Appendix A: Selected Kansas Case Law Decisions on Topics Related To the KSGA and Sentencing Issues Since 1993 (Decisions through 04/2006)

JAIL TIME CREDIT

White v. Bruce, 23 Kan. App. 2d 449, 932 P.2d 448, *rev. denied*, 262 Kan. 970 (1997). White was completing a 24 months term of postrelease supervision when he committed another offense. He received a 12 months prison sentence for the new offense and was credited with the 182 days he spent in custody. After serving 7 months of his 12 months new sentence, the Kansas Parole Board revoked his postrelease supervision, ordering him to serve to the maximum date of his postrelease supervision term. White filed a petition for habeas corpus pursuant to K.S.A. 60-1501, asserting the time he spent incarcerated on the new charge prior to the parole board's revocation should be credited against his postrelease supervision term. The sentencing court found White was entitled to such credit.

The Court reversed, holding under the Kansas Sentencing Guidelines, a term of incarceration and a term of postrelease supervision cannot be served at the same time. Under K.S.A. 21-4608(c), where an individual on postrelease supervision is incarcerated on another charge which results in a new conviction and sentence, the time spent incarcerated on the new charge cannot be credited against an unrevoked term of postrelease supervision.

State v. Taylor, 24 Kan. App. 2d 80, 941 P.2d 954, *rev. denied*, 262 Kan. 969 (1997). Taylor pled guilty to indecent liberties with a child in three separate counties. The cases all involved the same child victim. Taylor appealed the sentencing court's denial of his motion for jail time credit in one of those counties. The Court affirmed the sentencing court's denial. Taylor had argued that under *State v. Campbell*, 223 Kan. 528, 575 P.2d 524 (1978), an offender is not entitled to credit on a sentence for time which he has spent in jail upon other, distinct, and wholly unrelated charges. Taylor argued that because all three of his charges involved the same victim and the same period of time that those charges were "related" and thus he should receive credit for jail time that he spent in any of the three counties on any of the charges involved.

The Court disagreed and held that the factual relationship between criminal charges filed in separate counties is not relevant to determining whether an offender should receive jail time credit against a particular sentence. The Court ruled that an offender incarcerated on account of multiple criminal charges filed in separate counties should receive jail time credit only against the sentence for the charges filed in the county in which he or she is held.

State v. Palmer, 262 Kan. 745, 942 P.2d 19 (1997). Palmer appealed the sentencing court's denial of credit towards computation of his sentence, parole eligibility, and conditional release dates under K.S.A. 21-4614 for time he resided in a community residential facility while on bond awaiting trial. The Court held that K.S.A. 21-4614 does not authorize or require that the time an offender resides in a private residential facility as a condition of a pre-conviction appearance bond be credited as time spent "incarcerated" pending disposition of a case.

Citing *State v. Babcock*, 226 Kan. 356, 597 P.2d 1117 (1979), the Court determined that the "critical inquiry" in a determination of whether an offender is entitled to credit for time served in a community facility is whether the offender, while a resident at the community facility, was under actual or constructive control of jail or prison officials. The Court stated that in making this determination, the court will give particular attention to "the circumstances of

placement of the person in the facility" rather than "the nature of the facility itself." In Palmer's case the community "halfway house" facility at which he was under "house arrest" allowed Palmer to come and go as he wished during the day and thus fell short of the constructive control of the court, corrections officials or law enforcement agencies that the Court found to be required under *Babcock* for "incarceration."

State v. Wheeler, 24 Kan. App. 2d 616, 949 P.2d 634 (1997), *rev. denied*, 264 Kan. 824 (1998). Under K.S.A. 21-4614, jail time credit is earned only for the time spent in jail solely on account of the offenses for which the offender is being sentenced. Jail time credit is not earned under K.S.A. 21-4614 for time spent in jail solely on account of charges that are then dismissed.

State v. Winters, 25 Kan. App. 2d 386, 966 P.2d 678, *rev. denied*, 266 Kan. 1116 (1998). Under K.S.A. 21-4602 and K.S.A. 21-4610, a sentencing court may require an offender to serve time in jail as a condition of probation. In the present case the Court held that when an offender's probation is revoked and he or she is incarcerated, the offender is entitled to jail time credit for the time spent in jail as a condition of his or her probation.

State v. Heath, 25 Kan. App. 2d 587, 967 P.2d 775, *rev. denied*, 266 Kan. 1112 (1998). This case dealt with a situation where the offender was convicted on state charges and then was convicted on federal felony charges for separate crimes before he was sentenced on the state charges. Regarding the computation of an offender's criminal history score, the Court upheld the statutory rule that an offender's prior convictions are counted in the offender's criminal history regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case. See K.S.A. 21-4710(a). Concerning the proper award of jail time credit, the Court held that the offender should not have received jail time credit against his Kansas sentence for time spent incarcerated on his federal charges prior to his sentencing in the state court.

See also ***State v. Taylor***, 24 Kan. App. 2d 80, 82-83, 941 P.2d 954, *rev. denied*, 262 Kan. 969 (1997).

State v. Wolverton, 25 Kan. App. 2d 737, 969 P.2d 917 (1998). K.S.A. 1994 Supp. 8-262(a)(3) requires that, upon a second or subsequent conviction under this statute, an offender must complete a sentence of five days imprisonment before the offender is eligible for parole. In the current case, Wolverton spent more than five days in jail in lieu of felony bond prior to sentencing. At sentencing, defense counsel requested that Wolverton be immediately placed on probation given that Wolverton had already served more than five days in jail. The sentencing court granted Wolverton immediate probation, finding that the minimum five days incarceration period required by K.S.A. 1994 Supp. 8-262(a)(3) had been fulfilled. The State appealed.

Ruling on the question of whether Wolverton should have been required to serve five days imprisonment following sentencing, the Court held "If, prior to sentencing, a defendant has served time in jail in lieu of bond in excess of the mandatory minimum required to be served before probation eligibility, and the applicable statute is silent as to when the mandatory minimum must be served, then such defendant is entitled to full credit against the mandatory minimum for the time previously served." At Syl. ¶ 2.

State v. Cockerham, 266 Kan. 981, 975 P.2d 1204 (1999). The prosecution reserved the question of whether the sentencing court's grant of credit to the offender for prison time served in Kentucky against his earlier Kansas sentence was a modification of his sentence without jurisdiction and therefore an illegal sentence. The Court held that the sentencing court's grant of credit for the time served in Kentucky in this case was not a modification of sentence and was therefore not illegal.

State v. Cooper, 26 Kan. App. 2d 557, 990 P.2d 765 (1999). An offender who resists extradition while incarcerated on a charge for which the offender is later sentenced is entitled to credit for the time spent in custody. In this case the offender was arrested and held for a period of time in another state, however, the offender was being held solely on the Kansas charges that he was eventually sentenced on.

