

## 1. THE SENTENCING COMMISSION

**Q.** What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?

The Commission was established by statute in 1989,<sup>1</sup> and remains in existence.

**Q.** Membership: who appoints them, for what terms, with what required qualifications?

The Kansas Sentencing Commission consists of seventeen members, apportioned between the judicial system, the legislature, and the governor's appointees.

Judicial System:

- The Chief Justice of the Kansas Supreme Court, or chief justice's designee
- Two district court judges appointed by Chief Justice
- Attorney General or Attorney General's designee
- The secretary of corrections, or the secretary's designee
- The chairperson of the prisoner review board, or chairperson's designee
- A court services officer appointed by the chief justice

Governor's Appointees:

- A public defender
- A private defense counsel
- A county or district attorney
- Two members of the general public, at least one of whom shall be a member of a racial minority group
  - A director of a community corrections program

No more than three of the Governor's appointees may be of the same political party.

Legislative Members:

- One appointed by president of senate
- One appointed by senate minority leader
- One appointed by speaker of house
- One appointed by house minority leader

The governor designates a chairperson from the two district court judges, or the chief justice of the Supreme Court.<sup>2</sup>

**Q.** Is the commission an independent agency, or is it located in or hosted by some other state agency?

The Commission is an independent agency within the executive branch of Kansas state government.<sup>3</sup>

<sup>1</sup> 1989 Kan. Sess. Laws, ch. 225.

<sup>2</sup> Kan. Stat. Ann. § 74-9102 (2019).

<sup>3</sup> The statutes creating the Kansas Sentencing Commission are located in Chapter 74 of the Kansas Statutes, which is titled "State Boards, Commissions, and Authorities," [https://www.ksrevisor.org/statutes/ksa\\_ch74.html](https://www.ksrevisor.org/statutes/ksa_ch74.html).

**Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?**

The Commission has thirteen staff positions, which include:

- Executive Director
- Special Assistant to the Executive Director
- Director of Research
- Senior Research Analyst
- Two Research Analysts
- Two Research Data Entry Operators
- Data Entry Operator
- SB 123 Program Manager
- Program Assistant
- Staff Attorney
- Finance Director<sup>4</sup>

**Q. What is the commission's current statutory mandate?**

The Commission's mandate is to create and modify the guidelines for legislative adoption, advise the legislature on implementing and operating a guidelines system, provide training for criminal justice officials on the proper use of guidelines, conduct research on the impact of the guidelines on the State corrections system, develop prosecuting standards under the guidelines, provide official inmate population projections, and conduct all other general sentencing policy research required by the governor or the legislature.<sup>5</sup> Legislation passed in 2017 added the mandate to gather data and information from other state agencies in order to carry out the duties and functions listed above.<sup>6</sup>

**Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?**

The Commission is directed by statute to provide a fiscal impact and correctional resource statement for all bills amending the Kansas Criminal Code, and to make inmate population projections based on existing law at least annually. Further, the secretary of corrections must notify the sentencing commission whenever the prison population equals or exceeds 90% of total prison capacity. In that case, or when any projection shows that total prison capacity will be exceeded within two years, the Sentencing Commission is directed to propose modifications to the guidelines or other laws in order to lower the total prison population and avoid overcrowding. Such changes must be submitted to the legislature for approval.<sup>7</sup>

In addition to these specific directives, the Commission is also generally instructed to assist the secretary of corrections in ensuring that correctional resources are deployed in the most effective manner.<sup>8</sup>

<sup>4</sup> Kan. Sentencing Comm., *FY 2018 Annual Report* (Apr. 2019), [https://www.sentencing.ks.gov/docs/default-source/annual-reports/fy2018annualreport.pdf?sfvrsn=5f8bfd3f\\_6](https://www.sentencing.ks.gov/docs/default-source/annual-reports/fy2018annualreport.pdf?sfvrsn=5f8bfd3f_6).

<sup>5</sup> Kan. Stat. Ann. § 74-9101 (2019).

<sup>6</sup> *Id.*; 2017 Kan. Sess. Laws, ch. 79.

<sup>7</sup> Kan. Stat. Ann. §§ 21-6822, 74-9101(15) (2019).

<sup>8</sup> Kan. Stat. Ann. § 74-9101 (6), (15) (2019).

