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### Judiciary, Corrections, and Juvenile Justice

#### H-8 Sentencing Overview and Criminal Justice Reform Issues

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. (*Note: The source for the attached sentencing range grids for drug offenses and nondrug offenses is the *Kansas Sentencing Commission Guidelines, Desk Reference Manual, 2019*. These sentencing grids are provided at the end of this article.*)

The sentencing guidelines grids provide practitioners with an overview of presumptive felony sentences.

The determination of a felony sentence is based on two factors: the current crime of conviction and the offender's prior criminal history. The sentence contained in the grid box at the juncture of the severity level of the crime of conviction and the offender's criminal history category is the presumed sentence. [See KSA 21-6804(c).]

#### Off-Grid Crimes

The crimes of capital murder (KSA 2018 Supp. 21-5401), murder in the first degree (KSA 2018 Supp. 21-5402), terrorism (KSA 2018 Supp. 21-5421), illegal use of weapons of mass destruction (KSA 2018 Supp. 21-5422), and treason (KSA 2018 Supp. 21-5901) are designated as off-grid person crimes.

Kansas law provides for the imposition of the death penalty, under certain circumstances, for a conviction of capital murder (KSA 2018 Supp. 21-5401 and KSA 2018 Supp. 21-6617). Where the death penalty is not imposed, a conviction of capital murder carries a life sentence without possibility of parole (KSA 2018 Supp. 21-6620(a)).

The remaining off-grid person crimes require life sentences with varying parole eligibility periods. Persons convicted of premeditated first-degree murder committed prior to July 1, 2014, are eligible for parole after serving 25 years of the life sentence, unless the trier of fact finds there were aggravating circumstances justifying the imposition of the Hard 50 sentence (requiring 50 years to be served before parole eligibility).

Persons convicted of premeditated first-degree murder committed on or after July 1, 2014, are eligible for parole after serving 50 years of the life sentence, unless the sentencing judge, after a review of mitigating circumstances, finds substantial and compelling reasons to impose the Hard 25 sentence instead (KSA 2018 Supp. 21-6620(c)).

Persons convicted of felony murder committed prior to July 1, 2014, are parole eligible after serving 20 years of the life sentence. Persons convicted of felony murder convicted on or after July 1, 2014, are parole eligible after serving 25 years of the life sentence.

Persons convicted of terrorism, illegal use of weapons of mass destruction, or treason are parole eligible after serving 20 years of the life sentence (KSA 2018 Supp. 22-3717(b)(2)).

Also included in the off-grid group are certain sex offenses against victims under the age of 14: aggravated human trafficking (KSA 2018 Supp. 21-5426(b)), rape (KSA 2018 Supp. 21-5503), aggravated indecent liberties (KSA 2018 Supp. 21-5506(b)), aggravated criminal sodomy (KSA 2018 Supp. 21-5504(b)), commercial sexual exploitation of a child (KSA 2018 Supp. 21-6422), and sexual exploitation of a child (KSA 2018 Supp. 21-5510). Offenders sentenced for these off-grid crimes are parole eligible after 25 years in confinement for the first offense, parole eligible after 40 years in confinement for the second offense, or sentenced to life without parole if they have been convicted of two or more of these offenses in the past.

### Drug Grid and Nondrug Grid

The drug grid is used for sentencing on drug crimes described in KSA Chapter 21, Article 57. The nondrug grid is used for sentencing on other felony crimes. In both grids, 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 ([2019 Drug Grid \(PDF\)](#); [2019 Nondrug Grid \(PDF\)](#)).

The drug grid contains five severity levels; the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line are unshaded grid boxes, which are designated as presumptive prison sentences. Below the dispositional line are shaded grid boxes, which are designated as presumptive probation sentences.

The grids also contain boxes that have a dark shaded color 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 seven dark-shaded border boxes, in levels 4-E, 4-F, 4-G, 4-H, 4-I, 5-C, and 5-D. [See KSA 2018 Supp. 21-6804 and KSA 2018 Supp. 21-6805.]

### Grid Boxes

Within each grid box are three numbers, which represent months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence within the range. The middle number in the grid box 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 sufficient to warrant a departure, as explained in the next paragraph. [See KSA 2018 Supp. 21-6804 and KSA 2018 Supp. 21-6805.]