State v. Taylor, 27 Kan. App. 2d 539, 6 P.3d 441 (2000). Taylor sought review of the district court's refusal to allow him jail time credit for his stays in a reintegration program and a halfway house while on probation. As a condition of probation, Taylor had been ordered to enter an inpatient drug treatment facility. The drug treatment facility Taylor was admitted to transferred Taylor to a "reintegration program" prior to his release from the facility. The Court held in part: "Under K.S.A. 21-4614a(a) and *State v. Theis*, 262 Kan. 4, 936 P.2d 710 (1997), a defendant may receive jail time credit for time spent in an inpatient reintegration program or halfway house made a condition of the defendant's probation. Such programs fit the 'residential facility' language of the statute, and the requirement that a program be a condition of probation ensures at least a minimal consistency with the goals of the probation itself." At Syl. ¶ 1.

The Court reversed and remanded the case, holding Taylor was entitled to jail time credit for the time spent in the reintegration program, and directing the district court to determine whether the halfway house Taylor also resided in qualified as a "residential facility" and whether Taylor's placement there was a condition of his probation. If the halfway house qualified as a "residential facility" and Taylor was placed there as a condition of his probation, then, the Court held, Taylor will be entitled to jail time credit for the time spent in the halfway house.

State v. Parks, 27 Kan. App. 2d 544, 6 P.3d 444 (2000). The Court held that K.S.A. 21-4614 does not permit an offender to receive jail time credit for time spent under house arrest when the house arrest and the restrictions are not equivalent to incarceration. In this case the sentencing court allowed Parks to remain on house arrest pending an appeal. Parks was assigned as a condition of the house arrest that he remain on electronic monitoring and attend an aftercare program and AA meetings. Parks was not required to stay in a residential facility and was permitted to remain in his own home for the duration of the house arrest. The Court affirmed the denial of jail time credit in this case.

State v. Golston, 269 Kan. 345, 7 P.3d 1132 (2000). Under K.S.A. 21-4614, if a district court sentences an offender to confinement, the court shall specifically designate in the KSGA Journal Entry of Judgment the date upon which the offender's sentence begins. Such date shall be established to reflect and shall be computed as an allowance for the time the offender has spent incarcerated pending the disposition of the offender's case. Jail time credit is not to be considered to reduce the minimum or the maximum terms of confinement as are authorized by law for the offense of which an offender has been convicted. The Secretary of Corrections is responsible for tracking the offender's release date, which varies depending on whether the offender is entitled to good time credits. The grant or denial of good time credits is totally within the discretion of penal authorities, not the sentencing court.

State v. Lofton, 272 Kan. 216, 32 P.3d 711 (2001). The offender was sentenced in 1984 to two 15 years to life sentences for two pre-guidelines felonies and 6 months for one misdemeanor, with all three sentences to run consecutively. In 2000, the offender filed a motion challenging the computation of his jail time credits, alleging that each of the two consecutive 15 years to life sentences should have received a jail time credit for the time the offender spent in jail before the trial of these offenses. The sentencing court denied the motion on the basis that no relief could be provided under K.S.A. 22-3504(1) because the offender was not alleging that his sentences were illegal.

The Court agreed with the sentencing court regarding K.S.A. 22-3504(1). The Court also agreed with the sentencing court that if the issue of jail time credit had been properly before the sentencing court, the offender still was not entitled to the same credit for each of the consecutive sentences. The Court also pointed out that neither the jail time credit statute, K.S.A. 21-4614 nor the Court of Appeal's holding in *State v. Jenkins*, 10 Kan. App. 2d 8, 690 P.2d 396 (1984), should be applied in any such manner to allow the offender to a jail time credit of twice the amount of time that he had actually been incarcerated.

Hudson v. State, 273 Kan.251, 42 P.3d 150 (2002). The offender was convicted in 1991 of possession of cocaine while she was still on probation for a 1981 conviction for forgery. The offender's two indeterminate sentences were then aggregated and although the offender had been on probation for 9 years prior to the 1991 conviction, the offender did not receive any credit for "street time" while on parole. The offender filed a K.S.A. 60-1507 motion that the sentencing court granted, based upon the argument that parole is time spent in custody. The State appealed.

The Court's standard of review was unlimited in that the constitutionality of a statute was at issue, namely K.S.A. 21-4608(f)(5). The Court compared K.S.A. 21-4608(f)(5) to K.S.A. 22-3722 and stated: "K.S.A. 21-4608(f)(5) covers the event of a consecutive sentencing to a sentence for which the prisoner has been on parole. Credit for time on parole is a matter of legislative grace and not a constitutional right. For the purposes of K.S.A. 21-4608(f)(5), Hudson was not in custody or incarcerated during the time of her parole."

"The consequences of K.S.A. 21-4608(f)(5) did not affect Hudson until consecutive sentences were imposed for committing a new offense while on parole. Hudson had fair notice. The amendment was not effective for nearly 8 years before she committed the act which triggered the application of the statute. No additional punishment was inflicted upon Hudson by virtue of K.S.A. 21-4608(f)(5). Hudson was returned to prison to complete her original sentence and her new sentence. There is no double jeopardy or due process issue."

Davis v. McKune, 30 Kan. App. 2d 822, 48 P.3d 1287 (2002). After receiving two disciplinary convictions, it was discovered that an inmate was eligible to receive good time credit, which was retroactively awarded but with 120 days withheld due to the two disciplinary convictions. The inmate filed a K.S.A. 60-1501 petition for writ of habeas corpus.

The Court in its opinion, stated in part: "Davis argues that the calculation of his good time credits is intolerable to fundamental fairness because his credits were withheld by a unit team manager rather than by the disciplinary board and the hearing officer. To support his argument, Davis cites K.A.R. 44-13-406, which provides for the disposition of a disciplinary proceeding by a hearing officer. However, Davis' reliance on K.A.R. 44-13-406 is misplaced because his good time credits were not withheld pursuant to that regulation. Instead, Davis' good

time credits were distributed under K.A.R. 44-6-101(d), which provides that the "'[a]ward of good time credits' means the act of the unit team, as approved by the program management committee and the warden or designee, granting all or part of the allocation of credits available for the time period under review."

State v. Harper, 275 Kan. 888, 69 P.3d 1105 (2003). The offender was convicted of aggravated battery (a felony offense) and two counts of assault on a law enforcement officer (misdemeanor offenses). The sentencing court ordered that one of the 12 months misdemeanor sentences run consecutive with the 46 months felony sentence and also that the second 12 months misdemeanor sentence run concurrent with the felony sentence. Thus the offender's 529 days of jail time credit would first apply to one of the misdemeanor sentences with the balance to be credited towards the felony sentence.