**Q.** Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?

The Commission prepares a number of annual sentencing reports and provides outside agencies or researchers with data upon request. The Commission charges a fee of \$150 per hour to fulfill data requests.<sup>9</sup>

## 2. THE GUIDELINES

**Q.** When were the guidelines first implemented?

The Kansas Sentencing Guidelines took effect on July 1, 1993.<sup>10</sup>

**Q.** In recent years, have they been modified at least once a year?

The Commission updates the Guidelines annually to account for new and amended crimes and any technical changes necessary due to legislative and judicial action. The guidelines are contained in the Kansas statutes, and as such any updates must be affirmatively passed by the legislature and signed by the governor.<sup>11</sup>

**Q.** Do the commission's recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?

Proposed modifications to the guidelines must be submitted to the legislature by February 1st of the year in which the modifications would take effect. No changes may take effect without the approval of the legislature and the governor.<sup>12</sup>

**Q.** Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?

The Sentencing Guidelines apply to all felonies,<sup>13</sup> except those specified as off-grid offenses, which are subject to life sentences,<sup>14</sup> or non-grid offenses, which contain specific penalties in their respective statutes.<sup>15</sup>

**Q.** Is a grid used? Are there multiple grids? How many severity levels does the grid contain?

The Sentencing Guidelines use two grids: one for drug offenses and one for nondrug offenses. The drug offense grid contains five severity levels, and the nondrug offense grid contains ten.<sup>16</sup>

<sup>9</sup> Reports are available online at <http://sentencing.ks.gov/document-center/reports>. Data can be requested online at <http://sentencing.ks.gov/document-center/data-request-form>.

<sup>10</sup> Kan. Stat. Ann. § 21-6802(c) (2019).

<sup>11</sup> Kan. Stat. Ann. § 21-6822 (2019).

<sup>12</sup> Kan. Stat. Ann. § 21-6822 (2019).

<sup>13</sup> Kan. Stat. Ann. § 21-6802 (2019).

<sup>14</sup> Kan. Stat. Ann. § 21-6806(c), (d) (2019).

<sup>15</sup> Kan. Sentencing Guidelines ch. I, 17-20 (2018), [https://www.sentencing.ks.gov/docs/default-source/2018-drm/2018-drm-final-text.pdf?sfvrsn=5f0fd3f\\_0](https://www.sentencing.ks.gov/docs/default-source/2018-drm/2018-drm-final-text.pdf?sfvrsn=5f0fd3f_0).

<sup>16</sup> Kan. Stat. Ann. §§ 21-6807(a), 21-6808(a) (2019).

## Q. How is the presumptive sentence determined?

The presumptive sentence is determined by two factors: the severity level of the current conviction and the offender's criminal history score. On each of Kansas' two sentencing grids, the vertical axis represents the crime severity scale and the horizontal axis represents the criminal history scale. The presumptive sentence is determined by finding the grid block at the intersection of the severity level of the current crime of conviction and the offender's criminal history score. Each grid block indicates whether the appropriate disposition is a prison or non-prison sentence. And each block contains the presumed sentencing range in months, including prescribed aggravated, standard, and mitigated sentences.<sup>17</sup>

## Q. Is the choice among types of sentences regulated by a "disposition" or other prison in/out line? Are "out" sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?

Each of Kansas' two sentencing grids contains a disposition line. Blocks above the line presume a sentence of imprisonment, while blocks below the line presume a sentence of probation.

When a sentence falls below the disposition line, the sentencing court pronounces the non-prison sanction as well as the duration of the prison sentence to be served in the event of revocation.<sup>18</sup>

## Q. Are there border boxes or other categories permitting multiple sentence types?

Each of Kansas' two sentencing grids contains border boxes, which are grid blocks that are directly above the disposition line. When the presumptive sentence is located within a border box, a disposition of imprisonment is presumed, but the sentencing court has the ability to impose an optional non-prison sentence, such as probation. In order to impose an optional non-prison sentence the court must make findings on the record that: (1) an appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of recidivism; and (2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or (3) the non-prison sanction will serve community safety interests by promoting offender reformation.<sup>19</sup> An optional non-prison sentence is not considered to be a departure, and thus is not subject to appeal.<sup>20</sup>

## Q. Are the guidelines purely advisory, or are they legally binding?

The guidelines are legally binding. The court must pronounce a sentence within the prescribed guideline ranges, and may only depart from those ranges when substantial and compelling circumstances exist.<sup>21</sup>

<sup>17</sup> Kan. Stat. Ann. §§ 21-6804, 21-6805 (2019).

<sup>18</sup> Kan. Stat. Ann. §§ 21-6804(e)(3), 21-6805(c)(3) (2019).

