.A. 21-4642.

As with the aggravated habitual sex offender, K.S.A. 21-4635 provides that if a person is convicted of capital murder where the crime was committed on or after July 1, 2004, and a sentence of death is not imposed pursuant to K.S.A. 21-4624, such person shall be sentenced to life imprisonment without the possibility of parole. If the crime of capital murder was committed prior to July 1, 2004, and the death penalty was not imposed, the mandatory minimum term of imprisonment would be 25 years unless aggravating factors were found to outweigh any mitigating ones. In that case, the term would be either 40 or 50 years as with premeditated first degree murder. K.S.A. 2003 Supp. 21-4635. The death penalty and the sentence of life imprisonment without parole do not apply to juveniles or persons determined to be mentally retarded.

Drug Grid and Nondrug Grid

There are two grids used for sentencing on felony convictions. The drug grid is used for sentencing of drug crimes described in K.S.A. Chapter 65, Article 41. The nondrug grid is used for sentencing of all other felony crimes. Both grids are similar in appearance. 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 four severity levels while the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line are unshaded grid blocks, which 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 have lines passing through them, which are referred to as "border boxes." A border box has a presumptive prison sentence but the sentencing court may choose to impose an optional nonprison sentence, which will not constitute a departure. The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains five border boxes, in levels 3-E, 3-F, 3-G, 3-H and 3-I. See K.S.A. 21-4704 and 21-4705.

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. 21-4704 and 21-4705.

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid block. The court may also depart downward to lower the duration of a presumptive sentence to any extent. See K.S.A. 21-4716, 21-4717 and 21-4718. The court may also impose a dispositional departure when aggravating or mitigating circumstances exist that are substantial and compelling. See K.S.A. 21-4719(c)(2).

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. In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* and this change became effective on June 6, 2002. The jury now determines all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. The trial court determines if the presentation of evidence regarding the aggravating factors will be presented during the trial of the matter, or in a bifurcated jury proceeding following the trial. See K.S.A. 21-4718.

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. 21-4723.

The date of offense controls selection of the appropriate Journal Entry form. Each year the Journal Entry forms are updated to reflect the laws and special sentencing rules in effect beginning July 1 of that year. Therefore, when completing a 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 corresponding 1996 Journal entry form should be completed.

Accusatory Instruments

All accusatory instruments 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 accusatory instrument should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the accusatory instrument. See K.S.A. 22-3201.

Fingerprinting; Sentencing Guidelines Implications

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. 21-3408. See K.S.A. 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 of a person who is arrested if the person is:

- wanted for the commission of a felony. On or after July 1, 1993, fingerprints 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. 21-3408.
- 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. 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 and fingerprinted. See K.S.A. 21-2501(b).

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

- Fingerprints of a juvenile may be taken if authorized by the court having jurisdiction;
- After adjudication, fingerprints 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 or any of the following misdemeanor violations:
    - K.S.A. 21-3424, criminal restraint, when the victim is less than 18 years of age,
    - Subsection (a)(1) of K.S.A. 21-3503, indecent liberties with a child,
    - K.S.A. 21-3507, adultery, when one of the parties involved is less than 18 years of age,
    - K.S.A. 21-3508, lewd and lascivious behavior,
    - Subsection (b)(1) of K.S.A. 21-3513, promoting prostitution, when one of the parties involved is less than 18 years of age,
    - K.S.A. 21-3517, sexual battery, and
    - an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, to commit a violation of any of the offenses specified in this subsection;
- Fingerprints of a juvenile may be taken under K.S.A. 21-2501, if the juvenile has been prosecuted as an adult pursuant to K.S.A. 38-2347; and
- Fingerprints may be taken of any juvenile admitted to a juvenile correctional facility.

See K.S.A. 38-2313.

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). Effective April 21, 2005, all law enforcement agencies must report within 30 days and 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

The parties may move to dismiss any charge or counts pursuant to a plea bargain. The parties may stipulate to a particular sentence within the grid block classification appropriate for an offender given his or her crime of conviction and complete criminal history score. The parties may agree to recommend a sentence outside the presumptive range on the grid when departure factors exist. These factors must be stated on the record. The State may agree to file or not to file specific charges or counts. See K.S.A. 21-4713.

A plea agreement involving the deliberate deletion of an offender's prior convictions from criminal history or an agreement by the prosecution to disregard any prior convictions of the offender which will elevate the severity level of the offense or count in the offender's criminal history is impermissible. See K.S.A. 21-4713(f) and 21-4708(b)(2).

The sentencing court is free to accept or reject any plea agreement entered into by the parties. 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. 22-3210.

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. 21-4707(b)(4).

Diversions

A diversion agreement cannot be entered into for a DUI violation if; the defendant has previously participated in a diversion for DUI, 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. 22-2908(b)(1).

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

A county or district attorney may enter into a diversion agreement in lieu of criminal proceedings on a complaint for violation of Wildlife and Parks laws (Article 10 of Chapter 32) 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. 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. See K.S.A. 22-3429.

Drug Abuse Assessment

As part of the presentence investigation, offenders who meet the requirements of K.S.A. 21-4729(a) (2003 Senate Bill 123) shall be subject to a drug abuse assessment which shall include a clinical interview with a mental health professional (as defined in subsection (g) of K.S.A. 21-4729) and a recommendation concerning drug abuse treatment for the offender, and a criminal risk-need assessment, unless otherwise specifically ordered by the court. The criminal risk need assessment shall assign a high or low risk status to the offender. K.S.A. 21-4729(b).

The presentence criminal risk-need assessment shall be conducted by a court services officer or a community corrections officer. The presentence drug abuse treatment program placement assessment shall be conducted by a drug abuse treatment program certified by the secretary of corrections to provide assessment and treatment services. See K.S.A. 75-52,144(b).

The drug abuse assessment is only available to the parties, the sentencing judge, the department of corrections and if requested, the Kansas Sentencing Commission. See K.S.A. 21-4714(c).

CHAPTER III: CRIME SEVERITY LEVELS

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. 21-4707(a).

The crime severity scale contained in the sentencing guidelines grid for drug crimes consist of four levels of 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 4 is used to categorize the least severe crimes. K.S.A. 21-4708(a).

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

(1) 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. 21-4707(c)(1).

(2) 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. 21-4707(c)(2).

(3) All unclassified felonies shall be scored as level 10 nonperson crimes. K.S.A. 21-4707(c)(3).

All felony crimes, with the exception of off-grid crimes, felony driving under the influence (K.S.A. 8-1567), felony domestic battery (K.S.A. 21-3412a), and animal cruelty (K.S.A. 21-4310 and 21-4318) 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 are listed in Appendix E of this Manual in three versions: numerically by statute number; alphabetically by description; and by severity level and then by statute number.

Anticipatory Crimes

The anticipatory crimes, attempt, conspiracy and solicitation, are treated differently for off-grid felonies, offenses on the nondrug grid and drug grid, and misdemeanor offenses.

Attempt (K.S.A. 21-3301)

- An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1.
  - This reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender, or for child sex offenses involving a victim less than 14 years of age and an offender 18 or older. See K.S.A. 21-4642 and K.S.A. 21-4643 (Jessica's Law).
- 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.

- An attempt 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.

  - The provision for the reduction of a sentence on the drug grid by six months for an attempted crime does not apply in cases involving an attempt to manufacture a controlled substance under K.S.A. 65-4159. K.S.A. 65-4159(d).

- An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor.

Conspiracy (K.S.A. 2007 21-3302)

- Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2.
  - This reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender, or for child sex offenses involving a victim less than 14 years of age and an offender 18 or older. See K.S.A. 21-4642 and K.S.A. 21-4643 (Jessica's Law).

- 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.

- 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.

- Conspiracy to commit a misdemeanor is a class C misdemeanor.

Solicitation (K.S.A. 2007 21-3303)

- Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3.
  - This reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender, or for child sex offenses involving a victim less than 14 years of age and an offender 18 or older. See K.S.A. 21-4642 and K.S.A. 21-4643 (Jessica's Law).

- Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three (3) 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.

- 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.

CHAPTER IV: 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 three (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 weighted 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. 21-4709.

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.

Criminal History Category	**Descriptive Criminal History**
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.

Criminal History Categories are 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.

The "person" designation refers to crimes that inflict, or could inflict, physical or emotional harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery. The "nonperson" designation refers generally 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. The "select" designation refers to convictions for weapons violations.

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 pursuant to K.S.A. 21-4710:

1) Only verified prior convictions will be considered and scored. K.S.A. 21-4710(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. 21-4710(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. 21-4710(d)(9) and 21-4723.

   - Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately. K.S.A. 21-4710(c).

2) All prior adult felony convictions, including expungements, will be considered and scored. K.S.A. 21-4710(d)(2).

3) There will be no decay factor applicable to adult convictions. K.S.A. 21-4710(d)(3).

4) All person misdemeanor convictions, class A nonperson misdemeanor convictions, class B select nonperson misdemeanors, and comparable municipal ordinance and county resolution violations shall be considered and scored. K.S.A. 21-4710(d)(7).

