

## Criminal History and Sentencing Rules CLE

- ❖ Overview
  - Criminal History
  - How to calculate
  - Special Sentencing Rules
- ❖ Criminal History
  - KSA 21-6803(c) - “means and includes an offender’s criminal record of adult felony, class A misdemeanor, class B person misdemeanors or select misdemeanor convictions and comparable juvenile adjudications at the time such offender is sentenced
  - Includes (K.S.A. 21-6810)
    - Person felony adult convictions
    - Nonperson felony adult convictions
    - Person felony juvenile adjudications (that haven’t decayed)
    - Nonperson felony juvenile adjudications (that haven’t decayed)
    - Person misdemeanor adult convictions
    - Nonperson class A misdemeanor adult convictions
    - Person misdemeanor juvenile adjudications
    - Nonperson class A misdemeanor juvenile adjudications
    - Select class B misdemeanor adult convictions
      - Special classification established for weapons violations
        - ◆ Shall be considered and scored in determining an offender’s criminal history classification
    - Select class B misdemeanor juvenile adjudications
      - Special classification established for weapons violations
      - Shall be considered and scored in determining an offender’s criminal history classification
    - Convictions and adjudications for violations of municipal ordinances or county resolutions which are comparable to any crime classified under state law as a person misdemeanor, select class B misdemeanor, class A nonperson misdemeanor
  - Except as otherwise provided, all convictions are counted and scored (whether sentenced concurrently or consecutively)

- Only verified convictions will be considered and scored
- Expungements included
- Does not include
  - Class C misdemeanors
  - Most class B nonperson misdemeanors
  - Certain juvenile adjudications (decayed)
  - Diversions (unless specifically included)
  - Charges pending at time of sentencing
  - Convictions/adjudications that are elements (K.S.A. 21-6810(d)(10)).
  - Convictions of a crime defined by statute that has been determined unconstitutional. (K.S.A. 21-6810(d)(9)).
- Decay (KSA 21-6810(d)(3),(4))
  - Only juvenile adjudications can decay
    - NO decay if would have been class A, B or C felony if committed by an adult (prior to 7/1/93)
    - NO decay if off-grid or SL 1-4
  - Decay when:
    - Current crime of conviction is committed after offender is 25
      - ◆ Prior would have been D or E felony if committed pre 7/1/93
      - ◆ Prior would be a nondrug 5-10, nongrid, or drug felony
      - ◆ Prior is a misdemeanor
    - Offender under 25 and current crime of conviction committed at least 5 years after prior JA
      - ◆ No other convictions or adjudications within that 5 years
      - ◆ Prior would be D or E felony, 5-10 ND, NG, drug felony, or misdemeanor
    - PSIs typically do not show SL of prior - may need to gather additional information to know what SL was for adjudications for crimes for which there are multiple severity levels
- ❖ How classified
  - Post 1993 - Kansas Statute indicates if person or nonperson

- Unless otherwise provided by law, unclassified felonies and misdemeanors shall be scored as nonperson crimes (K.S.A. 21-6810(d)(7)).
- Pre-1993 (Always be aware of Apprendi implications) (K.S.A 21-6810(d)(2), (6))
  - Scored as person or nonperson crime using a comparable offense under Kansas Criminal code in effect on the date the current crime of conviction was committed.
    - Look at language in statute
      - ◆ Entire another hour could be spent talking about meaning of “comparable”
- Prior conviction 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. 21-6810(d)(8)).
- Burglary
  - Person felony if prior was of a dwelling
  - Nonperson if prior was not of a dwelling
    - Apprendi, Dickey (KS pre-1993 burglary convictions are nonperson)
- Out of State
  - Felony or misdemeanor according to convicting jurisdiction
    - Look at comparable KS statute to determine if class A, B, or C misdemeanor
    - If OOS misdemeanor would be a felony in KS = class A misdemeanor
    - If nothing comparable in KS - not used
    - If convicting jurisdiction not classify as felony or misdemeanor - look at comparable KS offense to determine if felony or misdemeanor
      - ◆ If nothing comparable - not used
  - Person/nonperson
    - Kansas determine
      - ◆ Comparable offenses under Kansas criminal code in effect on date the current crime of conviction was committed shall be referred to
        - If Kansas not have a comparable person offense in effect on date the current crime of conviction was committed - nonperson
      - ◆ Classified as person if one or more of following circumstances is present *as defined by the convicting jurisdiction in the ELEMENTS of the out-of-state offense*