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid box. The court also may depart downward to lower the duration of a presumptive sentence. [See KSA 2018 Supp. 21-6815, 21-6816, and 21-6817.] The court also may impose a dispositional departure, from prison to probation or from probation to prison (KSA 2018 Supp. 21-6818).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), the predecessor to KSA 21-6815 was found to be “unconstitutional on its face” for

the imposition of upward durational departure sentences by a judge and not a jury. In the 2002 Legislative Session, the departure provisions were amended to correct the upward durational departure problem arising from *Gould*. This change became effective 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 (KSA 2018 Supp. 21-6817).

## Probation

Probation is a procedure by which a convicted defendant is released after sentencing, subject to conditions imposed by the court and supervision by the probation service of the court or community corrections, generally without serving a period of imprisonment (although a felony offender may be sentenced to up to 60 days in county jail as a condition of probation). As noted above, a number of boxes on the sentencing grids are designated “presumptive probation,” which means probation will be granted unless a departure sentence is imposed. An underlying prison sentence is still imposed in felony cases where probation is granted, and if the defendant is subsequently found to have violated a condition of probation, probation may be revoked and the defendant required to serve the underlying prison term. Other possible actions a court may take upon a violation of probation include continuation of probation, modification of probation conditions, or various periods of confinement in a county jail. In some cases, where a defendant has waived the right to a hearing on a probation condition violation, court services or community corrections may impose two- or three-day “quick dip” periods of confinement in a county jail.

Recommended probation terms range from under 12 to 36 months, depending on the severity level of the crime of conviction.

## 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 similar case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals continue efforts to reestablish 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 (KSA 2018 Supp. 21-6604).

## Good Time and Program Credits

While incarcerated, offenders may earn (and forfeit) “good time” credits based upon factors like program and work participation, conduct, and the inmate’s willingness to examine and confront past behavioral patterns that resulted in the commission of crimes. Depending on the severity level of the offender’s crime, the offender may earn up to 15 percent or 20 percent of the prison part of the sentence in good time credits.

Additionally, offenders serving only a sentence for a nondrug severity level 4 or lower crime or a drug severity level 3 or lower crime may earn up to 120 days of credit that may be earned by inmates “for the successful completion of requirements for a general education diploma, a technical or vocational training program, a substance abuse treatment program or any other program designated by the secretary which has been shown to reduce offender’s risk after release.”

With a few exceptions for certain sex-related offenses, any good time or program credits earned and subtracted from an offender’s prison sentence are not added to the postrelease supervision term (KSA 2018 Supp. 21-6821).

## Postrelease Supervision

Once offenders have served the prison portion of a sentence, most must serve a term of postrelease supervision. For certain sex-related offenses, the postrelease supervision term is increased by the amount of any good time or program credits earned and subtracted from the prison portion of the offender's sentence. For crimes committed on or after July 1, 2012, offenders sentenced for drug severity levels 1-3 or nondrug severity levels 1-4 must serve 36 months of postrelease supervision, those sentenced for drug severity level 4 or nondrug severity levels 5-6 must serve 24 months, and those sentenced for drug severity level 5 or nondrug severity levels 7-10 must serve 12 months. These periods may be reduced based on an offender's compliance and performance while on postrelease supervision (KSA 2018 Supp. 22-3717(d)(1)).

While on postrelease supervision, an offender must comply with the conditions of postrelease supervision, which include reporting requirements; compliance with laws; restrictions on possession and use of weapons, drugs, and alcohol; employment and education requirements; restrictions on contact with victims or persons involved in illegal activity; and other conditions. A "technical violation" of the conditions of postrelease supervision (such as failure to report) will result in imprisonment for six months, reduced by up to three months based upon the offender's conduct during the imprisonment. A violation based upon conviction of a new felony or a new misdemeanor will result in a period of confinement as determined by the Prisoner Review Board, up to the remaining balance of the postrelease supervision period (KSA 2018 Supp. 75-5217).

## Recent Notable Sentencing Guidelines Legislation

In 2010, the Kansas Criminal Code, including the sentencing guidelines, was recodified. The recodification took effect July 1, 2011. Citations in this article are to the recodified code.