   - Convictions for "comparable municipal ordinance and county resolution violations" may only be scored for criminal history purposes for crimes committed on or after July 1, 1994, when K.S.A. 1993 Supp. 21-4710(d)(7) was amended to specifically allow for those convictions to

be counted for criminal history purposes. See *State v. Dunn*, 21 Kan. App. 2d 359, 900 P.2d 245 (1995).

5) 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. 21-4710(d)(8).

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. 21-4710(d)(9).

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. 21-4710(d)(10).

8) If prior convictions of any crime operate to enhance the severity level or penalties 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, those prior convictions may not be counted in the offender's criminal history. Unless otherwise provided, all other prior convictions will be considered and scored. See K.S.A. 21-4710(d)(11).

Juvenile Adjudications

Except as otherwise provided, a juvenile adjudication which would have been a nonperson class D or class E felony if committed before July 1, 1993, or a nondrug level 6, 7, 8, 9 or 10, or drug level 4, nonperson felony if committed on or after July 1, 1993, or a misdemeanor if committed by an adult, will decay if the current crime of conviction is committed after the offender reaches the age of 25. K.S.A. 21-4710(d)(4).

For convictions of crimes committed before July 1, 1993, a juvenile adjudication that would constitute a class A, B or C felony, if committed by an adult, will not decay. For convictions of crimes 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, if committed by an adult, will not decay. K.S.A. 21-4710(d)(5). All juvenile adjudications that would constitute a person felony will not decay. K.S.A. 21-4710(d)(6).

Diversions

Diversions are not "convictions" and are therefore not included in criminal history, with the exception of the felony DUI and the Involuntary Manslaughter provisions.

- The felony DUI exception provides that, for the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under the DUI provisions, a "conviction" includes entering into a diversion agreement in lieu of further criminal proceedings on a DUI violation. See K.S.A. 8-1567(m)(1), (2).

- On or after July 1, 1996, if the current crime of conviction is for a violation of K.S.A. 21-3442, Involuntary Manslaughter while driving under the influence of drugs or alcohol, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a DUI violation shall count as one person felony for criminal history purposes. K.S.A. 2005 Supp. 21-4711(c)(2).

Information Not Relevant to Criminal History

The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.

- **Adults:** Do not include traffic infractions, diversions contacts with law enforcement, or arrests not resulting in conviction.

Special Applications in Determining Criminal History K.S.A. 21-4711

The following special rules are applicable to the determination of the offender's criminal history category.

3:1 Person Misdemeanors

Every three prior adult convictions or juvenile adjudications of class A and class B person misdemeanors in the offender's criminal history, or any combination thereof, are to be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 21-4711(a). Convictions or adjudications for misdemeanor person crimes may place an offender in a higher criminal history category classification. For example, an offender who has five misdemeanor batteries will fall into criminal history category D, which reflects one prior person felony conviction, rather than criminal history category H, which reflects only multiple misdemeanor convictions.

In addition, every three prior adult convictions or adjudications of misdemeanor assault, as defined in K.S.A. 21-3408, 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. 21-4711(a).

Select Class B Nonperson Misdemeanors

A prior conviction for a violation of: subsection (a)(1) of K.S.A. 21-4204, criminal possession of firearms by a person who is both addicted to and an unlawful user of a controlled substance; subsection (a)(5) of K.S.A. 21-4204, possession of a firearm on school grounds; or K.S.A. 21-4218, possession of a firearm on the grounds of or in the state capitol building, shall 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. K.S.A. 21-4711(b).

Involuntary Manslaughter and DUI

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a violation of K.S.A. 8-1567, 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. 8-1567, shall count as one person felony for criminal history purposes. K.S.A. 21-3442 and 21-4711(c)(2).

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. K.S.A. 21-4711(d)(1).

- 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. K.S.A. 21-4711(d)(2).

- As a prior nonperson felony if the prior conviction or adjudication was classified 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. K.S.A. 21-4711(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. 21-4711(d).

Out-of-State Convictions

Prior out-of-state convictions and juvenile adjudications will also be used to determine the appropriate criminal history category classification. Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 21-4711(e). For example, if a crime is a felony in another state, it will be counted as a felony for criminal history purposes regardless of the classification of the crime under Kansas law.

However, the laws of the state of Kansas shall control when classifying the crime as person or nonperson. In designating a crime as person or nonperson, comparable Kansas offenses shall be referred to. K.S.A. 21-4711(e). See also *State v. LaGrange*, 21 Kan. App. 2d 477, 901 P.2d 44 (1995), *rev. denied* 258 Kan. 861 (1995). If the state of Kansas does not have a comparable offense, the out-of-state conviction shall be classified as a nonperson crime. 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. 21-4711(e).

The facts required to classify out-of-state adult convictions and juvenile adjudications such that they are considered in the determination of the offender's criminal history score must be established by the State by a preponderance of the evidence. K.S.A. 21-4711(e).

Juvenile Records

Subject to the decay rules in K.S.A. 21-4710(d) (4), (d)(5) and (d)(6), 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. 21-4711(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. 22-3212(i).

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. 21-4711(g).

Drug Crimes

Drug crimes are designated as nonperson crimes for criminal history scoring. K.S.A. 21-4711(h).

Proof of Criminal History

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. K.S.A. 21-4715.

CHAPTER V: PRESENTENCE INVESTIGATION REPORTS

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. 21-4714(a). The KSGA establishes a uniform format for the PSI in all felony cases. This format must be used to provide consistency statewide. The PSI includes a face sheet, a Criminal History Worksheet, and limited topic sections covering the current offense: official version, defendant's version, victim(s) statement(s), drug, alcohol, and psychological evaluations of the defendant, restitution amounts, and the field services officer's recommendations regarding conditions of probation where appropriate. See K.S.A. 21-4714. 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. 22-3439(a).

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:

1. A summary of the factual circumstances of the crime or crimes of conviction.

2. If the defendant desires to provide one, a summary of the defendant's version of the crime.

3. 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.

4. An appropriate classification of each crime of conviction on the crime severity scale.

5. 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.

    a. The following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.
        i. **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.
        ii. **Adults:** Do not include traffic infractions, diversions contacts with law enforcement, or arrests not resulting in conviction.

6. A proposed grid block classification for each crime, or crimes of conviction and the presumptive sentence for each crime, or crimes of conviction.

7. 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 scale.

8. 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.

9. For defendants who are being sentenced for a conviction of a felony violation of K.S.A. 65-4160 or 65-4162, and meet the requirements of K.S.A. 21-4729 (2003 Senate Bill 123), the drug abuse assessment package as provided in K.S.A. 21-4729.

The presentence investigation report 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. 75-5220. K.S.A. 21-4714(c).

The criminal history worksheet will not substitute as a presentence investigation report. K.S.A. 21-4714(d).

The presentence investigation report 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. 21-4714(e).

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. 2006 Supp. 21-4714(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).

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. 21-4714(g).

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form, and Instructions for completing the Presentence Investigation Report form are contained in Appendix D of this Manual.

CHAPTER VI: 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. If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. See K.S.A. 21-4704.

Sentencing Options

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. While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may depart from the presumptive sentence based upon substantial and compelling reasons. See K.S.A. 21-4704 and 21-4716. The sentencing court may increase the sentence up to double the duration within the grid block, lower the duration to any extent, or impose a dispositional departure when aggravating or mitigating circumstances exist which are substantial and compelling. See K.S.A. 21-4716(a), 21-4717(a) and K.S.A. 21-4719(c)(2).

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. However, in the 2002 Legislative Session, K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were both amended to correct the upward durational departure problem arising from *Gould*, effective June 6, 2002. A bifurcated jury procedure is now provided to allow the jury to determine any aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. K.S.A. 21-4716(b).

Sentencing in General

Authorized Dispositions (K.S.A. 21-4603d)

Whenever any person has been convicted of a crime, the sentencing court has several sentencing options available that may be imposed either alone or in combination. 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;

- Impose fines applicable to the offense that may be paid in installments if authorized by the court;

- 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;

- Assign the defendant to a community correctional services program pursuant to K.S.A. 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;

- Assign the defendant to house arrest pursuant to K.S.A. 21-4603b;

- Order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (3) of K.S.A. 21-4502;

- 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. 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 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 subsection (4) of K.S.A. 21-4502;

- 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.

Fines

Felony and misdemeanor fines are as follows (K.S.A. 2007 21-4503a):

Off-grid and drug severity level 1	≤ $500,000
Nondrug severity level 1 through 5 and drug severity level 2 and 3	≤ $300,000
Nondrug severity level 6 through 10 and drug severity level 4	≤ $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. 21-4503a(c).

A civil penalty of up to $25,000 may be imposed for each violation of the Kansas Securities Act. If the violation is committed against an elderly or disabled person, in addition to any civil penalty otherwise provided by law, the administrator may impose a penalty not to exceed $15,000 for each violation. The total penalty against a person shall not exceed $1,000,000. See K.S.A. 2007 Supp. 17-12a412(c)(3), 17-12a603(b)(2)(C) and 17-12a604(b)(1).