- Death or killing of any human being
- Threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person
- Bodily harm or injury, physical neglect or abuse, restraint, confinement or touching of any person, without regard to degree
- Presence of a person other than the defendant, a charged accomplice or another person with whom the D is engaged in the sale, distribution or transfer of a controlled substance or a non-controlled substance
- Possessing, viewing, depicting, distributing, recording or transmitting an image of any person
- Lewd fondling or touching, sexual intercourse or sodomy with or by any person or an unlawful sexual act involving a child under the age of consent
- Being armed with, using, displaying or brandishing a firearm or other weapon
  - Excluding crimes of mere unlawful possession
- Entering or remaining within any residence, dwelling or habitation
- Elements of out of state felony offense that resulted in conviction – necessarily prove that a person was present during the commission of the offense
  - Includes physical presence and presence by electronic or telephonic communication

◆ Nonperson if none of the above apply

- Facts required to classify out of state adult convictions and juvenile adjudications shall be established by the State by a preponderance of the evidence (APPRENDI ISSUE)

- Attempt, conspiracy, solicitation – same as underlying offense
- Drug – nonperson
- KORA – same as the designation which triggered registration
- 3 person misdemeanors = 1 person felony
  - Counsel?

❖ Special Rules (Attached Chart)

**Special Rule Triggered by Crime Charged**

<u>Rule #</u>	<u>Current Offense</u>	<u>Statute</u>	<u>Rule Effect</u>
3	Agg Assault on a LEO	21-6804(g)	6H or 6I - Presumptive Prison; may impose probation if findings made under 6804(q)
8	Agg Dom Batt	21-5414(b); 21-6804(i)	Mandatory 90 days/county jail
11	Extended juvenile jurisdiction	38-2347, 38-2364	juvenile and adult sentence imposed
21	Animal Cruelty (21-6412(a)(1),(6); 21-6416)	21-6412, 6416; 21-6804(i)	Mandatory 30 days/county jail
34	Battery on a LEO	21-6804(r)	Presumptive prison/consecutive to all
35	Agg child end	21-5601(c)(2)	Consecutive to all
38	unlawful sexual relations	21-6804(s)	Presumptive Prison
46	SL5 KORA	21-6804(m)	5E-5I - presumptive prison; can impose nonprison if 6804(q) findings made

**Special Rule Triggered by Circumstance Alleged in Commission of Crime**

<u>Rule #</u>	<u>Circumstance Alleged</u>	<u>Statute</u>	<u>Rule Effect</u>
1	Person felony committed with firearm	21-6804(h)	Presumptive Prison; may impose probation if findings made under 6804(q)
4	Crime committed for benefit of criminal street gang	21-6804(k)	Presumptive Prison; may impose probation if findings made under 6804(q)
15	KS Uniform Securities Act - loss of \$25k or more	17-12a508(a)(5)	Presumptive Prison
20	Loan Brokers Act - Loss of \$25k or more	50-1013(a)	Presumptive Prison
25	Fraudulent Insurance Act - any combination of acts w/i 6 months involving \$25k or more	40-2,118(e)	Presumptive Prison
30	Substance abuse, underlying factor <b>(not funded)</b>	21-6804(p)	
32	Drug felony - firearm carried/possessed	21-6805(g)(1)(A)	Presumptive prison; Additional 6 months (implicates Apprendi)
33	Drug felony - firearm discharged	21-6805(g)(1)(B)	Presumptive prison; Additional 18 months (implicates Apprendi)
36	Ballistic Resistent material worn	21-6804(t)	Presumptive prison; Additional 30 months (implicates Apprendi); consecutive to all others
48	LEO victim in nondrug when being LEO not an element	21-6805(y)(1)	Crime committed against LEO because of status as LEO (not including offenses in which status as LEO is element); If crime 2-10 - increase a severity level; if crime SL1 - Hard 25 life