<sup>19</sup> Kan. Stat. Ann. §§ 21-6804(f), 21-6805(d) (2019).

<sup>20</sup> Kan. Stat. Ann. §§ 21-6804(f), 21-6805(d) (2019).

<sup>21</sup> Kan. Stat. Ann. § 21-6815(a) (2019).

## 3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

### Q. What is the overall/general standard for departure?

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Whenever a departure occurs, the sentencing court must make findings of fact showing substantial and compelling circumstances. If a factual aspect of the crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, it may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime.<sup>22</sup>

### Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?

The guidelines provide lists of non-exclusive, statutorily enumerated aggravating and mitigating factors that may be considered in determining whether substantial and compelling reasons for a departure exist. The listed factors relate to case-specific facts that make the conviction offense more or less serious than is typical for the crime of conviction. There is not a list of prohibited factors.<sup>23</sup>

### Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?

The sentencing court may consider as a mitigating factor supporting departure any assistance provided by the defendant in the investigation or prosecution of another person who is alleged to have committed an offense. In so doing, the court may consider factors such as the significance, usefulness, and timeliness of the assistance as well as any danger or risk of injury to the defendant or defendant's family resulting from the assistance.<sup>24</sup> The guidelines do not address mitigation based on a guilty plea or acceptance of responsibility.

### Q. Are there limits on the degree of durational (length-of-custody) departure?

An upward durational departure may not exceed twice the maximum presumptive sentence.<sup>25</sup> There is generally no limit on downward durational departures, with the exception that in cases of extreme sexual violence a downward durational departure may not be less than 50% of the center of the range for such a crime.<sup>26</sup>

### Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?

When there is an upward dispositional departure (from probation to prison), the term of imprisonment may not exceed the maximum duration of the presumptive imprisonment term listed within the sentencing grid. Any sentence outside of that term is considered an additional (durational) departure, and must be justified

<sup>22</sup> Kan. Stat. Ann. § 21-6815(c)(3) (2019).

<sup>23</sup> Kan. Stat. Ann. § 21-6815 (c) (2019); see also Kan. Sentencing Guidelines ch. V, 60-61 (2018).

<sup>24</sup> Kan. Stat. Ann. § 21-6815(e) (2019).

<sup>25</sup> Kan. Stat. Ann. § 21-6818(b) (2019).

<sup>26</sup> Kan. Stat. Ann. § 21-6818(a) (2019).

by substantial and compelling reasons independent of that supporting the dispositional departure.<sup>27</sup> Downward dispositional departures are not available for any crime of extreme sexual violence.<sup>28</sup>

## 4. PRISON RELEASE DISCRETION

**Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?**

Parole has been abolished for all felony crimes except those designated as off-grid. Postrelease supervision is mandatory for on-grid offenders, and the length of supervision is based upon the severity of the conviction.<sup>29</sup>

**Q. Does the state have a “truth in sentencing” law, limiting the extent of early release?**

Under the Sentencing Guidelines, Kansas provides that an inmate may, generally, only earn good time credits for up to 15% of the prison portion of the sentence. If an inmate’s sentence is for a crime that falls within severity levels seven through ten on the nondrug grid, or severity levels three through five on the drug grid, the inmate may earn up to 20% of the prison portion of the sentence. Any good time reductions made to the prison portion of a sentence are added to the applicable postrelease supervision term.<sup>30</sup>

Any inmate who has abused the judicial process (i.e. filing a false or malicious claim with the court, or submitting or attempting to submit false evidence) while imprisoned may not receive good time credits for a review period established by the secretary of corrections.<sup>31</sup>

**Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?**

The recommended prison durations shown on the applicable guidelines grid, and the sentence pronounced by the judge either from the grid or by departure, represent the maximum time the offender will serve in prison. Under state law, the offender’s actual time to serve equals the prison term pronounced minus credit for good behavior (up to 15 or 20 percent, depending on the offense of conviction) plus credit for program participation where applicable (up to sixty days). There is no parole release discretion for offenses sentenced under the guidelines.<sup>32</sup>

**Q. Is the period of post-prison supervision independent of any unserved prison term?**

The post-prison supervision term for offenders is prescribed by the statute according to the severity level of the crime of conviction. Generally, a reduction in prison time for good time served will not impact the period of postrelease supervision. But for certain sexually violent or sexually motivated crimes, any good time credits earned will be added to the period of postrelease supervision. Postrelease supervision for offenses other than sexually violent or sexually motivated crimes can be reduced by 6-12 months,

<sup>27</sup> Kan. Stat. Ann. § 21-6818(c)(2) (2019).