Presumptive Nonprison

In a presumptive nonprison case, the sentencing court must pronounce the duration of the nonprison sanction and must pronounce the underlying prison sentence. See K.S.A. 21-4704(e)(3), 21-4705(c)(3) and 21-4706(b).

Duration of Probation (Court Services or Community Corrections)

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. 21-4611(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	36	36	≤18	* ≤12	N/A	N/A	N/A	N/A	N/A	N/A

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7 and on the drug grid for severity levels 1 and 2. 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. 21-4611(c)(6). 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 five (5) years or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 21-4611(c)(8). Second, if the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. K.S.A. 21-4611(a) and (c)(7). Third, if the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid. K.S.A. 21-4611(c)(7).

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid and severity levels 3 and 4 on the drug grid. 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. 21-4611. K.S.A. 21-4611(c)(5).

Conditions of Probation

Court services and community corrections officers may recommend conditions of probation for offenders ordered to community placement. The maximum amount of time an offender can be incarcerated in a county jail as a condition of probation in a felony case is 60 days (with an additional maximum of 60 days in jail as a condition of a probation revocation), except for convictions for felony driving under the influence. K.S.A. 21-4603d(a)(3).

Target Population for Community Corrections (2000 Senate Bill 323)

K.S.A. 75-5291(a)(2) defines the target population of offenders for placement in Community Corrections programs. This target population consists of adult offenders convicted of felony offenses who meet one of the following criteria:

1. Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;

2. Offenders whose sentence falls within nondrug grid blocks 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;

3. 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;

4. 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;

5. Offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established as provided in K.S.A. 22-3716 prior to revocation to a state correctional facility;

6. Offenders who are determined to be "high risk or needs, or both" by the use of a statewide, mandatory, standardized risk assessment tool or instrument validated for community corrections placement (effective July 1, 2010);

7. Offenders who are placed in community correctional services programs as a condition of supervision following the successful completion of a conservation camp program;

8. Offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 21-4729 (2003 Senate Bill 123). K.S.A. 75-5291(a)(2).

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. 75-5291(a)(4). A public safety provision also allows direct placement to prison of offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established, as provided in K.S.A. 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. 75-5291(a)(5).

Target Population for Treatment (2003 Senate Bill 123)

K.S.A. 21-4603d(n) provides a nonprison sanction of certified drug abuse treatment under community corrections supervision for a defined target population of offenders. This target population is defined in K.S.A. 21-4729 and consists of **adult** offenders convicted of K.S.A. 65-4160 or 65-4162, who meet one of the following criteria:

1. Offenders whose offense is in the 4-E, 4-F, 4-G, 4-H or 4-I grids blocks of the drug grid and who have no prior conviction(s) of:
    a. K.S.A. 65-4142 (unlawful acts involving proceeds derived from violations of the uniform substances control act);
    b. K.S.A. 65-4159 (unlawful manufacturing or attempting such of any controlled substance);
    c. K.S.A. 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants);
    d. K.S.A. 65-4163 (unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances); or
    e. K.S.A. 65-4164 (unlawful acts relating to certain narcotic drugs),
    f. or any similar offense from another jurisdiction; or

2. Offenders whose offense is in the 4-A, 4-B, 4-C, or 4-D grids blocks of the drug grid and who have no prior conviction(s) of:
    a. K.S.A. 65-4142 (unlawful acts involving proceeds derived from violations of the uniform substances control act);
    b. K.S.A. 65-4159 (unlawful manufacturing or attempting such of any controlled substance);
    c. K.S.A. 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants);
    d. K.S.A. 65-4163 (unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances); or
    e. K.S.A. 65-4164 (unlawful acts relating to certain narcotic drugs),
    f. or any similar offense from another jurisdiction,

    if the offender's prior person felony conviction(s) were severity level 8, 9, or 10 or nongrid offenses and 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. K.S.A. 21-4729.

Offenders whose offense is classified in the 4-E or 4-F drug grid blocks but do not qualify for the certified drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. This must also be done prior to the revocation of a nonprison sanction for an offender whose offense is classified in the 4-E or 4-F drug grid blocks but does not qualify for the certified drug treatment program. K.S.A. 21-4603d(g).

The Secretary of Corrections may also make direct placement to Labette Correction Conservation Camp for offenders whose offense is classified in the 4-E or 4-F drug grid blocks if those offenders do not otherwise meet the requirements of K.S.A. 21-4729. K.S.A. 21-4603d(l).

On or after July 1, 2006, 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. 21-4729(h).

Presumptive 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. 21-4704(e)(2) and 21-4705(c)(2).

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; or,
- 20% good time for crimes of drug severity level 3 or 4 or nondrug severity level 7-10 committed on or after January 1, 2008. K.S.A. 2007 21-4706(a) and 21-4722(a)(2).

Any reduction in the prison sentence due to good time must be added to the postrelease supervision period to be served after the prison sentence is completed. K.S.A. 2007 21-4722(b).

In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision shall not negate the existence of such period of postrelease supervision. K.S.A. 21-4704(e)(2).

Border Boxes

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 3-E, 3-F, 3-G, 3-H or 3-I 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:

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

    a. the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or

    b. 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. 21-4704(f) and 21-4705(d).

Aggravated Habitual Sex Offender

K.S.A. 21-4642(a) provides that the sentence for an aggravated habitual sex offender shall be imprisonment for life without the possibility of parole in the custody of the secretary of corrections. An offender who is sentenced pursuant to this section shall not be eligible for parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence.

An "aggravated habitual sex offender" is defined as a person who, on and after July 1, 2006: (A) has been convicted in this state of a sexually violent crime; and (B) prior to the current conviction, has been convicted on at least two prior conviction events of any sexually violent crime. A "prior conviction event" is defined as one or more felony convictions of a sexually violent crime, occurring on the same day and within a single count. These convictions may result from multiple counts within an information or from more than one information. If a person crosses a county line and commits a felony as part of the same criminal act or acts, such felony, if such person is convicted, shall be considered part of the prior conviction event. K.S.A. 21-4642(c).

Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of corrections and the court shall state in the sentencing order of judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole. K.S.A. 21-4642(b).

Special Sentencing Rules

Public Safety Offenses:

1. Person Felonies 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. 21-4704(h).

2. Aggravated Battery Against a Law Enforcement Officer

The sentence for the violation of K.S.A 2006 Supp. 21-3415 (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. 21-4704(g)***.

3. Aggravated Assault Against a Law Enforcement Officer

The sentence for the violation of K.S.A 2006 Supp. 21-3411 (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. 21-4704(g)***.

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

K.S.A. 21-4704(k). 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.

11. Extended Jurisdiction Juvenile Imposed

Under K.S.A. 2007 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. 2007 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.*

Habitual or Repeat Offenses:

5. Persistent Sex Offender

The sentence for any persistent sex offender (as defined in K.S.A. 21-4704(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. 21-3502) and the offender has at least one prior conviction for rape in this state or a comparable felony from another state. K.S.A. 21-4704(j).

A prior conviction used to classify a defendant as a persistent sex offender may not again be used to calculate the defendant's criminal history category. K.S.A. 21-4710(d)(11), see also *State v. Taylor*, 27 Kan. App. 2d 62, 998 P.2d 123 (2000), affirmed *State v. Zabrinas,* 271 Kan. 422, 24 P.3d 77 (2001).

Example

- An offender's current crime of conviction is sexual exploitation of a child (K.S.A. 21-3516). The offender has one prior conviction of indecent solicitation of a child (K.S.A. 21-3510). The

offender's prior conviction will be used to determine the offender's status as a "persistent sex offender" and will not be used in calculating the offender's criminal history category. Therefore, the offender will have a criminal history score of 5-I (sentence doubled) if the offender has no other criminal convictions.

- An offender's current conviction is indecent liberties with a child (K.S.A. 21-3503). The offender has two prior convictions of indecent solicitation of a child (K.S.A. 21-3510). One prior conviction of indecent solicitation of a child will be used to determine the offender's status as a "persistent sex offender" and the other conviction will be used in calculating the offender's criminal history score. Therefore, the offender will have a criminal history score of 5-D (sentence doubled) if the offender has no other person/nonperson felony convictions.

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. 2007 Supp. 65-4159, is a severity level 1 drug felony and the sentencing court is required to 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. 21-4705(e).

26. Third or Subsequent Conviction for Drug Possession

The sentence for a third or subsequent felony conviction of K.S.A. 65-4160 or 65-4162, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section, **if**:

- the defendant has previously completed a certified drug abuse program;
- the defendant has previously been discharged from a certified drug abuse program; or
- the defendant has previously refused to participate in a certified drug abuse program, as provided in K.S.A. 2007 Supp. 75-52,144.

Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 21-4705(f). If the felony occurs on or after July 1, 2008, the sentence shall be presumed imprisonment.

13. Burglary of a Residence Committed When the Offender has a Prior Conviction for Burglary of a Residence or Non-Residence, or a Prior Conviction for Aggravated Burglary

The sentence for the violation of subsection (a) of K.S.A. 21-3715, burglary of a residence, when the offender has a prior conviction for the burglary of a residence or non-residence, or an aggravated burglary (K.S.A. 21-3716), shall be presumed imprisonment. K.S.A. 21-4704(l).