The Court reviewed K.S.A. 21-4614 before stating in part: "Harper's case involves both a misdemeanor jail sentence and a consecutive felony sentence. Because of the felony sentence, K.S.A. 21-4614 required the judge to designate a sentence begins date that allowed Harper 529 days of jail time credit and to deliver that information "with the defendant to the correctional institution…." The statute then provides that "the date of sentence and all good time allowances as are authorized by the Kansas adult authority are to be allowed on such sentence from such date as though the defendant were actually incarcerated in any of the institutions of the state correctional system."

"Clearly, when a felony sentence is involved, the statute requires all jail time credit established by the designated sentence begins date to be applied first to the felony sentence to compute that felony sentence and the parole eligibility and conditional release dates."

***Kesterson v. State*,** 276 Kan. 732, 79 P.3d 1074 (2003). The offender filed a petition of writ of habeas corpus asking that the Department of Corrections (DOC) be ordered to restore good time credits it had withheld because of his failure to participate in a sex offender program. The district court granted the petition and DOC appealed. The offender moved to transfer to the Kansas Supreme Court and the Court granted his request.

The sole issue on appeal was whether the version of the Kansas Administrative Regulation that awards good time credits in effect at the time of the inmate's crime can be changed to his detriment without violating the Ex Post Facto Clause of the United States Constitution. The administrative regulation in effect at the time the offender committed his crimes was K.A.R. 44-6-124 (1984), which addressed awarding good time credits.

The Court in its opinion stated in part: "This case is on all fours with *Stansbury v. Hannigan*, 265 Kan. 404, 960 P.2d 227, *cert. denied*, 525 U.S. 1060 (1998) and *Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412, *cert. denied*, 525 U.S. 1060 (1998). In those cases, an inmate lost good time credits under K.A.R. 44-6-124(g)(6) for refusal to participate in the Sexual Abuse Treatment Program. In those cases, the application of the amended version of K.A.R. 44-1-124(g)(6) was found to be a violation of the prohibition against ex post facto laws as applied to *Stansbury* and *Bankes*. In this case, the respondents are again attempting to apply an amended version of K.A.R. 44-6-124 against the petitioner. These actions fly directly in the face of the *Stansbury* and *Bankes* decisions. The application of the amended version of K.A.R. 44-6-124 to petitioner is a violation of the prohibition against ex post facto laws."

State v. Guzman, 279 Kan. 812, 112 P.3d 120 (2005). Defendant appealed the trial court's denial of his motion for jail credit for time spent on 24 hour-a-day house arrest while on bond until sentencing. The Supreme Court reviewed K.S.A. 21-4614 and distinguished cases where a person is held in a hospital and noted that a person chooses to accept house arrest in lieu of being held in a jail prior to sentencing. Therefore, the Court held that such a person is not "incarcerated" under K.S.A. 21-4614 and, thus, not entitled to jail credit.

State v. Smith, 33 Kan. App. 2d 554, ___ P.3d ___ (2005). Defendant appeals the trial court's modification of his jail time credit. On October 31, 2003, Smith pled no contest to an amended charge of attempted criminal possession of a firearm. At sentencing, the PSI report indicated that Smith had earned 92 days of jail credit on the current case. In addition, Smith had been served with a probation revocation warrant on Sept. 19, 2003 and had remained in custody until November 21, 2003 when his probation was revoked and he was remanded to the Department of Corrections.

The trial court sentenced Smith to 11 months' imprisonment with postrelease supervision of 12 months and awarded him 92 days of jail credit. The State objected to the award of credit arguing that Smith would be receiving double credit if awarded the 92 days because the court had served him with the probation warrant on Sept. 19 and he had received credit from that date through Nov. 21 when his probation was revoked. Because Smith had received jail time credit in the amount of 64 days between Sept. and Nov., the court subtracted those days from the jail credit awarded in the current case and ultimately awarded him jail time credit of 28 days.

On appeal, Smith contends that under the KSGA, the trial court was without jurisdiction to modify his sentence by subtracting jail time after the court had imposed a lawful sentence. Smith relied on *State v. Zirkle*, 15 Kan. App. 2d 674, 678, 814 P.2d 452 (1991) in his argument that once the court imposed his sentence, the court was unable to vacate that sentence and impose a harsher one. The State relied on *State v. Cockerham*, 266 Kan. 981, 985, 975 P.2d 1204 (1999) wherein the court found that granting a defendant jail time credit did not constitute a modification of a defendant's sentence.

A sentence is effective when it is pronounced from the bench, not from the date of filing of the journal entry. Once a sentence is imposed, the sentencing court is powerless to vacate that sentence and impose a harsher one. *State v. Jackson*, 262 Kan. 119, 140, 936 P.2d 761 (1997); see also *State v. Rinck*, 260 Kan. 634, 637-45, 923 P.2d 67 (1996) (discussing due process protections upon resentencing). "An illegal sentence subject to correction is a sentence imposed by a court without jurisdiction, a sentence which does not conform to the statutory provision, . . . or a sentence which is ambiguous with respect to the time and manner in which it is to be served." *State v. Huff*, 277 Kan. 195, 199, 83 P.3d 206 (2004). K.S.A. 2004 Supp. 21-4614 provides that a defendant is entitled to receive jail time credit. Credit is for time spent in jail solely for the pending charge for which the defendant is later charged. *Campbell v. State*, 233 Kan. 528, 530-31, 575 P.2d 524 (1978).

The Court of Appeals found the *Cockerham* case closely resembled the present case with the exception of the fact that in *Cockerham*, the court decreased the number of days spent in jail by adding jail credit whereas, in this case, the court increased the number of days Smith was to serve on his sentence by subtracting jail time credit. Nevertheless, the *Cockerham* court determined there was no modification of the sentence if the original sentence imposed remained the same. In this case, the original sentence of 11 months remained the same. Therefore, based on *Cockerham*, the trial court did not modify the sentence when it changed Smith's jail time

credit.

In re T.G., 35 Kan. App. 2d 216, ___ P.3d ___ (2006). The sole issue on appeal is whether the district court properly denied T.G. credit for time spent at Marillac prior to sentencing. T.G. was placed in juvenile detention under the custody of the Juvenile Justice Authority (JJA) on a charge of rape. Pursuant to a plea agreement the district court sentenced T.G. "to a term of incarceration in a juvenile correctional facility for a period of 18 months," with 24 months of aftercare. The court further ordered that the term of incarceration was to be stayed and that T.G. would "remain in the care, custody and control of the JJA with authority for placement." The court then recommended placement at Marillac and ordered that T.G. "complete the Sexual Offenders Program and follow all the recommendations for treatment and aftercare."