<sup>28</sup> Kan. Stat. Ann. § 21-6818(a) (2019).

<sup>29</sup> Kan. Stat. Ann. § 22-3717(d)(1) (2019).

<sup>30</sup> Kan. Stat. Ann. § 21-6821 (2019).

<sup>31</sup> Kan. Stat. Ann. § 21-6821(d) (2019).

<sup>32</sup> Kan. Stat. Ann. §§ 21-6821 (2019) (specifying allowable good-time and program-participation credits) and 22-3717(d)(1) (2019) (stating that with certain exceptions persons sentenced for crimes committed on or after July 1, 1993 are not eligible for parole release).

depending on the severity of the offense, on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.<sup>33</sup>

## Q. What good-time credits do prisoners earn? Is program participation considered?

Good time credits can reduce the actual prison term served by 15-20%, depending on the offense of conviction.<sup>34</sup> The secretary of corrections is authorized to create rules and regulations for maintaining a system of good time credits for inmates. The statute provides that good behavior is the expected norm, and that good time credits should be awarded for program and work participation, as well as an inmate's willingness to examine and confront previous antisocial behaviors.<sup>35</sup>

The guidelines also provide for the earning of a limited number of program credits, to be awarded upon successful completion of a program designated as rehabilitative by the secretary of corrections. Inmates serving sentences for crimes that fall within severity level four through ten on the nondrug grid, or severity level three through five on the drug grid, may earn up to sixty days of program credits for participation in a number of rehabilitative programs. As with good time reductions, any time earned and subtracted is only added to an inmate's postrelease supervision if the inmate is serving time for certain sexually violent or sexually motivated offenses. Inmates participating in sex offender treatment programs are ineligible for program credits for such participation.<sup>36</sup>

## Q. Are prisoners subject to exceptional, "second-look" releasing mechanisms?

Inmates sentenced under the guidelines are eligible for pardon or commutation, but prison terms are not otherwise subject to exceptional "second-look" release other than in cases of functional incapacitation or terminal medical illness.<sup>37</sup>

## 5. RELATIONSHIP TO CRIMINAL LAWS

### Q. Did the guidelines replace some or all previous statutory maxima?

Except for off-grid crimes, which are punishable by life imprisonment, and nongrid crimes, which contain specific penalties within their respective statutes,<sup>38</sup> the guidelines did replace the maximum sentences previously provided for in statute. Prior to enactment of the guidelines, felony offenses were categorized as class A through E felonies, and minimum and maximum punishments for each class of offense were defined in statute. For example, in 1992, the statutes pertaining to aggravated robbery read as follows:

#### **21-3427. Aggravated robbery.**

Aggravated robbery is a robbery committed by a person who is armed with a dangerous weapon or who inflicts bodily harm upon any person in the course of such robbery.

Aggravated robbery is a class B felony.

<sup>33</sup> Kan. Stat. Ann. § 22-3717(d) (2019).

<sup>34</sup> Kan. Stat. Ann. § 21-6821(b) (2019).

<sup>35</sup> Kan. Stat. Ann. § 21-6821(a), (b) (2019).

<sup>36</sup> Kan. Stat. Ann. § 21-6821(e) (2019).

<sup>37</sup> Kan. Stat. Ann. §§ 22-3701, 22-3728, 22-3729 (2019).

<sup>38</sup> Kan. Sentencing Guidelines ch. I, 14-17 (2018).

## 21-4501. Classes of felonies and terms of imprisonment.

For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

\* \* \*

(b) Class B, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than five years nor more than 15 years and the maximum of which shall be fixed by the court at not less than 20 years nor more than life.

\* \* \*<sup>39</sup>

But following enactment of the guidelines, felony offenses are no longer defined by these classes, and are now instead defined according to their severity level on the sentencing guidelines grids and whether they are considered person or nonperson offenses. For example, the statute defining aggravated robbery now reads as follows, and one must look to the sentencing grid to determine the presumptive statutory maximum sentence, taking into account the offender's criminal history score:

## 21-5420. Robbery; aggravated robbery.

(a) Robbery is knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person.

(b) Aggravated robbery is robbery, as defined in subsection (a), when committed by a person who:

- (1) Is armed with a dangerous weapon; or
- (2) inflicts bodily harm upon any person in the course of such robbery.

(c) (1) Robbery is a severity level 5, person felony.