27. Burglary with Two or More Prior Convictions for a Felony Violation of Theft, Burglary or Aggravated Burglary

The sentence for a violation of K.S.A. 21-3715, burglary, when the offender has two or more prior burglary convictions or a combination of a prior conviction of burglary and an aggravated burglary (K.S.A. 21-3716) 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. 2008 Supp. 21-4704(p) [Effective July 1, 2008].

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

The sentence for a violation of K.S.A. 21-3701, theft, when the offender has three or more prior convictions for a felony violation of theft, burglary (K.S.A. 21-3715), or aggravated burglary (K.S.A. 21-3716) shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. K.S.A. 2008 Supp 21-4704 (p) [Effective July 1, 2008].

30. Substance Abuse Underlying Factor

The court may make findings that substance abuse is the underlying factor in the commission of crimes under #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. 2008 Supp. 21-4704(p) [Effective July 1, 2008].

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. 21-3705(b) shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2008 Supp. 21-4704(n) [Effective July 1, 2008].

16. 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. 21-3710(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. 21-4704(i).

The specific mandatory sentencing provisions of K.S.A. 21-3710 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. 21-3710(b).

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 30 or 45 day sentences as provided herein. K.S.A. 21-3710(b).

9. New Felony Committed While the Offender is Incarcerated and Serving a Sentence for a Felony, or While the Offender is on Probation, Assignment to a Community Correctional Services Program, 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. 21-4608 and 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. See ***K.S.A. 21-4603d(f)(1)*** and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001).

28. New Felony Committed While the Offender is Incarcerated in a Juvenile Correctional Facility for an Offense Which if Committed by an Adult Would be a Felony

K.S.A. 21-4603d subsection (f) was amended by 2006 Senate Bill 166 to create a special rule pertaining 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. 21-4603d(f)(2).

10. New Felony Committed While the Offender is on Release for a Felony (Felony Bond)

In this situation, if an offender is on release pursuant to article 28 of chapter 22 of the Kansas Statutes Annotate, ***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. 21-4608 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. 21-4603d(f)(3).

Nongrid Offenses:

6. Felony DUI

Felony driving under the influence as defined in K.S.A. 2007 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. 21-4704(i). However, for a fourth or subsequent DUI, an offender is required to serve a mandatory period of one year postrelease supervision under the custody of the secretary of corrections. Therefore, it is possible that an offender may serve time in a state correctional facility if the offender violates conditions of this postrelease supervision. K.S.A. 2007 Supp. 8-1567(g).

K.S.A. 8-1567 (DUI) was amended in the 2007 Legislative Session to provide that the court may order that the term of imprisonment imposed for a third, fourth or subsequent DUI violation be served in a state facility in the custody of the secretary of corrections in a facility designated for the provision of

substance abuse treatment pursuant to K.S.A. 21-4704. The person shall remain imprisoned in the state facility only while participating in the substance abuse treatment program and shall be released to the custody of the sheriff for execution of the balance of the term of imprisonment upon completion of or discharge from the substance abuse treatment program. K.S.A. 2007 Supp. 8-1567.

8. Felony Domestic Battery

Felony domestic battery, as defined in K.S.A. 21-3412a, 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. 21-4704(i).

21. Animal Cruelty

Felony animal cruelty, as defined in K.S.A. 21-4310(a)(1) and (d)(2)(second or subsequent conviction of a violation of (a)(2), (a)(3), (a)(4), or (a)(5)), 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. 21-4310(d)(1) or (d)(2). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 21-4704(i) and 21-4310.

Felony animal cruelty involving a working or assistance dog, as defined in K.S.A. 21-4318(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. 2006 Supp. 21-4310(c). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2006 Supp. 21-4704(i) and 21-4318.

Finance Offenses Apply:

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 as defined in subsection (a) which occur in 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. 2007 Supp. 40-2,118(e).

15. Kansas Securities Act

Any violation of the Kansas 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 17-12a508(a)(4).

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. 2007 Supp. 9-2203(c).

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. 50-1013(a).

Special Sentencing Considerations

Correctional Conservation Camps

The sentencing court shall consider placement of an offender in the Labette Correctional Conservation Camp, conservation camps established by the Secretary of Corrections pursuant to K.S.A. 75-52,127, or a community intermediate sanction center in the following instances:

- Prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guidelines 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;

- 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 and whose offense does not meet the requirements of K.S.A. 21-4729;

- Prior to revocation of a nonprison sanction of a defendant whose offense is classified grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes and whose offense does not meet the requirements of K.S.A. 21-4729; 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.

A 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 the conservation camp's or a community intermediate sanction center's placement criteria, unless the sentencing court states on the record the reasons for not placing the offender in a conservation camp or a community intermediate sanction center. K.S.A. 21-4603d(g).

Revocation of Nonprison Sanction of Certified Drug Abuse Treatment (K.S.A. 21-4729)

If the offender 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 or is convicted of a new felony, the offender shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 21-4705. K.S.A. 21-4603d(n) and 21-4729(f). In addition, K.S.A. 21-4610 grants the district court broad discretion concerning the conditions and revocation of probation. Therefore, condition violations may also result in discharge from the mandatory drug abuse treatment. See *State v. Gumfory*, 281 Kan. 1168, (June 9, 2006) (holding that K.S.A. 21-4729(f)(1)(A) and (B) do not set forth exclusive grounds for revocation of an SB 123 sentence.) If the offender is revoked, upon completion of the underlying prison sentence, the offender shall not be subject to a period of postrelease supervision and the amount of time spent participating in such program shall not be credited as time against the underlying prison sentence. K.S.A. 21-4603d(n) and 21-4705.

Multiple Convictions; Sentences on Same Date

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. 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. 21-4608(c), (d) and (e). *The sentencing court must state on the record whether the sentence is to be served concurrently or consecutively.* K.S.A. 21-4608 and K.S.A 21-4720(b).

Limitations on Concurrent and Consecutive Sentences for Multiple Convictions

Consecutive sentencing is mandatory in certain circumstances if it will not result in a manifest injustice. K.S.A. 21-4720(a). Pursuant to K.S.A. 21-4608, 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;

- A sentence for a felony committed while the offender was on felony bond;

- A sentence for a felony committed while the offender was incarcerated and serving a sentence for a felony in any place of incarceration. K.S.A. 21-4608(c), (d) and (e).
    - 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 Kansas Parole 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. 21-4608(e)(2).

When consecutive sentences are imposed for multiple convictions in one case, stemming from multiple counts brought in one charging instrument, the total prison sentence imposed cannot exceed twice the base sentence. It is not necessary to reduce the duration of any of the non-base sentences in order to satisfy this rule because the limit applies only to the total controlling sentence. K.S.A. 21-4720(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.

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. 21-4720(b)(2).

When an offender is sentenced for multiple convictions of crimes carrying both presumptive prison and nonprison sentences, if the sentence for the primary crime is prison, the entire imprisonment term of consecutive sentences, will be served in prison. K.S.A. 21-4720(b)(6).

The postrelease supervision period will be the longest supervision period imposed for any of the multiple convictions, including the lifetime supervision period carried by a life sentence imposed for an off-grid crime. Even in the case of consecutive prison sentences, postrelease supervision periods will not be aggregated. In addition, in cases of multiple nonprison sentences, even if the underlying prison sentences are ordered to run consecutively, the nonprison terms shall not be aggregated or served consecutively. However, if the nonprison term is revoked the offender will serve the prison terms consecutively. K.S.A. 21-4720(b)(4), (b)(7) and (b)(8).

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. 21-4720(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.
- 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, therefore, in the instance of sentencing with the drug grid and nondrug grid, one crime having a presumption of imprisonment and one having a presumption of probation, the crime which presumes imprisonment shall be the primary crime.

- When the offender is convicted of crimes sentenced on both the 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.

The base sentence is where the severity level of the primary crime and the criminal history score intersect on the appropriate guidelines grid and shall be the presumed sentence in months. The base sentence will have the full criminal history score assigned. However, non-base sentences will not have criminal history scores applied and shall be calculated in the criminal history I column of the grid according to the severity level of the crime. K.S.A. 21-4720(b)(3) and (b)(5).

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. See K.S.A. 21-4718(a)(1) and (a)(3).

Upward durational departure sentencing was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face." In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to provide for a procedure that allows the jury to determine all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. These amendments became effective upon publication on June 6, 2002.

Facts that would increase the penalty beyond the statutory maximum must now be submitted to a jury. K.S.A. 21-4716(b). A county or district attorney seeking an upward durational departure sentence must file such motion not less than 30 days prior to the date of trial unless the trial is to take place in less than 30 days then such motion shall be filed within 5 days from the date of the arraignment. K.S.A. 21-4718(b)(1). The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented to the jury during the trial of the matter or in a jury proceeding following the trial. K.S.A. 21-4718(b)(2). The determination of the aggravating factors shall be by a unanimous jury vote, on a special jury verdict form and based on the reasonable doubt standard. K.S.A. 21-4718(b)(4) and (b)(7).