In 2012, the Legislature passed Senate Sub. for Sub. for HB 2318, which changed the drug grid from a four-level grid to a five-level grid, adding a new level 2 with penalties falling between the existing first and second levels of the grid. The new grid also expanded the presumptive imprisonment boxes and the border boxes.

In 2013, the Legislature passed HB 2170, which represented the recommendations of the Justice Reinvestment Working Group, a statutorily created body charged with analyzing the Kansas criminal justice system and, based upon that analysis, providing evidence-based policy options that would reduce recidivism and, at the same time, the increasing prison population. Among other provisions, the bill implemented a series of graduated sanctions for probation violators, including 2- or 3-day jail stays and 120- or 180-day prison stays. [Note: 2019 SB 18 eliminated the 120- or 180-day prison stay sanctions.]

In June 2013, the U.S. Supreme Court's decision in *Alleyne v. U.S.*, 570 U.S. 2151, 133 S. Ct. 2151, 186 L. Ed. 2D 314 (2013), called the constitutionality of Kansas' Hard 50 sentencing statute (KSA 21-6620) into doubt. Since 1994, in cases where a defendant was convicted of premeditated first-degree murder, the statute had allowed the sentencing court to impose a life sentence without eligibility for parole for 50 years when the judge found one or more aggravating factors were present. The *Alleyne* decision indicated such determinations must be made by the trier of fact (usually a jury) using a reasonable doubt standard, rather than by the sentencing judge.

In response to the *Alleyne* decision, the Kansas Attorney General requested Governor Brownback call the Kansas Legislature into Special Session "for the purpose of repairing" the Hard 50 sentence. The Governor subsequently called the Legislature into Special Session starting September 3, 2013, to respond to *Alleyne*.

Before the 2013 Special Session, the Special Committee on Judiciary met to review *Alleyne*, receive testimony, and report preliminary findings to the House and Senate Judiciary Committees at the commencement of the Special Session.

The Special Committee recommended language for a bill that would institute a jury procedure for the Hard 50 determination.

At the Special Session, the Legislature considered and passed HB 2002, which was an amended version of the language proposed by the Special Committee. HB 2002 went into effect upon its publication in the *Kansas Register* (September 6, 2013).

In 2014, the Legislature passed HB 2490, which included amendments to the sentencing provisions for premeditated first-degree murder, attempted capital murder, and felony murder.

The bill increased the default sentence for premeditated first-degree murder committed on or after July 1, 2014, from the Hard 25 sentence to the Hard 50 sentence. The sentencing judge may impose the Hard 25 sentence if the judge reviews mitigating factors and finds substantial and compelling reasons to impose the lesser sentence.

The bill also imposed the Hard 25 sentence for attempted capital murder (previously a severity level 1 felony) and felony murder (previously a Hard 20 sentence).

If a defendant's criminal history when sentenced for any of these crimes would subject the defendant to imprisonment for a term exceeding the Hard 50 or Hard 25 sentence (as applicable), the defendant will be required to serve the mandatory minimum term equal to the sentence established under the sentencing guidelines.

In 2015, the Legislature passed HB 2051, which increased the amount of good time inmates sentenced for post-July 1, 2012, drug severity level 3 crimes may earn, to try to restore the general good time eligibility criteria to a similar state as it existed before the 2012 changes to the drug grid. The bill also increased the amount of time from 60 days to 90 days that may be earned by any eligible inmate for program credits.

In 2016, the Legislature passed three bills related to sentencing: HB 2151, HB 2447, and HB 2463. HB 2151 authorized the Secretary of Corrections

(Secretary) to transfer certain low-to moderate-risk offenders to house arrest pursuant to community parenting release if the conditions listed in the bill are met and the Secretary determines the offender's placement in the program is in the child's best interests. The Secretary can return an offender to a correctional facility to serve the remaining sentence if the offender fails to comply with release requirements.

HB 2447 increased the maximum number of days an inmate's sentence may be shortened for earning program credits from 90 days to 120 days.

The bill also permitted the dismissal of parole, conditional release, or postrelease supervision violation charges to be conditioned upon the released inmate agreeing to credit being withheld for the period of time from the date the Secretary issued a warrant to the date the offender was arrested or returned to Kansas.