T.G. failed to complete the Sexual Offenders Program which was a violation of the order of the court and led to the question of the proper disposition order pertaining to the underlying sentence and whether T.G. should get credit for the time spent at Marillac.

The Court pointed out that under K.S.A. 38-1664(b) the court shall have no power to direct a specific placement by the commissioner, but may make recommendations. However the JJA has the power to place a juvenile offender in "a community mental health center," among other options. K.S.A. 38-1664(b).

The Court compared the instant case with *In the Interest of W.M.*, Case No 90,277, unpublished opinion filed December 24, 2003. In that case, the juvenile offender stipulated to the commission of the crime, was placed in Marillac and subsequently brought out the issue of credit for time served upon his subsequent commitment to a juvenile correctional facility. In analyzing K.S.A. 38-16,133, the court decided that the determinative factor was whether the individual claiming the credit had been sent to the facility pursuant to court order. The court concluded that incarceration as used in K.S.A. 38-16,133 meant placement in a facility where the offender would be subject to a charge of escape from custody in violation of K.S.A. 21-3809 or 21-3810 if he or she escaped. In both statutes, the critical factor was whether the individual was placed at a facility pursuant to court order.

Therefore, the Court of Appeals held that since T.G. willingly entered into the plea agreement by which he avoided incarceration by voluntarily seeking residential treatment, and since the treatment was not ordered pursuant to the court, but by JJA, T.G. was not entitled to credit for time spent at Marillac prior and subsequent to his sentencing.

SENTENCING CONSIDERATIONS

State v. Dighera, 22 Kan. App. 2d 359, 916 P.2d 68 (1996), *rev. denied* 260 Kan. 997 (1996). K.S.A. 22-3210(a)(2) does not require that the sentencing court inform an offender of the KSGA presumption of imprisonment prior to accepting his or her guilty plea. The statutory presumption of imprisonment is not a consequence of the plea as that phrase is used in the statute.

State v. Soto, 23 Kan. App. 2d 154, 928 P.2d 103 (1996). In a very brief opinion dismissing the offender's appeal, the Court held that in a criminal case, final judgment occurs upon pronouncement of sentence from the bench. Further, under the KSGA, a sentencing court does not have the authority to suspend imposition of a sentence in felony cases.

State v. Patterson, 262 Kan. 481, 939 P.2d 909 (1997). Patterson appealed the legality of his sentence by challenging the validity of prior convictions that formed the basis for enhancement of his sentence under the Habitual Criminal Act (K.S.A. 21-4504). The Court held that an offender who collaterally challenges the use of a prior conviction to enhance his or her sentence has the burden to show that he or she did not have the benefit of counsel at the prior conviction and, absent such a showing, the enhanced sentence is presumed to be regular and valid.

See also ***Boykin v. Alabama***, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969), ***Parke v. Raley***, 506 U.S. 20, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992) and ***State v. Jones***, 272 Kan. 674, 35 P.3d 887 (2001). *Jones* involved the denial of a motion to correct an illegal sentence and the Court once again held in a collateral challenge of the constitutional validity of prior convictions used to enhance a sentence based upon a claim of the absence of counsel, the offender has the burden of proof to show that he/she didn't have counsel.

State v. Haskins, 262 Kan. 728, 942 P.2d 16 (1997). Even if the parties make a mutual mistake as to an offender's criminal history score prior to the entry of a guilty plea, the sentencing court can impose a sentence on the more serious criminal history score discovered after the guilty plea but prior to sentencing. The State is prohibited pursuant to K.S.A. 21-4713(f) from entering into a plea agreement that excludes prior convictions from an offender's criminal history. Prior convictions discovered after a plea has been accepted are properly considered in an offender's criminal history at sentencing under K.S.A. 21-4707(c)(4). The Court, citing K.S.A. 21-3715(a) and K.S.A. 21-4711(d)(1), further held that the legislature has expressed a clear intention that juvenile adjudication for a residential burglary is to be counted as a person felony.

State v. Snow, 24 Kan. App. 2d 117, 942 P.2d 57, *rev. denied*, 262 Kan. 968 (1997). Snow pled guilty to aggravated intimidation of a witness. Following a hearing on the departure motion filed by Snow, the sentencing court sentenced Snow as follows: "This court assigns Brian A. Snow to Community Corrections and to Labette Conservation Camp. I believe that this is a statutorily acceptable sentence. In the event that Mr. Snow is not accepted by Labette Conservation Camp, it will be necessary for him to reappear in Court and the court reserves the opportunity to modify this sentence in case that he is not accepted."

The Labette Conservation Camp declined Snow's admission due to a medical condition, and Snow was returned to the sentencing court for resentencing. Upon resentencing the court sentenced Snow to the presumptive sentence for his crime, which included a prison term. Snow appealed claiming that the sentencing court improperly modified his sentence at the second hearing. Snow contended that since the court had originally departed and sentenced him to community corrections, that it was impermissible for the court to later increase his sentence by sentencing him to prison.

The Court rejected Snow's claim, stating that the original sentence imposed by the sentencing court left open the possibility of assignment to Labette and community corrections if Snow could obtain acceptance to those programs. In essence, the Court found that the sentencing court's original sentence gave Snow the possibility of avoiding a prison sentence, and then continued the matter for sentencing or final disposition until such time as it was clear whether Snow would be able to be accepted to Labette. When it turned out that Snow could not get into Labette, the sentencing court properly imposed a final sentence in keeping with the KSGA.

City of Junction City v. Cadoret, 263 Kan. 164, 946 P.2d 1356 (1997). Crimes that are designated as felonies can only be charged and tried in the district courts of the State of Kansas. Municipalities do not have jurisdiction over felonies and may not prosecute crimes designated as a felony by state statute.

A municipal ordinance that attempts to prohibit conduct designated as a felony by state statute of uniform application is in direct conflict with state law. The Kansas legislature, in enacting K.S.A. 1996 Supp. 8-1567(f), clearly intended that persons charged with and convicted of a third or subsequent offense of driving under the influence of alcohol be guilty of a nonperson felony. Municipalities may not prosecute, pursuant to a city ordinance, the third or subsequent violations for driving under the influence of alcohol, as such crimes are designated felonies by K.S.A. 1996 Supp. 8-1567(f).

State v. Unruh, 263 Kan. 185, 946 P.2d 1369 (1997). Under the provisions of K.S.A. 21-4713(f), a prosecutor shall not enter into any agreement to decline to use a prior drug conviction of the offender to elevate or enhance the severity level of a drug crime as provided in K.S.A. 65-4127a, 65-4127b, and 65-4159 or K.S.A. 1995 Supp. 65-4160 though 65-4164 and amendments thereto, or make any agreement to exclude any prior conviction from the criminal history of the offender.