At the conclusion of the departure hearing or within 20 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. 21-4718(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. 21-4718(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 <u>only if</u> 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. 21-4716(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. 21-4716(d)(1)-(4).

Mitigating Factors - K.S.A. 21-4716 (c)(1)(A) - (E) and (e)

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

A. The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction;

B. 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;

C. 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;

D. 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

E. The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense. K.S.A. 21-4716(c)(1)(A) - (E).

Subsection (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."

Aggravating Factors - K.S.A. 21-4716(c)(2)(A) - (H)

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

A. 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;

B. 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;

C. 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;

D. The offense involved a fiduciary relationship which existed between the defendant and the victim;

E. 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;

F. 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;

G. The defendant was incarcerated at the time the crime was committed; or

H. 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.

Additional Aggravating Factors for Drug Grid - K.S.A. 21-4717(a)(1) – (4)

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:

1. 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:
    a. The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity;
    b. The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity;
    c. The presence of drug transaction records or customer lists that indicate a drug sale activity of major size;
    d. 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;
    e. Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense;
    f. Possession of large amounts of illegal drugs, or substantial quantities of controlled substances;

g. A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation or delivery of controlled substances.

2. The offender possessed illegal drugs:
    a. With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
    b. 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;
3. 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;
4. The offender was incarcerated at the time the crime was committed. K.S.A. 21-4717(a)(1) - (4). In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement. K.S.A. 21-4717(b).

Sex Offenders Postrelease Supervision Departure

The sentencing court may depart from the normal postrelease supervision period to a period of up to 60 months if it is found that the primary crime of conviction is sexually violent or sexually motivated and the court states on the record substantial and compelling reasons to impose a departure. K.S.A. 22-3717(d)(1)(D)(i) and (ii). The sentencing court may order a psychological evaluation be prepared and the recommended program be completed by the offender. The department of corrections or the parole board shall ensure that court ordered sex offender treatment be carried out. K.S.A. 22-3717(d)(1)(D)(iv).

Durational and Dispositional 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. 21-4719(b).

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. 21-4719(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. 21-4719(c)(2). However, this requirement does not apply in the case of a downward dispositional and durational departure combination.

K.S.A. 21-4719(a) was amended during the 2008 Legislative Session to provide that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; and further provides that the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to less that 50% of the center of the range of the sentence for such crime.

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:

1. 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. 21-4720(c)(1).
2. 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. 21-4720(c)(2).
3. 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 means that the total prison term of the consecutive sentences must also remain within the limit of double the base sentence including the departure sentence. K.S.A. 21-4720(c)(3).

Example

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 @ 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 x 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 so-called "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.

Reporting Dispositions to the Kansas Bureau of Investigation and 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. 22-3426(f). 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. 21-4714 to the Kansas Sentencing Commission within 30 days after sentencing. K.S.A. 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 Revocation form as approved by the Kansas Sentencing Commission shall be completed by the court. K.S.A. 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 Revocation to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 74-9101(b)(5).

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. 21-3408, 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. 22-3439(c).

Likewise in the municipal courts, the municipal judge shall ensure that information concerning dispositions of city ordinance violations that result in convictions comparable to class A and B misdemeanors 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).

The Kansas Sentencing Commission staff will review felony Journal Entries for possible illegal sentences. The staff promptly will 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.

CHAPTER VII: APPEALS

Appellate Review Principles – K.S.A. 21-4721

A departure sentence is subject to appeal by the defendant or the state, to the appellate courts in accordance with rules adopted by the Supreme Court. K.S.A. 21-4721(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. 21-4721(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. 21-4721(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. 21-4721(d). 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. 21-4721(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. 21-4721(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. 21-4720 concerning the sentencing of multiple conviction cases. K.S.A. 21-4720(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. 21-4721(i).

CHAPTER VIII: COMMUNITY SANCTIONS AND POSTRELEASE SUPERVISION

Postrelease Supervision

Upon completion of the prison portion of the imposed sentence, most inmates will be released to serve a term of postrelease supervision, plus the amount of good time earned and retained while imprisoned. K.S.A. 22-3717(a). Under the terms of 2000 House Substitute for Senate Bill 323, effective May 25, 2000, for crimes committed on or after July 1, 1993, and sentenced under the KSGA, postrelease supervision is:

- 36 months for felonies classified in severity levels 1 through 4 on the nondrug grid and felonies classified in severity levels 1 and 2 on the drug grid;
- 24 months for felonies classified in severity levels 5 and 6 on the nondrug grid and felonies classified in severity level 3 on the drug grid;
- 12 months for felonies classified in severity levels 7 through 10 on the nondrug grid and felonies classified in severity level 4 of the drug grid except for some K.S.A. 65-4160 or 65-4162 offenses committed on or after November 1, 2003.

Severity Levels	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**
Nondrug	36	36	36	36	24	24	12	12	12	12
Drug	36	36	24	12	N/A	N/A	N/A	N/A	N/A	N/A

Offenders convicted of severity levels 1 through 6 on the nondrug grid and severity levels 1 through 3 of the drug grid may have their period of postrelease supervision reduced up to 12 months based on the offender's performance under supervision. Offenders convicted of severity levels 7 through 10 of the nondrug grid and severity level 4 of the drug grid may have their period of postrelease supervision reduced up to six (6) months based on the offender's performance under supervision. See K.S.A. 22-3717.

However, under the language found in K.S.A. 1993 Supp. 22-3717, for crimes committed prior to April 20, 1995, postrelease supervision lengths, for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, were for a period of 24 months. Despite the retroactive application of the changes made to postrelease supervision periods under K.S.A. 22-3717 in the 2000 Kansas Legislative Session, it appears 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, will continue to receive the postrelease supervision periods applicable for those crimes at the time the crimes were committed.

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term will determine the period of supervision for offenders ordered to serve more than one sentence, whether concurrent or consecutive. K.S.A. 22-3717(d)(1)(F).

If an offender is convicted of a sexually motivated crime or sexually violent crime, as defined in K.S.A. 22-3717(d)(1)(F)(2)(A) through (L), 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. 22-3717(d)(1)(D)(i) and (ii). The Kansas Parole Board may, in its discretion, grant early discharge from this extended postrelease supervision period upon completion of any treatment programs 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. 22-3717(d)(1)(D)(vi). Offenders convicted of crimes deemed "sexually violent or sexually motivated" must register with local law enforcement agencies according to the habitual sex offender registration act, K.S.A. 22-4901 through 22-4910, and amendments thereto. K.S.A. 22-3717(d)(1)(D)(vii).

The Parole Board will continue to review release plans. However, the Board will be unable to make any changes regarding release dates for offenders sentenced under the KSGA. K.S.A. 22-3717(i).

For convictions of certain child sex offenses wherein the offender was 18 years of age or older and the victim was less than 14 years of age, upon release from a mandatory minimum imprisonment term, the offender will be subject to lifetime postrelease supervision and lifetime electronic monitoring. K.S.A. 22-3717(d)(1)(G) and (u).

If an offender is revoked from a nonprison sanction and a prison sentence is imposed, in most cases the offender will not be required to complete a postrelease period. K.S.A. 22-3716(e).

Violations of Conditions of Release; Probation or Postrelease Supervision

Probation

Notwithstanding the provisions of any other law to the contrary, an offender whose nonprison sanction is revoked and a term of imprisonment imposed pursuant to either the sentencing guidelines grid for nondrug or drug crimes shall not serve a period of postrelease supervision upon the completion of the prison portion of that sentence. However, this does not apply to:

- Offenders sentenced to a nonprison sanction pursuant to a dispositional departure;
- Offenders whose offense falls within a border box of either the sentencing guidelines grid for nondrug or drug crimes;
- Offenders sentenced for a "sexually violent crime" as defined by K.S.A. 22-3717, and amendments thereto;
- Offenders whose nonprison sanction was revoked as a result of a conviction for a new misdemeanor or felony offense; or
- Offenders who are serving or are to begin serving a sentence for any other felony offense that is not excluded from postrelease supervision by this subsection on the effective date of this subsection.

See K.S.A. 22-3716(e).

When an offender is sentenced for a felony committed while the offender was on felony probation (or other felony nonprison status), a consecutive sentence generally is mandated, and the sentencing court may sentence the offender to prison for the new offense even if that offense otherwise presumes a nonprison sentence. This is not considered a departure and does not require additional substantial and compelling circumstances on the record. K.S.A. 21-4603d(f) and 22-3716(b).

Postrelease Supervision

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. 75-5217(b). If the violation results from a conviction of a new felony, upon revocation of postrelease supervision, the offender will serve the entire remaining balance of the postrelease supervision period in prison even if the new conviction does not result in a new prison term, including the amount of good time which had been earned before release. K.S.A. 75-5217(c). If an offender is returned to prison with a new misdemeanor conviction, upon revocation, the offender shall serve a period of confinement to be determined by the Kansas parole board, which shall not exceed the remaining balance of the period of postrelease supervision. K.S.A. 75-5217(d).