HB 2463 amended statutes governing the determination of criminal history to add nongrid felonies, nondrug severity level 5 felonies, and any drug severity level 1 through 4 felonies committed by an adult to the list of juvenile adjudications that will decay if the current crime of conviction is committed after the offender reaches age 25. The bill also allowed a court to continue or modify conditions of release for, or impose a 120- or 180-day prison sanction on, an offender who absconds from supervision, without having to first impose a 2- or 3-day jail sanction. Finally, the bill made a violation or an aggravated violation of the Kansas Offender Registration Act a person offense if the underlying crime (for which registration is required) is a person crime. If the underlying crime is a nonperson crime, the registration offense is a nonperson crime. Previously, a violation or aggravated violation of the Kansas Offender Registration Act was a person crime regardless of the designation of the underlying crime.

Legislation passed by the 2017 Legislature involving sentencing included SB 112 and HB 2092. SB 112, among other changes, enacted the Law Enforcement Protection Act. This act created a special sentencing rule with enhanced penalties

if a trier of fact finds beyond a reasonable doubt that an offender committed a nondrug felony offense (or an attempt or conspiracy to commit such offense) against a law enforcement officer while the officer was performing the officer's duty or solely due to the officer's status as a law enforcement officer.

HB 2092, among other changes, amended law related to mandatory minimum sentences. The bill clarified mandatory minimum sentences will not apply if, due to criminal history, the offender would be subject to presumptive imprisonment for a severity level 1 crime for a term longer than the mandatory minimum. In such case, the offender would serve a sentence equal to the longer term and would not be eligible for parole until the entire sentence is completed. In addition, the sentence could not be reduced by good time credits.

In 2019, the Legislature passed SB 18, which makes numerous amendments regarding crimes, punishments, and criminal procedure. Among its provisions are the following.

The bill removes the ability of the sentencing court to specifically withhold authority from supervising court services or community corrections officers to impose certain probation violation sanctions of confinement in a county jail for a 2-day or 3-day period or an additional 18 days of confinement in a county jail.

The bill also removes probation violation sanctions allowing the court to remand the defendant to the custody of the Secretary for periods of 120 or 180 days and removes and modifies other related provisions.

The bill amends a mitigating factor that may be applied when the victim was an aggressor or participant in the criminal conduct associated with the crime of conviction, to prohibit the application of this factor to a sexually violent crime or to electronic solicitation, when: a) the victim is less than 14 years old and the offender is at least 18 years old, or b) the offender hires any person by giving, or offering to or agreeing to give, anything of value to the person to engage in an unlawful sex act.

The bill also amends law related to correction of an illegal sentence by specifying such sentences may only be corrected while the defendant is serving the sentence.

The bill also amends law related to classification of out-of-state criminal history of a defendant by listing certain factors or circumstances that would result in the out-of-state crime being considered a person felony for Kansas criminal history classification purposes, if such factors or circumstances are elements of the crime as defined by the convicting jurisdiction.

## **Criminal Justice Reform Issues**

During the 2018 and 2019 Legislative Sessions, legislation aimed at targeting specific criminal justice reform issues has been passed.

### ***Wrongful Conviction Compensation***

In 2018, the Legislature passed HB 2579, concerning wrongful conviction compensation.

The bill creates a civil cause of action entitling claimants to recover damages from the State for wrongful conviction if the claimants can establish, by a preponderance of the evidence, several elements specified in the bill. Claimants must bring suit within two years of the the criminal charges' dismissal, finding of not guilty on retrial, or pardon of a claimant. Claimants convicted, imprisoned, and released from custody before July 1, 2018, are required to commence an action no later than July 1, 2020.

Claimants entitled to damages will receive \$65,000 for each year of imprisonment and not less than \$25,000 for each additional year a claimant served on parole or postrelease supervision or was required to register as an offender under the Kansas Offender Registration Act, whichever is greater. The court must order the award be paid as a combination of an initial payment not to exceed \$100,000 or 25 percent of the award, whichever is greater, and the remainder as an annuity not to exceed \$80,000 per year. (Claimants may designate a beneficiary for the annuity.) Alternatively, the court may order

one lump-sum payment if it is in the claimant's best interests.