State v. White, 263 Kan. 283, 950 P.2d 1316 (1997). If an offender is charged with murder in the first degree, the county or district attorney shall file written notice if such attorney intends, upon conviction or adjudication of guilt of the offender, to request a separate sentencing proceeding to determine whether the offender should be required to serve a mandatory term of imprisonment of 40 years. Such notice shall be filed with the sentencing court and served on the offender or the offender's attorney at the time of arraignment. If such notice is not filed and served as required by statute, the county or district attorney may not request such a sentencing proceeding and the offender, if convicted of murder in the first degree, shall be sentenced as otherwise provided by law, and no mandatory term of imprisonment shall be imposed hereunder. The notice requirements of K.S.A. 1993 Supp. 21-4624(1) are mandatory, and where the State fails to follow the requirements, the Hard 40 sentence cannot be imposed.

The Court further held that if the evidence in a case raises a bona fide doubt as to the offender's competency, then the failure to hold a hearing to determine competency is a denial of due process.

Thompson v. State, 25 Kan. App. 2d 659, 967 P.2d 361 (1998). The Court held: "Where the State has stipulated to a defendant's erroneous criminal history and the defendant's sentence is converted on the basis of that criminal history and the defendant's sentence is converted on the basis of that criminal history, the State cannot later move to correct the sentence conversion as an illegal sentence under K.S.A. 22-3504." At Syl. ¶ 1. The Court based its ruling on the holding in *State v. Strickland*, 23 Kan. App. 2d 615, 933 P.2d 725, *rev. denied*, 262 Kan. 968 (1997) which held when the State fails to find convictions in an offender's criminal history, the State cannot later amend and increase the severity level of an offender's criminal history for the crime at issue.

State v. Mullins, 267 Kan. 84, 977 P.2d 931 (1999). When a jury verdict is nonspecific and uncertain as to whether an act was committed before or after the effective date of an amended statute, the offender may be sentenced only to the lesser offense or sentence. Citing *State v. Jackson*, 239 Kan. 463, at 472, 721 P.2d 232 (1986).

State v. Gill, 26 Kan. App. 2d 127, 980 P.2d 591 (1999). The offender argued that the sentencing court erred in sentencing him in his absence. The Court held that an offender may waive his right to be present at sentencing. See also *State v. Braun*, 253 Kan. 141, 146-47, 853 P.2d 686 (1993). Here the offender left the courtroom of his own volition. The Court held that the sentencing court did not err in sentencing the offender in his absence.

See also ***State v. Williams***, 259 Kan. 432, 445-46, 913 P.2d 587 (1996).

State v. Arculeo, 29 Kan. App. 2d 962, 36 P.3d 305 (2001). The offender had been convicted in two separate cases of twelve sex offenses, however, at the upward durational departure hearing for the first case the prosecution presented evidence of the yet to be prosecuted offenses for the second case in an effort to enhance the sentence. Syl. ¶ 6 of the Court's opinion clearly states the sentencing issue: "Presentation of evidence concerning other crimes admitted at a sentencing hearing, which is presented to enhance the defendant's sentence, constitutes introduction of evidence in a "prior prosecution" if those other crimes are prosecuted at a later time."

Thus the five offenses that the offender was convicted on stipulated facts to the court in the second case were dismissed as a double jeopardy violation. The offender's upward durational departure sentence in his first case was vacated pursuant to the holding in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) and remanded for resentencing.

State v. Williams, 30 Kan. App. 2d 28, 36 P.3d 859 (2001). The offender pled guilty to one count of possession of cocaine and no drug tax stamp and was sentenced to 24 months probation with an underlying sentence of 11 months, plus 24 months of postrelease supervision. The probation was revoked for the failure to comply with the conditions of probation. The offender appealed raising an issue that K.S.A. 2000 Supp. 22-3716(e) should apply resulting in no postrelease supervision.

The Court's review was unlimited since the interpretation of a statute was involved. In a very brief opinion, the Court stated in part: "Here, Williams' probation was revoked when he failed to remit payment for the ordered costs and failed to report to his probation officer. However, under K.S.A. 2000 Supp. 22-3716(e), postrelease supervision is not to be imposed when an offender's nonprison sanction is revoked for failure to comply with the terms and conditions of probation and he or she fulfills the obligation of the underlying sentence. As a conditional violator, Williams does not fall within the exceptions listed in K.S.A. 2000 Supp. 22-3716(e) and is not subject to postrelease supervision…"

State v. Frazier, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied*, 274 Kan. 1115 (2002). The offender was convicted of possession of ephedrine or pseudoephedrine and sentenced to 150 months imprisonment for a severity level 1 offense on the drug grid. The offender appealed his sentence. One of the offender's arguments on appeal was that his conduct was the same under two different statutes, namely K.S.A. 2001 Supp. 65-7006 and K.S.A. 2001 Supp. 65-4152. The first statute prohibits the possession of ephedrine or pseudoephedrine and the second statute prohibits the possession of drug paraphernalia.

Although the offender's argument was not made to the trial court, the Court of Appeals had jurisdiction to correct an illegal sentence and to also determine the proper application of these two statutes. The offender argued that both statutes had the same elements and the Court of Appeals agreed in holding that both statutes involve the same conduct. The Court applied *State*

v. Nunn, 244 Kan. 207, 768 P.2d 268 (1989) in remanding this matter back to the sentencing court with directions to correct the sentence imposed to conform to the penalties for a severity level 4 drug offense, instead of a severity level 1 drug offense.

State v. Muriithi, 273 Kan. 952, 46 P.3d 1145 (2002). Refer to the Syllabus. Syl. ¶ 2. "With regard to the entry of a nolo contendere plea, defense counsel has an obligation to advise the defendant as to the range of permissible penalties and to discuss the possible choices available to the defendant." Syl. ¶ 4. "K.S.A. 2001 Supp. 3210 does not require the district courts to warn or inform defendants of the collateral consequences of their convictions. Syl. ¶ 5. "K.S.A. 2001 Supp. 22-3210 embodies the due process requirements as interpreted by the United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)."

State v. Sweat, 30 Kan. App. 2d 756, 48 P.3d 8, *rev. denied*, 274 Kan. 1118 (2002). The offender was convicted by a jury of attempted first-degree murder, conspiracy to commit first-degree murder and aggravated battery. The sentencing court sentenced the offender to the standard sentence in each grid box with all three sentences to be served *consecutive*. However, although the offender's co-defendant (Fierro) also received the standard sentence in each grid box for the same offenses, the co-defendant's offenses were sentenced *concurrent*. The offender appealed with an argument that: "…the district court did not provide adequate reasons on the record for the disparity in sentences and that her culpability relative to Fierro was the same."