Conversion of Sentence for a Crime Committed After July 1, 1993, but Before 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:

1. Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
2. 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).

Conversion of Sentence for a Crime Committed After March 24, 1994

On or after March 24, 1994, if an offender is sentenced to prison for a crime committed on or after July 1, 1993, while on probation, parole, conditional release or in a community corrections program, for a crime committed prior to July 1, 1993, and the offender is not eligible for retroactive application of the KSGA under K.S.A. 21-4724, the new sentence will not be aggregated with the old sentence. Instead, the offender will not begin to serve the new sentence until he or she is paroled, or reaches the conditional release date on the old sentence. K.S.A. 22-3717(f).

If the offender was past the conditional release date at the time the new offense was committed, the new sentence shall begin when the offender is ordered released by the Kansas Parole Board or reaches the maximum expiration date of the old sentence, whichever is earlier. Then the offender will begin to serve the new sentence, which will also govern the postrelease supervision term. However, if the old sentence was life or an indeterminate term with life as the maximum, the offender will remain under supervision for life, or until discharged by the Parole Board. K.S.A. 22-3717(f).

CHAPTER IX: RETROACTIVITY

Retroactive Application of Sentencing Guidelines

The retroactive provision of the KSGA applies to offenders incarcerated 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).

K.S.A. 21-4724(b)(1) also contains a provision concerning the modification of sentences for individuals convicted of pre-July 1, 1993, crimes that, had the crime been committed after July 1, 1993, would have been classified in grid blocks 3-H, or 3-I of the drug grid. K.S.A. 21-4724(b)(1) provides that such drug grid 3-H or 3-I crimes may be converted to KSGA determinate sentences "*pursuant to the provisions of subsection (c) of K.S.A. 21-4705, and amendments thereto.*" This provision created the commonly referred to "small sale" exception for marijuana which allowed for the conversion of sentences equivalent to 3-H or 3-I drug grid sentences for only those individuals who fit within the "small sale" of marijuana definition that was found at K.S.A. 21-4705(c). See *State v. Hackler*, 21 Kan. App. 2d 325, 900 P.2d 241 (1995). However, the changes made in K.S.A. 1996 Supp. 21-4705 eliminated the definition of a "small sale" of marijuana exception from subsection (c) of the statute, and thus effectively eliminated the possibility of having a pre-guidelines conviction that would equate to a 3-H or 3-I drug grid conviction converted to a determinate sentence.

2000 Retroactivity Provisions

Legislation passed during the 2000 Kansas Legislative Session, found at K.S.A. 2000 Supp. 21-4611(d), also contained provisions with retroactive application for sentences under the Kansas Sentencing Guidelines Act. For a full description of those provisions, please see the **"TIMELINE OF CERTAIN IMPORTANT EVENTS RELATED TO THE KSGA"** located on the KSC website at www.kansas.gov/ksc.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT

Crime severity and criminal history are the main factors which control sentencing decisions

The KSGA provides invaluable guidance to the sentencing court in the form of a rational sentencing structure based on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids reflect the sentences that are presumed to be appropriate in the vast majority of cases when these two factors are taken into consideration to determine whether the offender should be sent to prison and for what length of time.

Sentences imposed are served

The terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA are of a pre-established, binding duration. In other words, the offender will actually serve the sentence imposed by the sentencing court. The offender may earn good time in an amount no greater than:

- 20% for crimes committed on or after July 1, 1993 and prior to April 20, 1995;
- 15% for crimes committed on or after April 20, 1995; or,
- 20% for crimes of drug severity level 3 or 4 or, nondrug severity level 7-10, committed on or after January 1, 2008. K.S.A. 2007 Supp. 21-4706(a) and 21-4722(a)(2).

Although good time serves to reduce the portion of the sentence that must be served in prison, the amount of good time earned is added to the period of postrelease supervision, so that the entirety of the term will not be affected or reduced. K.S.A. 2007 21-4722(b).

In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision shall not negate the existence of such period of postrelease supervision. K.S.A. 21-4704(e)(2).

Guidelines provide objectivity but 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 upward durational departure 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. Evidence of aggravating circumstances is either presented during the trial of the matter or in a bifurcated jury proceeding following the trial. See K.S.A. 21-4716 and 21-4618.

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 and this authority allows imposition of a sentence up to twice the maximum presumptive term of imprisonment if substantial and compelling reasons for the departure are adequately stated on the record. See K.S.A. 21-4720.

Forms help make a record

In order to assist the sentencing court in making a complete record of all aspects of the sentencing proceedings, the Journal Entry of Judgment form approved by the Kansas Sentencing Commission facilitates inclusion of all requisite information and findings for the record in a concise and efficient manner. Under statute, each KSGA Journal Entry of Judgment must be on a form approved by the Kansas Sentencing Commission and this form must be used for all felony cases sentenced on or after July 1, 1993. K.S.A. 22-3426. In addition, the sentencing court must forward a copy of the Journal Entry of Judgment, attached together with the Presentence Investigation Report to the Kansas Sentencing Commission within thirty (30) days of the sentencing. K.S.A. 22-3439(a).

Each Journal Entry of Probation Revocation Hearing must also be on a form approved by the Kansas Sentencing Commission and be sent to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 22-3426a(c) and 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. K.S.A. 74-9101(b)(5). Information for felony probation revocations based upon crimes committed on or after July 1, 1993 (and all class A and class B misdemeanor crimes and assault as defined in K.S.A. 21-3408, committed on or after July 1, 1993), must also be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. See K.S.A. 22-3439(c).

Court not bound by 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. 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. 21-4713 and 21-4707(b)(4).

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. 22-3210, K.S.A. 21-4713 and 21-4707(b)(4).

Informing the offender of the possible penalties when accepting a guilty or *nolo contendere* plea

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. See K.S.A. 21-4707 and K.S.A. 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. See K.S.A. 21-4707(c)(4).

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 as is available. See K.S.A. 21-4714(a).

Challenges to criminal history; other hearings

If the offender does not agree in open court to the criminal history as reflected in the Criminal History Worksheet/Presentence Investigation Report and gives written notice of any errors contained there, the prosecutor will have to prove the disputed elements by a preponderance of the evidence at the hearing, and the sentencing court is authorized to give the prosecution reasonable time to produce such evidence. The offender must specify the exact nature of any alleged error if he/she objects to his/her criminal history worksheet. See K.S.A. 21-4715(c).

If any party seeks imposition of a departure sentence, a hearing on the matter must be held, and the parties must be given adequate time to prepare and present their arguments regarding the proposed departure. Written arguments may be submitted and oral arguments presented, and the sentencing court must review any victim impact statement. Copies of the Presentence Investigation Report must be provided to the parties prior to the hearing. The sentencing court will have up to twenty (20) days to rule. K.S.A. 21-4718(a)(1), (2). Any departure from the presumptive sentence must be supported by substantial and compelling reasons stated on the record. See K.S.A. 21-4716(a), 21-4717(a), 21-4720(c)(1) and K.S.A. 21-4719(c)(2).

Appeals

Any sentence imposed by the sentencing court which is within the presumptive sentencing range provided for the crime on the proper grid, or which results from a plea agreement between the parties and is approved by the sentencing court on the record, is generally not appealable unless the determination of the severity level of the crime, or the criminal history of the offender are brought into question. A

departure sentence is appealable to the extent that the reasons justifying the departure must be found to be supported by the evidence in the record and are substantial and compelling. Otherwise, review of departure sentences on appeal is limited to claims that the sentence resulted from partiality, prejudice, oppression, or corrupt motive. K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 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. 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.

SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA

1. ANNOUNCE THE CASE.

2. HAVE COUNSEL STATE THEIR APPEARANCES FOR THE RECORD.

3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.

A. Specify whether a plea agreement was involved, if any of the charges were dismissed and whether the case involved a bench trial or a trial by jury.

4. HAVE BOTH PARTIES ACKNOWLEDGE RECEIPT OF THE PRESENTENCE INVESTIGATION REPORT (PSI).

5. ASK BOTH PARTIES IF THEY HAVE CHALLENGES TO THE CRIMINAL HISTORY.

A. Require the parties to answer on the record.

B. Address the defendant personally and ask whether he or she admits the criminal history set out in the Criminal History Worksheet. See K.S.A. 2007 21-4715.

C. If challenges to the criminal history exist, 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.

1. Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.

2. 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).

3. 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).

D. If changes are made to the defendant's criminal history, the court should also make the actual changes on the Criminal History Worksheet.

E. If the defendant's criminal history score changes due to a revision, the court should offer counsel a continuance to file a departure request or other presentence preparation required by the change(s).

6. ANNOUNCE THE CRIMINAL HISTORY SCORE.

7. ASK THE PARTIES IF THERE IS ANY LEGAL REASON WHY SENTENCE SHOULD NOT BE PRONOUNCED AT THIS TIME.

8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.

A. There is no prescribed proceeding for a departure hearing under K.S.A. 2007 21-4718.

B. A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.

C. If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, "or within 20 days thereafter." See K.S.A. 2007 21-4718(a)(2).

9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.