(2) Aggravated robbery is a severity level 3, person felony.<sup>40</sup>

The revised statutory definition of crimes, combined with the "doubling" limit on upward durational departures, means that the maximum sentence for a crime now equals twice the maximum presumptive sentence shown in the appropriate cell of the applicable guidelines grid.

**Q.** Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

The guidelines were designed to function alongside the mandatory minimum statutes, with the direction that sentencing courts are to choose the more severe sentence of the two. If, after application of the guidelines, the calculated sentence is greater than the mandatory minimum, the guidelines sentence is imposed. If not, the mandatory minimum still applies.<sup>41</sup>

Some mandatory minimum sentences function independently of the guidelines, with no overlap between the two. All crimes within this category are treated as "Off-grid" and sentenced accordingly.<sup>42</sup>

<sup>39</sup> Kan. Stat. §§ 21-3427, 21-4501 (1992). This felony classing system is still codified at Kan. Stat. § 21-6701 (2019) and is applicable when the court is sentencing offenses committed prior to July 1, 1993.

<sup>40</sup> Kan. Stat. § 21-5420 (2019).

<sup>41</sup> Kan. Sentencing Guidelines ch. I, 16-17 (2018).

<sup>42</sup> Kan. Sentencing Guidelines ch. I, 14-16 (2018).

## Q. Are some “mandatory” minima subject to case-specific “departure” or other exception?

Courts may depart from some mandatory minimums<sup>43</sup> if they find “substantial and compelling” reasons to do so. This standard is in line with the standard for departure under the guidelines.

## 6. CRIMINAL HISTORY SCORING

### Q. What are the major components of the criminal history score?

The criminal history score of an offender is based upon the following types of prior convictions and/or adjudications:

1. person felonies;
2. nonperson felonies;
3. person misdemeanors and comparable municipal ordinance and county resolution violations;
4. prior eligible nonperson misdemeanors and comparable municipal ordinance and county resolution violations.

Kansas weights prior convictions and adjudications on the basis of two factors: whether they are misdemeanors or felonies, and whether they are “person” or “nonperson” crimes.

A “person” crime refers to crimes that inflict, or could inflict harm to another person, while a “nonperson” crime refers generally to crimes committed that inflict, or could inflict damage to property. Unclassified and drug crimes are treated as “nonperson” for criminal history scoring purposes, and anticipatory crimes are treated as either “person” or “nonperson” in accordance with the designation given to the underlying crime. Further, certain “person” misdemeanors are converted to “person” felonies for scoring purposes at a rate of three misdemeanors to one felony.<sup>44</sup>

Juvenile adjudications are treated in the same way as adult convictions for purposes of criminal history scoring.<sup>45</sup> Prior out-of-state convictions and adjudications are treated as if they occurred in Kansas, and are accordingly counted when calculating an offender’s criminal history score.<sup>46</sup>

### Q. Does the jurisdiction utilize “decay”/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

Adult convictions do not decay. Juvenile conviction decay if the crime of conviction was committed after the offender reached the age of 25, and the prior juvenile adjudication was for an offense that was a level six through ten “nonperson” felony, a drug severity level five felony, or a misdemeanor.<sup>47</sup>

<sup>43</sup> See, e.g., Kan. Stat. Ann. § 21-6627(d) (2019) (providing that a sentencing judge may depart from certain statutorily prescribed mandatory minimums, if it is a first-time conviction for that crime, upon finding “substantial and compelling” reasons). The sentencing judge must then depart to the sentence prescribed by the guidelines, and if a second departure from the guidelines sentence is ordered, a second showing of “substantial and compelling” reasons must be made.

<sup>44</sup> Kan. Sentencing Guidelines ch. III, 28 (2018).

<sup>45</sup> Kan. Sentencing Guidelines ch. III, 29 (2018).; Kan. Stat. § 21-6811(f) (2019).

<sup>46</sup> Kan. Stat. Ann. § 21-6811(e) (2019); Kan. Sentencing Guidelines ch. III, 33-34 (2018).

<sup>47</sup> Kan. Stat. Ann. § 21-6810(d) (2019); Kan. Sentencing Guidelines ch. III, 29-30 (2018).

**Q.** Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

The guidelines differentiate an offender's criminal history by "person" and "nonperson" crimes. If an offender has not been convicted of a person offense, the offender's criminal history score can be no higher than the E category on the criminal history scale.<sup>48</sup> Aside from this distinction, the guidelines do not limit criminal history in any other significant way.