In its opinion, the Court stated in part: "*Bailey* does not control here. Although the district court did not specifically compare Sweat's and Fierro's sentences, it noted its involvement in accepting Fierro's plea and articulated its reasons for imposing Sweat's term of imprisonment. The district court mentioned that Sweat had planned Edden's murder and that she had engaged in her behavior because she wanted get even with the victim. The court also noted that her sentence would be elevated because of her criminal history and said she needed to be "severely punished" because she convinced her son's 18-year-old friend to help her. The evidence presented clearly supported these statements by the district court, and these statements constituted an adequate on-the-record rationale for the sentencing difference. The district court did not abuse its discretion."

See also ***State v. Bailey***, 215 Kan. 527, 834 P.2d 1353 (1992).

State v. Luttig, 30 Kan. App. 2d 1125, 54 P.3d 974, *rev. denied*, 275 Kan. 967 (2002). The offender was convicted in a bench trial of the unlawful manufacture of methamphetamine and possession of drug paraphernalia. The resulting sentence for the unlawful manufacture count was based upon K.S.A. 2001 Supp. 65-4159, a drug severity level 1 offense. On appeal, the offender argued for the first time that he should have been sentenced pursuant to K.S.A. 2001 Supp. 65-4127c instead of K.S.A. 2001 Supp. 65-4159, since both statutes set forth penalty provisions for the same crime. A K.S.A. 2001 Supp. 65-4127c sentence is a class A nonperson misdemeanor.

The Court noted K.S.A. 22-3504 provides the basis to correct an illegal sentence at any time. However, the Court then pointed out although K.S.A. 2001 Supp. 65-4159 was not one of the specific statues exempted from the general penalty provision of K.S.A. 65-4127c, K.S.A. 2001 Supp. 65-4159 had a specific penalty provision of its own, namely subsection (b). The Court stated in part: "Here, K.S.A. 2001 Supp. 65-4159(b) is the more specific statute, as it defines the crime of which Luttig was convicted. In contrast, as evidenced by its title, K.S.A 2001 Supp. 65-4127c is a general penalty statute. There is nothing to suggest the legislature intended for the penalty set forth in the general statute to trump that which was prescribed in the

special statute. Accordingly, we determine that the penalty provision in K.S.A. 2001 Supp. 65-4159(b) prevails."

State v. Johnson, 30 Kan. App. 2d 1133, 55 P.3d 927 (2002). The Court's Syllabus states the decision best, namely: "When a plea agreement includes an agreement to recommend as illegal sentence, the sentencing court imposes the recommended but illegal sentence, and the illegal sentence impermissibly increases a defendant's term of imprisonment, the State should be given the option of either acquiescing in a defendant's request for a new trial or requiring that only the excessive sentence should be vacated, with the judgment left intact and the defendant resentenced to a legal sentence."

State v. Layton, 276 Kan. 777, 80 P.3d 65 (2003). The offender was convicted of unlawful manufacture of methamphetamine, possession of methamphetamine with intent to distribute, possession of drug paraphernalia, and criminal possession of a firearm. His convictions and sentences were affirmed by the Court of Appeals in *State v. Layton*, 31 Kan. App. 2d 350, 65 P.3d 551 (2003).

The Court granted the offender's petition for review of the Court of Appeals' decision on the sole issue of his sentence for unlawful manufacture of methamphetamine. The offender argued the trial court erred in imposing a felony sentence for unlawful manufacture of methamphetamine. The offender's position was that because there are two separate and different penalty provisions applicable to a violation of K.S.A. 2001 Supp. 65-4159 (now K.S.A. 65-4159), he could only be sentenced to the lesser penalty provision. The offender further argued that K.S.A. Supp. 65-4127c (now K.S.A. 65-4127c) provides that K.S.A. 2001 Supp. 65-4159 (now K.S.A. 65-4159) is a class A non person misdemeanor, not a felony.

The Court's analysis included a review of K.S.A. 2001 Supp. 65-4127c and K.S.A. 2001 Supp. 65-4159 and the legislative intent behind those statutes. The court stated in part: "As we construe the statutes, although K.S.A. 2001 Supp. 65-4159 is not specifically listed within K.S.A. 2001 Supp. 65-4127c, the legislature clearly provided that a violation of K.S.A. 2001 Supp. 65-4159 would constitute a felony. Where there is a conflict between statute dealing generally with a subject and another statute dealing specifically with a certain phrase of it, the specific statute controls unless it appears that the legislature intended to make the general act controlling. *State v. Hartpence*, 30 Kan. App. 2d 486, 42 P.3d 1197 (2002); *State v. VanHecke*, 28 Kan. App. 2d 778, 20 P.3d 1277 (2001). We therefore consider it clear that the legislature intended for the unlawful manufacture of methamphetamine to be considered a felony rather that a misdemeanor." The Court affirmed the offender's conviction for the unlawful manufacture of methamphetamine.

State v. Winters, 31 Kan. App. 2d 38, 59 P.3d 1034 (2002), *rev'd*, 276 Kan. 34, 72 P3d 564 (2003). This involved an offender who was charged with alternative battery charges, namely with both a severity level 4 aggravated battery and a severity level 7 aggravated battery. The offender was convicted of both and appealed.

The Court of Appeals found that the sentencing court had failed to recognize that the prosecution had charged the offender with alternative battery charges and that the jury instructions and verdict forms were erroneous. The Court stated in part: "The jury found Winters guilty of an aggravated 7 person felony, a lesser degree of an aggravated 4 person felony. Accordingly, as a matter of law, Winters could not be convicted of the greater offense. The trial court erred in its response to the jury and in applying multiplicitous doctrine to merge the

convictions. The proper remedy is to vacate Winter's conviction and sentence for a level 4 aggravated battery and remand to the trial court for imposition of sentence for the level 7 aggravated battery."

State v. Williams, 275 Kan. 284, 64 P.3d 353 (2003). The offender pled guilty to two counts of premeditated first-degree murder and prior to sentencing, sought to withdraw his guilty pleas. Although the plea agreement had correctly stated that the sentence for each of the murder charges, at the plea hearing the court had orally advised the offender "the maximum possible punishment could be anywhere up to 25 years in prison with no parole." The offender's motion to withdraw his pleas was denied and he was sentenced to concurrent life terms with the possibility of parole after 25 years. The offender appealed.

The Court noted that the offender's second ground for appeal had not been raised to the sentencing court, namely the issue of the erroneous statement as to the maximum sentence. This issue was first raised on appeal. The Court reviewed K.S.A. 2002 Supp. 22-3210(a)(2) regarding the basis for the withdrawal of a guilty plea and then stated in part: "Defendant had been advised by the court that the maximum penalty that could be imposed on each count was "anywhere up to 25 years in prison with no parole." There was no reason for defendant to complain about that statement. It was incorrect but favorable to defendant. Under the unique circumstances herein, we conclude that consideration of defendant's belated claim that he should be permitted to withdraw his pleas falls within the exception to the general rule precluding consideration of belated claims of error."