A. 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. See K.S.A. 2007 21-4718(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 WITNESSES FOR EITHER PARTY TO TESTIFY.

A. Sentencing for an upward durational departure was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face." Facts that would increase the penalty beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt. K.S.A. 2007 21-4716(b).

B. A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or, within 5 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. 2007 21-4718(b)(1).

C. 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. 2007 21-4718(b)(2).

D. 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. 2007 21-4718(b)(4) and (b)(7).

11. ASK IF ANY VICTIMS OR OTHERS WISH TO SPEAK.

A. 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.

12. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION.

A. Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow any statements or evidence.

13. ANNOUNCE THE BASE SENTENCE FROM THE APPROPRIATE GRID.

A. "I hereby establish Count __ as the base sentence. For the offense of _____, a severity level __ (person or nonperson) __ (drug or nondrug) felony, on which the defendant has a criminal history score of __, thus placing him/her in grid block ____. I hereby sentence the defendant to a term of __ months in the custody of the Secretary of Corrections. On this sentence the defendant may earn up to __ months of good time credit and would be subject to __ months of post-release supervision." If a fine is to be imposed, also announce the fine and the reasons for the fine. See K.S.A. 21-4607.

14. ANNOUNCE ANY DEPARTURES FROM THE BASE SENTENCE AND THE REASONS FOR THE DEPARTURE(S).

A. Statutory mitigation and aggravation factors may be found at K.S.A. 2007 21-4716 (nondrug) and K.S.A. 2007 21-4717 (drug).

B. Sentencing courts must provide separate reasons based upon facts in the record, for any/every durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).

C. Reasons for departure must be "substantial and compelling." See K.S.A. 2007 21-4716(a), 21-4717(a) and K.S.A. 21-4719(c)(2). If the court is imposing a durational postrelease supervision departure under K.S.A. 2007 22-3717(d), specifically state on the record the substantial and compelling reasons relied upon to impose a departure. See *State v. Anthony*, 273 Kan. 726 45 P.3d 852 (2002).

D. Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. K.S.A. 2007 21-4718(a)(4).

E. For sex offenders, a post-release supervision period of up to 60 months may be ordered. K.S.A. 2007 22-3717(d)(1)(D)(i). When imposing a durational postrelease supervision departure under K.S.A. 2007 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).

15. IF A SPECIAL RULE APPLIES WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED.

Special Sentencing Rules

K.S.A. 2007 21-4704(h)	Person felony committed with a firearm – presumed prison.
K.S.A. 2007 21-4704(g)	Aggravated battery on a LEO, ***committed prior to July 1, 2006,*** if criminal history is 6H or 6I – presumed prison.
K.S.A. 2007 21-4704(g)	Aggravated assault on a LEO, if criminal history is 6H or 6I – presumed prison.
K.S.A. 2007 21-4704(k)	Felony committed for the benefit of a criminal street gang – presumed prison.
K.S.A. 2007 21-4704(j)	Persistent sex offender if current conviction is presumed prison double the maximum duration.
K.S.A. 2007 21-4704(i)	Felony DUI, third, fourth or subsequent conviction – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 8-1567, term of imprisonment not to be served in KDOC.
K.S.A. 2007 21-4704(i)	Felony domestic battery, third or subsequent conviction within five years – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-3412a(b)(3), term of imprisonment not to be served in KDOC.
K.S.A. 2007 21-4603d(f)	New crime committed while incarcerated and serving a sentence for a felony or while on probation, assignment to a community correctional services program, parole, conditional release, or postrelease supervision for a felony – new sentence **shall** be consecutive to old pursuant to K.S.A. 21-4608 and the court **may** impose a prison sentence even if presumption is nonprison.
K.S.A. 2007 21-4603d(f)	***New crime committed while incarcerated in a juvenile correctional facility for an offense that would have been a felony if committed by an adult – presumed prison.***
K.S.A. 2007 21-4603d(f)	New felony committed while on felony bond, ***KS or other jurisdiction*** – new sentence **may** be consecutive to old pursuant to K.S.A. 21-4608(d) and the court **may** impose a prison sentence even if presumption is nonprison.
K.S.A. 2007 38-2347	Extended jurisdiction juvenile imposed– both juvenile and adult K.S.A. 2007 38-2364 sentences imposed, adult sentence stayed

	conditioned on successful completion of juvenile sentence.
K.S.A. 2007 21-4705(e)	Second or subsequent conviction for manufacture, or the attempted manufacture of a controlled substance – presumed prison, twice the maximum duration.
K.S.A. 2007 21-4705(f)	Third or subsequent possession of a controlled substance in violation of K.S.A. 2006 Supp. 65-4160 or K.S.A. 65-4162 presumed prison.
K.S.A. 2007 21-4704(l)	Residential burglary after a prior residential or a non-residential burglary or an aggravated burglary conviction – presumed prison.
K.S.A. 2007 21-4704(l)	***Burglary with two prior burglary convictions or a combination of a prior burglary and an aggravated burglary – presumed prison.***
K.S.A. 2007 Supp.17-12a508(a)(5)	Any violation of the Kansas Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of $25,000 or more – presumed prison.
K.S.A. 2007 21-4704(i)	Second forgery conviction, if criminal history is I to C – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-3710(b)(3), term of imprisonment not to be served in KDOC.
K.S.A. 2007 21-4704(i)	Third or subsequent forgery conviction, if criminal history is I to C – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-3710(b)(4), term of imprisonment not to be served in KDOC.
K.S.A. 2007 Supp. 9-2203(c)	Second or subsequent conviction of a violation of the Mortgage Business Act, K.S.A. 9-2201 *et. seq.* – presumed prison.
K.S.A. 2007 Supp. 50-1013(a)	Any violation of the Loan Brokers Act, K.S.A. 50-1001 *et. seq.*, resulting in a loss of $25,000 or more – presumed prison.
K.S.A. 2007 21-4704(i)	Felony animal cruelty, intentional and malicious violation of K.S.A. 21-4310(a)(1) – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-4310(d)(1), term of imprisonment not to be served in KDOC.
K.S.A. 2007 21-4704(i)	Felony animal cruelty, intentional, second or subsequent violation of K.S.A. 21-4310(a)(2) – (a)(5) – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A.

	21-4310(d)(2), term of imprisonment not to be served in KDOC.
K.S.A. 2007 21-4704(i)	Felony animal cruelty, working/assistance dogs, violation of K.S.A. 21-4318(a) – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-4318(c), term of imprisonment not to be served in KDOC.
K.S.A. 2007 Supp. 40-2,118	***Any combination of fraudulent insurance acts occurring within 6 consecutive months and involving $25,000 or more – presumed prison.***

16. IF A DURATIONAL DEPARTURE IS GRANTED, THE TOTAL LENGTH OF THE DEPARTURE SENTENCE CANNOT EXCEED TWICE THE BASE SENTENCE.

See K.S.A. 2007 21-4720(b)(4).

17. ANNOUNCE ALL OTHER SENTENCES AND WHETHER EACH SENTENCE IS CONCURRENT OR CONSECUTIVE TO THE BASE SENTENCE.

See K.S.A. 2007 4720(b).

A. 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. 21-4608(c), (d) and (e). K.S.A. 21-4608(a).

B. The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The "Double-Double" Rule is found at K.S.A. 2007 21-4720(b)(4) and was discussed and applied in *State v. Peterson*, 22 Kan. App. 2d 576, 920 P.2d 463 (1996).

C. Only the primary crime will have the full criminal history applied. Non-base crimes will have a criminal history score of "I" applied, regardless of whether they are to run concurrently or consecutively. K.S.A. 2007 21-4720(b)(5), see also *State v. Bowen*, 20 Kan. App. 2d 576, 890 P.2d 374 (1995).

18. ANNOUNCE WHETHER PROBATION OR COMMUNITY CORRECTIONS PLACEMENT IS GRANTED. IF DEPARTING FROM A PRESUMPTIVE DISPOSITION, STATE THE REASONS ON THE RECORD. ANNOUNCE THE CONDITIONS AND THE DURATION OF PROBATION.

In the event the offender is sentenced for a first or second violation of K.S.A. 65-4160 or K.S.A. 65-4162, and the offender is eligible for certified drug abuse treatment under K.S.A. 21-4729 (2003 Senate Bill 123), the offender should be informed on the record that under the provisions K.S.A. 21-4729: certified drug abuse treatment may last for a period of up to 18 months; the offender may be responsible for repayment of the costs of treatment which will be determined by the sentencing court after an assessment by community corrections; if the offender is unsuccessfully discharged or voluntarily quits the mandatory treatment, the offender would be subject to the entire underlying prison sentence with no jail time credit for time spent in treatment; every condition violation shall be subject to some form of nonprison sanctions (i.e., county jail time, fines, community service,

intensified treatment, house arrest, electronic monitoring, etc.); absent a judicial finding, condition violations alone will not result in discharge from treatment; and upon the successful completion of a certified drug abuse treatment program the offender will be discharged and not subject to postrelease supervision.

19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING IF THIS IS IN DISPUTE.

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. 2007 21-4614 and K.S.A. 21-4614a.