**Special Rule Triggered by Crime Charged and Criminal History**

<u>Rule #</u>	<u>Current Offense/Condition</u>	<u>Statute</u>	<u>Rule Effect</u>
5	Persistent Sex Offender (defined 21-6804(j)(2))	21-6804(j)(1)	Double maximum
9	Current offense committed while on felony probation/prs/parole	21-6604(f), 21-6606(c)	Consecutive to offense on which being supervised; Court MAY impose prison
10	Current offense committed while on felony bond	21-6604(f)(4), 21-6606(d)	There is a discrepancy in the statutes - 6604(f)(1) - MAY run consec to case on bond, MAY impose prison; 6606(d) SHALL run consecutive
12	2nd or Sub conviction - manufacture controlled substance	21-6805(e); 21-5703(2)(B)	Double Maximum (if prior was meth), (no more than 50% downward departure allowed);
13	Residential burglary with prior burglary or agg burglary (includes attempt or conspiracy)	21-6804(l)	Presumptive Prison (KS Priors only)
16	2nd Forgery	21-6804(i); 21-5823(b)(3)	30 days; fine lesser of \$1000 or amnt of forged instrument; county jail if incarcerated
17	3rd or Sub forgery	21-6804(i); 21-5823(b)(4)	45 days; fine less of \$2500 or amnt of forged instrument; county jail if incarcerated
19	2nd or Sub violation of Mortgage Business Act	9-2033(f)	Presumptive Prison
26	3rd or Sub Poss	21-6805(f)	Presumptive Prison; not eligible for SB123 treatment (KS Priors only)
27	Burglary with 2 or more convictions for theft, burglary or agg burglary	21-6804(p)	Presumptive Prison (KS Priors only) (statute does not indicate that the prior triggering thefts must be felony thefts - plain reading of the Statute could mean that a burglary conviction with 2 prior misdemeanor theft convictions could be presumptive prison)
28	Crime, which would be a felony if committed by an adult, committed in a juvenile correctional facility	21-6604(f)(3)	Presumptive prison; discharges all obligations of prior sentence (other than restitution)
29	Theft with 3 or more prior convictions for felony theft, burglary or aggravated burglary	21-6804(p)	Presumptive Prison (KS Priors only)
31	3rd or sub crim deprivation of motor vehicle	21-6804(n)	Presumptive Prison (KS Priors only)
37	2nd or sub ID theft or ID fraud (includes attempt and conspiracy)	21-6804(u)	Presumptive Prison (KS Priors only)
40	Crime committed after early discharge from supervision	21-6604(f)(2)	MAY impose prison
47	Residential burglary with CH C-E	21-6804(x)	Presumptive Prison

<u>Special Rules Triggering Special Scoring Rules for Prior Convictions</u>			
<u>Rule #</u>	<u>Current Offense</u>	<u>Statute</u>	<u>Rule Effect</u>
41	Leaving the scene of an accident	21-6811(i)	Prior <b><i>convictions</i></b> of offenses below, committed on or after 7/1/11, shall be scored as person felonies for criminal history purposes: driving without a license (8-235); driving while suspended (8-262); habitual violator (8-287); violation of restrictions on DL (8-291); reckless driving (8-1566); DUI (8-1567); F&E (8-1568); leaving scene of accident (8-1602, 8-1605); No insurance (40-3104); involuntary manslaughter by DUI (21-5405(a)(3), (a)(5)); vehicular homicide (21-5406)
42	Involuntary manslaughter by DUI	21-5405(a)(3), 21-6811(c)(2)	All prior convictions, adjudications, and diversion for DUI or commercial DUI shall be scored as person felonies for criminal history purposes
43	3rd or sub F&E	21-6804(v)	Presumptive Prison; consecutive to all (Ks Priors only)
44	Agg Batt by DUI	21-6811(c)(3)	First prior conviction, diversion or adjudication of DUI or Commercial DUI is scored as a nonperson felony; every subsequent scored as person felony
45	Agg Crim Dam to Property	21-6804(w)	Presumptive Prison if ANY prior nonperson felonies.