"As this is a determination that consideration is necessary to serve the ends of justice or to prevent the denial of fundamental rights, it follows that, on consideration, we must find reversible error occurred, as there is no dispute but that error occurred."

The case was reversed and remanded to the district court with directions to permit the offender to withdraw his pleas and for further proceedings as if the guilty pleas had not occurred.

State v. Maass, 275 Kan. 328, 64 P.3d 382 (2003). At his sentencing hearing for a nonresidential burglary, the offender objected to the provision of K.S.A. 2001 Supp. 21-2511 that required him to provide the KBI with blood and saliva samples for the KBI DNA database. The offender committed the offense on June 8, 2001, was convicted on August 16, 2001 and argued that the amendment to the statute should only be prospective for crimes committed on or after July 1, 2001. The sentencing court overruled the objection and the offender appealed.

The Court upheld the sentencing court and stated in part: "Under our stated canons of review, we need not go beyond the plain and unambiguous language of the statute. Under K.S.A. 2001 Supp. 21-2511(a)(1), it is the date of *conviction* that controls, no the date the crime was committed. Thus, Maas' first argument to support his claim of error by the district court must fail."

"… We have no quarrel with the proposition that the criminal penalty to be applied must be as it stood on the date the crime was committed. See *State v. Patterson*, 25 Kan. App. 2d 245, 252-253, 963 P.2d 436, *rev. denied*, 265 Kan. 888 (1998). However, the provisions of K.S.A. 2001 Supp. 21-2511 do not constitute a penalty but are intended to assist law enforcement agencies in the identification and detection of crimes and offenders. State action in furtherance of achieving those goals is not a penalty or punishment."

"For the foregoing reasons, we conclude that although the district court erred in concluding K.S.A. 2001 Supp. 21-2511 should be applied retroactively, the court came to the correct conclusion that Maass should be ordered to provide specimens. See *Bergstrom v. Noah*, 266 Kan. 847, 875-76, 974 P.2d 531 (1999)."

The Court also addressed an issue first raised on appeal, namely that the application of K.S.A. 2001 Supp. 21-2511 resulted in a violation of his right to privacy and constituted an unreasonable search and seizure. In denying this argument the Court stated in part: "The constitutionality of K.S.A. 21-2511 prior to the 2001 amendment was upheld in *Schlicher v. Peters*, 103 F.3d 940, 943 (10th Cir. 1996). In *Schlicher*, the court relied upon the holdings in *Boling v. Romer*, 101 F.3d 1336, (10th Cir. 1996), *Jones v. Murray*, 962 F.2d 302 (4th Cir.), *cert. denied*, 506 U.S. 977 (1992), and *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996)."

"In summary, we need not consider the special needs doctrine in deciding the constitutionality of K.S.A. 2001 Supp. 21-2511. Under the balancing test considered and applied in *Schlicher*, *Boling*, *Jones*, *Rise* and *Gaines*, we hold K.S.A. 2001 Supp. 21-2511 is constitutional, as the minimally intrusive nature of providing blood and saliva samples are significantly outweighed by the State's interest in establishing and maintaining a statewide automated DNA database to search, match, and store DNA records."

State v. Prater, 31 Kan. App. 2d 388, 65 P.3d 1048, *rev. denied*, 276 Kan. 973 (2003). In 1997 the offender was convicted by a jury of aggravated arson and assault of a law enforcement officer. During the sentencing proceedings the State stipulated to a change in the Criminal History Worksheet, the offender was sentenced to prison and the offender then appealed his convictions. On appeal the aggravated arson conviction was reversed and the matter was remanded with an order to enter a conviction for attempted aggravated arson.

The mandate for the appeal was issued on February 16, 2000, however, there wasn't any resentencing until after the offender was involved in another incident later that year which resulted in the offender pleading no contest to two counts of aggravated assault of a law enforcement officer, one count of reckless driving and misdemeanor DUI. The offender's presentence investigation report for those 2000 convictions included the 1997 convictions even though there had not yet been any resentencing for the 1997 convictions.

In March 2001 the offender was sentenced for the 2000 convictions and he argued that the State had stipulated to his criminal history score in 1997 and that the State should still be bound to that stipulation. In addition, the offender also argued that he still had not yet been resentenced for his 1997 convictions although they were still included in his criminal history worksheet for his 2000 convictions. The sentencing court declined to allow the offender to withdraw his plea, did not approve either of the offender's arguments and sentenced the offender accordingly. The offender appealed both his convictions and his sentence.

In May 2001 the court sentenced the offender for his 1997 convictions. The offender once again appealed both his convictions and his sentence. The two appeals were consolidated.

The first issue on appeal was whether or not the offender's due process rights were violated by the delayed resentencing for his 1997 convictions. In addressing this issue, the Court pointed out that the answer involved *State v. Royal*, 217 Kan. 197, 535 P.2d 413 (1975) which adopted the test established in *United States v. Marion*, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct.

455 (1971). *Marion* involves two factors both of which must be present, namely: has the delay prejudiced the accused in his ability to defend himself and also was the delay a tactical device to gain an advantage over the accused. Although the inclusion of the 1997 convictions resulted in a higher criminal history category for the sentencing of the 2000 convictions, the offender failed to prove that the delay in sentencing for the 1997 convictions was in the words of the Court of Appeals "an intentional ploy to gain a tactical edge over him." and that issue failed.

The second issue involved whether the 1997 conviction was a "verified prior conviction" at the time of the sentencing for the 2000 convictions. Specifically, the Court asked: "did the mandate issued by the Court of Appeals ordering the district court to enter a conviction of attempted aggravated robbery have the effect of a verified conviction as required by the KSGA?" The Court answered this question as follows: "Since the mandate became a part of the judgment of the district court, Prater's guilt had been demonstrated and all that remained was a formal conviction by the district court. The issuance of the mandate is sufficient to include the conviction for attempted aggravated arson in Prater's criminal history score."

The offender's third issue involved the stipulation of the offender's criminal history score for his 1997 conviction. This argument was based upon whether or not the parties' stipulation for the 1997 sentencing should bind the 2001 resentencing for those convictions by the doctrine of collateral estoppel. On this issue the Court stated in part: "The State stipulated to a lower criminal history score rather than present evidence on the issue of whether the misdemeanor convictions had been counseled. This tactical decision by the State is not a judgment on the merits such that the application of collateral estoppel would be justified. No evidence was presented regarding the prior misdemeanor convictions. The only facts on the record are the district court's acceptance of the State's stipulation."

"In *Kelly*, the court held that the presentation of a journal entry and oral testimony regarding a prior conviction was a prior judgment on the merits. 262 Kan. at 767-68. In this case there was no such presentation of evidence. A stipulation to a lower criminal history score by the State is not a prior judgment on the merits."