## 7. MULTIPLE CURRENT OFFENSES

**Q.** Are consecutive sentences limited? If so, how (e.g. prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

When multiple current offenses are sentenced with terms of imprisonment, whether those sentences are to run concurrently or consecutively is a discretionary matter for the sentencing court. The sentencing judge considers the need to impose an overall sentence that is proportional to the harm and culpability, and states on the record whether the sentence is to be served concurrently or consecutively.

If the sentencing court does not state whether sentences are to be served concurrently or consecutively, the presumption is for concurrent service. Mandatory consecutive service is required only when the sentenced offense occurred during a term of incarceration or conditional release for a prior sentence, or when specifically provided for by the applicable criminal statute.

Consecutive prison sentences, when either mandated or given at the sentencing judge's discretion, may not exceed twice the "base sentence". The "base sentence" applies to the sentence given for the primary sentenced crime, and is the sentence actually imposed, not the maximum sentence that could have been imposed under the guidelines.

The primary crime is generally the crime with the highest severity ranking, and in situations where two crimes fall within the same severity level, the sentencing judge designates one offense as primary, subject to the direction that a presumptive imprisonment crime is primary over a presumptive nonimprisonment crime, and that between two imprisonment crimes with one on the drug grid and the other on the nondrug grid, the offense carrying the longest prison term is primary.

Multiple non-prison sentences may not be aggregated or served consecutively, even though the underlying prison sentences have been ordered to be served consecutively.<sup>49</sup>

**Q.** In consecutive sentencing, how is the offender's criminal history taken into account?

Criminal history is considered only for the "base sentence" given for the primary crime. All non-base sentences are calculated on the basis of crime severity level, with a criminal history score placed in the I category ("one misdemeanor or no history"), which is the lowest category on the criminal history scale.<sup>50</sup>

<sup>48</sup> Kan. Stat. Ann. § 21-6809 (2019); Kan. Sentencing Guidelines ch. III, 27 (2018).

<sup>49</sup> Kan. Stat. Ann. § 21-6819(b)(8) (2019). If the non-prison sentence is revoked, the offender must serve the prison sentences consecutively as originally imposed.

<sup>50</sup> Kan. Stat. Ann. § 21-6819 (b)(5) (2019).

## 8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

### Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

The sentencing guidelines provide for appellate review when a departure from the presumptive guidelines sentence has occurred. Non-departures and plea agreement sentences accepted by the sentencing court may not be appealed.

Appellate review of departure sentences is limited to whether the court’s finding of facts and reasons justifying departure are supported by evidence on the record and constitutes substantial and compelling reasons for departure. In any appeal, including those unrelated to a departure sentence, the appellate court may review claims that a departure resulted from partiality, prejudice, oppression, or that the sentencing court erred in its calculation of crime severity level or criminal history score.<sup>51</sup>

The sentencing court retains authority for 90 days after entry of judgment regardless of any notice of appeal to modify its judgment and sentence to correct any arithmetic or clerical errors.<sup>52</sup>

### Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

Sentence appeals, and the requirement of substantial and compelling reasons for departure from the guidelines, provide the only enforcement mechanisms. Sentencing courts are also required to complete and submit the Journal Entry of Judgment form to the Kansas Sentencing Commission, which will review the form and inform the sentencing court in the event that a possible illegal sentence is imposed.<sup>53</sup>

Judge-specific departure rates are not published, and judges are given a broad range of sentencing alternatives (where available) and ranges.

### Q. Are some deviations from the guidelines not deemed departures?

If a presumptive sentence falls within one of the three border boxes on the grid, the sentencing court may deviate downward and sentence an offender to probation instead of imprisonment without departing, provided the court makes certain prescribed findings on the record.<sup>54</sup>

### Q. Do some deviations require especially strong justification? Or minimal justification?

The procedural and substantive standard for departures from the guidelines is the same in cases of dispositional departure as it is in cases of durational departures, aside from when the presumptive sentence falls within one of the grid’s border boxes.<sup>55</sup>

<sup>51</sup> Kan. Stat. Ann. § 21-6820(d), (e) (2019).

<sup>52</sup> Kan. Stat. Ann. § 21-6820(i) (2019).

<sup>53</sup> Kan. Sentencing Guidelines Ch. V, 65-66 (2018).

<sup>54</sup> Kan. Stat. Ann. § 21-6804(q) (2019).

<sup>55</sup> Kan. Sentencing Guidelines Ch. V, 69-72 (2016).