21. ADVISE THE DEFENDANT THAT HE OR SHE MAY HAVE RIGHTS OF EXPUNGEMENT UNDER K.S.A. 2007 21-4619.

22. IF THE CASE WAS TRIED, OR IF YOU HAVE RULED ADVERSELY TO THE DEFENDANT AT THE HEARING, ADVISE THE DEFENDANT OF HIS OR HER RIGHT TO APPEAL UNDER K.S.A. 21-4721.

23. ADVISE THE DEFENDANT OF THE OBLIGATION TO REGISTER AS A SEX OFFENDER, IF APPLICABLE.

See K.S.A. 2007 22-4905(b)(1) and (b)(2)(A).

24. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.

See K.S.A. 2007 21-4204(a)(2) through (a)(4).

25. 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. 2007 21-4615. Anyone convicted of a felony on or after 07/01/02 may not vote until his or her "sentence" is completed. This specifically includes a sentence of probation.

26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF 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 AND/OR COMMUNITY CORRECTIONS IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND HOW TO REPORT TO THOSE AGENCIES.

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. See K.S.A. 2007 21-4715.

Plea agreements

The prosecution may enter into plea negotiations and agreements with the offender, although there are some limitations on the type of agreement that can be reached. An agreement by the prosecutor not to allege prior convictions that will enhance the crime severity level or will affect the criminal history of the offender is **impermissible**. However, the prosecutor may agree to a dismissal of some charges or counts in return for a plea by the offender to the charged offense or to a lesser or related charge. The prosecution may also agree to file or not to file a particular charge or count, to make a recommendation for a particular sentence within the appropriate sentencing range on the grid, or to make a recommendation for a departure sentence where substantial and compelling departure factors exist and are stated on the record. See K.S.A. 2007 22-3210, K.S.A. 21-4713 and 21-4707.

Departure hearings

The prosecution may file a motion alleging that substantial and compelling aggravating circumstances exist which call for a more severe sanction than the presumptively appropriate sentence provided by the guidelines. If the grid establishes a presumptive nonprison sentence for the crime of conviction, the prosecution may seek a dispositional departure in the form of a prison sentence. If the grid establishes a presumptive prison sentence within the range of time provided within the appropriate grid block, the prosecution may seek an upward durational departure in the form of a longer prison sentence. The prosecution is also free to seek a downward dispositional or durational departure based on the existence of substantial and compelling mitigating circumstances. The KSGA contains non-exclusive lists of aggravating and mitigating circumstances on which motions for departures can be based. See K.S.A. 2007 21-4716 and 21-4717.

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 departures. However, both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 subsequently were amended to correct the upward durational departure 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. See K.S.A. 2007 21-4716 and 21-4618.

Written and/or oral arguments may be presented to the sentencing court in support of any motion by the prosecution for a departure from the presumptive guidelines sentence or in response to any such motion by the offender when the matter of the proposed departure is set for hearing. The prosecution will have the duty to notify the victim(s) or their families of any departure hearings. See K.S.A. 2007 21-4718, 21-4720 and K.S.A. 21-4719.

Definite terms of sentence imposed

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of specific duration, the prosecutor will be able to inform the victim(s) and their families about the amount of time the offender will serve in definite terms.

Using the Journal Entry of Judgment form to assist the court in making a proper record

The prosecution can also help the sentencing court to make a complete record of all phases of the sentencing proceedings, which are required by the guidelines through use of the Journal Entry of Judgment form approved by the Kansas Sentencing Commission. The use of the Journal Entry form is mandated by the KSGA and it provides guidance in conducting the sentencing process by including all essential information and findings on the record. See K.S.A. 2007 22-3426. This form must be used for all felony cases sentenced on or after July 1, 1993. In addition, the court must forward a copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2007 21-4714, to the Kansas Sentencing Commission within 30 days of sentencing. See K.S.A. 2007 22-3439.

All revocation of probation Journal Entries must be on a form approved by the Kansas Sentencing Commission (i.e., the Journal Entry of Probation Revocation Hearing) and must be sent to the Kansas Sentencing Commission within 30 days of final disposition. See K.S.A. 2007 22-3426a(c) and 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2007 74-9101(b)(5). Information for felony probation revocations, which do not result in imprisonment in the KDOC, must be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. K.S.A. 2007 22-3439(c).

Appeals

The prosecution may appeal when the sentencing court imposes a sentence that constitutes an unfavorable departure. If the sentencing court imposes a nonprison sentence that constitutes a departure because the guidelines establish a presumption for a prison sentence for the crime of conviction, this dispositional departure may be appealed by the prosecution. If the sentencing court imposes a prison sentence of shorter duration than the presumptive term provided by the guidelines for the crime of conviction, this durational departure may also be appealed by the prosecution. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 2007 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. 2007 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.

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 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. 2007 21-4715.

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. 2007 21-4714. 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).

Plea agreements

Plea bargaining remains an available tool for use by defense counsel, subject to certain limitations. The KSGA **prohibits** the use of plea bargaining which involves a promise from the prosecutor not to allege prior convictions that may operate to enhance the crime severity level or are included in the offender's criminal history. However, 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. The offender may also obtain from the prosecution a promise to recommend a particular sentence within the appropriate sentencing range on the grid. In addition, the offender is free to secure a promise from the State to recommend a departure sentence favorable to the offender where mitigating departure factors exist. An agreement that a particular charge or count will or will not be filed, or any other promise not explicitly precluded by the KSGA, is permissible. However, the sentencing court will not be bound by any plea agreement proposed by the parties. See K.S.A. 2007 22-3210, K.S.A. 21-4713 and 21-4707.

Can seek dispositional or durational departure on behalf of offender

The offender may file a written motion alleging the existence of substantial and compelling mitigating circumstances that support the imposition of a less severe sanction than that provided by the KSGA for the crime of conviction. When the guidelines call for a prison sentence, the offender may move the sentencing court to impose a nonprison sentence as a dispositional departure. When the guidelines call for a prison sentence within the range of time provided by the appropriate grid block, the

offender may move the sentencing court to impose a shorter prison sentence as a downward durational departure. See K.S.A. 2007 21-4716, 21-4717, 21-4718, 21-4720 and K.S.A. 21-4719.

The offender may also be given the opportunity to offer written and/or oral arguments at the hearing on a motion for a departure favorable to the offender or in opposition to any unfavorable departures that may be proposed by the prosecution or the sentencing court on its own motion. See K.S.A. 2007 21-4718.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2007 21-4716 was found to be "unconstitutional on its face" for the imposition of upward durational departures. However, both K.S.A. 2002 Supp. 21-4716 and K.S.A. 2002 Supp. 21-4718 were amended to correct the upward durational departure 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. See K.S.A. 2007 21-4716 and 21-4618.

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.

Appeals

The offender may appeal a sentence that constitutes a departure unfavorable to the offender. The imposition of a prison sentence where the guidelines provide a presumptive nonprison sentence is an appealable dispositional departure. The imposition of a prison sentence of greater duration than the guidelines presume is an appealable durational departure. A departure sentence is appealable on the grounds that substantial and compelling reasons justifying the departure are not supported by the record.

Appellate review of departure sentences imposed pursuant to the guidelines is otherwise limited to claims of partiality, prejudice, oppression, or corrupt motive, or claims challenging the crime severity ranking or the criminal history. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 2007 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. 2007 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.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR FIELD SERVICES OFFICERS

Preparation of the Presentence Investigation Report

Field services officers, including court services officers and community corrections 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(s) 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(s) of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender. The PSI report will not contain socio-economic information about the offender and should not contain sentencing recommendations to the sentencing court.

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.

The criminal history worksheet can be challenged for accuracy by the defense or the prosecution, and a hearing will then be held in which the prosecution has the burden of proving prior convictions through certified copies of journal entries or any other properly authenticated documents and proving by a preponderance of the evidence that any challenged component of the history is correct. See K.S.A. 2007 21-4715. The sentencing court has the duty and authority to correct any errors. 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. 2007 21-4714(f).

NOTE: The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in an adjudication.

- **Adults:** Do not include traffic infractions, diversions contacts with law enforcement, or arrests not resulting in conviction.

Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction.

The 2008 Presentence Investigation Report form contains a section on page 4 of the form to be used by field services officers to indicate which criteria of K.S.A. 2007 75-5291(a)(2) is met by an offender who is being recommended for placement in a Community Corrections program. Field services officers completing PSI forms need to make certain to indicate for the sentencing court the specific box or boxes under which the offender may qualify for placement in Community Corrections.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS

Providing documentation of prior convictions

Because of the heavy focus on 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

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 can be kept in the court file. See K.S.A. 2007 21-4714.

Copies of required documents

A copy of the Journal Entry of Judgment, the Presentence Investigation Report and the Criminal History Worksheet of the Presentence Investigation Report, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. See K.S.A. 2007 21-4714(g) and 22-3439(a).

A copy of the Journal Entry of Probation Revocation 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 with in 30 days of the final disposition. See K.S.A. 2007 22-3439(b).

Extended jurisdiction juvenile cases

Under K.S.A. 2007 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. 2007 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.