The court may also award other non-monetary relief, including counseling, housing assistance, and personal financial literacy assistance. Further, claimants are entitled to reasonable attorney fees and costs incurred in an action brought under the bill of not more than \$25,000, unless the court authorizes a greater reasonable total upon a showing of good cause; tuition assistance; and participation in the state health care benefits program.

The bill outlines additional details regarding procedure, claim payment, tuition assistance, and health care benefits. It also provided for a certificate of innocence for the claimant, an expungement order, and destruction of biological samples held by the Kansas Bureau of Investigation.

As of August 2019, the State has agreed to pay compensation to two exonerated persons under the provisions of the bill. The State agreed to pay \$1.10 million to Richard Jones, who was incarcerated for nearly 17 years. The State also agreed to pay \$1.03 million to Floyd Bledsoe, who was incarcerated for 16 years.

### ***Criminal Justice Reform Commission***

In 2019, the Legislature passed HB 2290, which, among other provisions, established the Kansas Criminal Justice Reform Commission.

The bill establishes a 19-member Criminal Justice Reform Commission (Commission), composed of legislators, Judicial Branch personnel, prosecutors and defense attorneys, and other stakeholders, and requires the Commission to analyze, review, and study various criminal justice topics specified by the bill. The Commission must submit an interim report to the Legislature by December 1, 2019, and a final report and recommendations to the Legislature by December 1, 2020.

### ***Kansas Closed Case Task Force***

HB 2290 also establishes a 15-member Kansas Closed Case Task Force, composed of legislators, executive branch officials, and stakeholders, and requires the Task Force to develop a plan to ensure uniform statewide policies and procedures related to the handling, reporting, investigation, and sharing of information regarding hits to the state-combined DNA index system (CODIS) related to solved and unsolved cases. The Task Force is required to complete the plan by October 1, 2020, and submit a report by December 1, 2020. The Task Force will expire December 30, 2020.

**SENTENCING RANGE- DRUG OFFENSES**

Categories→ Severity Level ↓	A 3 + Person Felonies	B 2 Person Felonies	C 1 Person & 1 Nonperson Felony	D 1 Person Felony	E 3 + Nonperson Felonies	F 2 Nonperson Felonies	G 1 Nonperson Felony	H 2 + Misdemeanors	I 1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
V	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10
Presumptive Probation									
Border Box									
Presumptive Imprisonment									

• Fines not to exceed \$500,000 (SL-1-SL2), \$300,000 (SL3-SL4), \$100,000 (SL5)

• Severity level of offense increases one level if controlled substance or analog is distributed or possessed w/ intent to distribute on or win 1000 ft of any school property.

Levels	Distribute or Possess w/ intent to Distribute									
	Cocaine	Meth & Heroin	Marjuana	Manufacture (all)	Cultivate	Dosage Units	Postrelease	Probation	Good Time	
I	≥ 1 kg	≥ 100 g	≥ 30 kg	2nd or Meth	>100 plants	>1000	36	36	15%	
II	100 g - 1 kg	3.5 g - 100 g	450 g - 30 kg	1st	50-99 plants	100-999	36	36	15%	
III	3.5 g - 100 g	1 g - 3.5 g	25 g - 450 g		5-49 plants	10-99	36	36	**20%	
IV	< 3.5 g	< 1 g	< 25 g			<10	24	*≤18	20%	
V	Possession	Possession	Possession-3rd offense				12	*≤12	20%	

\* ≤ 18 months for 2003 SB123 offenders

\*\* Retroactive application for offense committed on or after July 1, 2012

\*\*\* Severity Level increases one level if on or win 1000 ft of any school property



**SENTENCING RANGE – NONDRUG OFFENSES**

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	88 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	48 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

Probation Terms are:  
 36 months recommended for felonies classified in Severity Levels 1-5  
 24 months recommended for felonies classified in Severity Levels 6-7  
 18 months (up to) for felonies classified in Severity Level 8  
 12 months (up to) for felonies classified in Severity Levels 9-10  
 Postrelease Supervision Terms are:  
 36 months for felonies classified in Severity Levels 1-4  
 24 months for felonies classified in Severity Levels 5-6  
 12 months for felonies classified in Severity Levels 7-10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

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