The offender's fourth issue was not raised at sentencing and was thus lost. The fifth issue involved the sentencing court's refusal to allow the withdrawal of the offender's plea for his 2000 convictions and the offender argued that he was unaware of the effect of the appeal for his 1997 convictions on the sentencing for his 2000 convictions when he entered his plea. The Court reviewed *State v. Ford*, 23 Kan. App. 2d 248, 930 P.2d 1089 (1996), *rev. denied*, 261 Kan. 1087 (1997) and stated in part: "Applying the analysis of *Ford*, Prater had no recourse for the fact that he failed to take into consideration the effect of his appeal on his criminal history score. Prater knew that he had been convicted of aggravated arson and that his case had been appealed. That he did not inquire into the status of his own appeal does not demonstrate good cause to withdraw the plea such that the district judge abused his discretion in refusing to allow it."

State v. McAdam, 277 Kan.136, 83 P.3d 161 (2004). The offender was convicted of conspiracy to unlawfully manufacture methamphetamine, attempted theft, attempt to unlawfully possess anhydrous ammonia and conspiracy to unlawfully possess anhydrous ammonia. The Court of Appeals affirmed the convictions of conspiracy to unlawfully manufacture methamphetamine and attempted theft, reversed the convictions of attempt to unlawfully possess anhydrous ammonia and conspiracy to unlawfully possess anhydrous ammonia, remanded for resentencing in accordance with reversal of those convictions, and affirmed the drug severity level 1 felony penalty for conspiracy to unlawfully manufacture methamphetamine.

The Kansas Supreme Court granted the offender's petition for review to determine if he was illegally sentenced for conspiracy to manufacture methamphetamine. The offender claimed that he was illegally sentenced for conspiracy to unlawfully manufacture methamphetamine when he was sentenced for violation of K.S.A. 65-4159(a) a drug severity level 1 felony, rather than for a violation of K.S.A. 65-4161(a), a drug severity level 3 felony.

K.S.A. 65-4159(a) provides: "Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to *manufacture* any controlled substance or controlled substance analog." Methamphetamine is a controlled substance. K.S.A. 65-4101(e); K.S.A. 65-4107(d)(3). The penalty for violation of 65-4159(a) is a drug severity level 1 felony. K.S.A. 65-4159(b).

K.S.A. 65-4161(a) provides: "Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver or distribute; prescribe; administer; deliver; distribute; dispense or *compound* any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Except as provided in subsections (b), (c) and (d), any person who violates this subsection shall be guilty of a drug severity level 3 felony."

Methamphetamine is a stimulant designated in 65-4107(d)(3).

Compound means to put together, combine or construct. (Black's law dictionary, 7th Edition 1999)

The statutory definition of manufacture is: "Manufacture means the production, preparation, propagation, *compounding*, conversion or processing of a controlled substance either directly or indirectly or by extraction from substances of natural origin or independently by means of chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container…" K.S.A. 2003 Supp. 65-4101(n).

The Kansas Supreme Court noted that by definition compounding is manufacturing. The Court agreed with the offender that 65-4161(a) and 65-4159(a) are identical and therefore he can only be sentenced under the lesser penalty provision of 65-4161(a). The Court's analysis included a review of *State v. Nunn*, 244 Kan. 207, 786 P.2d 268 (1989), which held that "[w]here two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision." The Court vacated the offender's sentence and remanded the case to the district court for resentencing to a drug severity level 3 felony.

State v. Reider, 31 Kan. App. 2d 509, 67 P.3d 161, *rev. denied*, 276 Kan. 973 (2003). The offender pled no contest to lewd and lascivious behavior and three counts of assault, and was then sentenced to 12 months probation. The sentencing court also ordered the offender to register as a sex offender for 10 years. The offender objected to the length of the registration, arguing that pursuant to K.S.A. 2001 Supp. 22-4904(a)(7), he should only have to register for the term of his probation. The sentencing court disagreed and the offender appealed.

The Court reviewed both K.S.A. 2001 Supp. 22-4904(a)(7) and 22-4906. In addition, the Court also reviewed another former statute, K.S.A. 2000 Supp. 22-4908 and pointed out that the

2001 amendment to 22-4908 was determinative to the resolution of this issue and stated in part: "We believe that the intent of the legislature is now clear. There shall be no reduction in the 10-year registration requirement for sex offenders in Kansas. To rule otherwise would make the 2001 amendments to 22-4908 meaningless. With that in mind, the seeming conflict of the two prior statutes disappears."

"If the legislature had reserved discretion in the district courts to reduce registration to only the period of time that a defendant could be placed on probation or during diversion they did not say so in 2001. District Court discretion was the very procedure eliminated in 2001 by the enactment of K.S.A. 2001 amendments the legislature intended for all the first time offenders to be registered for 10 years and for second offenders to be registered for their lifetimes."

NOTE: Prior to the 2001 amendment to K.S.A. 2000 Supp. 22-4908, an offender could ask the sentencing court for a reduction of the mandatory 10 year registration period.

State v. Cooper, 275 Kan. 823, 69 P.3d 559 (2003). The offender was convicted in 1982 of one count of aggravated kidnapping and one count of indecent liberties with a child. The sentencing court sentenced the offender to consecutive sentences of life imprisonment and 3 to 10 years respectively. In 1999 the offender filed a K.S.A. 60-1507 motion based in part upon the argument that he had been illegally charged and convicted of indecent liberties with a child instead of aggravated incest, since the victim was his stepson. The Court of Appeals reversed the sentencing court's denial of the offender's motion and remanded the matter back to the sentencing court for resentencing for aggravated incest. The sentencing court then resentenced the offender to 3 to 10 years imprisonment and the offender appealed.

The Court reviewed *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994) and *Beem v. McKune*, 317 F.3d 1175 (10th Cir. 2003) before analyzing the offender's due process argument. However, the Court did not find any due process violation and stated in part: "Here, application of the *Carmichael* remedy did not affect Cooper's conviction, nor was he found guilty of and sentenced for an offense for which he was not charged and convicted. The court simply corrected an illegal sentence, which it has jurisdiction to do at any time. See *State v. Vanvey*, 262 Kan. 524, Syl. ¶ 1, 94 P.2d 365 (1997). Further, since Cooper was resentenced within the allowable guidelines range for aggravated incest, which did not result in a more severe sentence, due process under *Apprendi* was not violated."

The offender also raised an argument that his resentencing for aggravated incest was vindictive and he requested that it be set aside on the basis that the original sentence was a minimum sentence and that the resentencing was a maximum sentence. The Court reviewed *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969) and *State v. Rinck*, 260 Kan. 634, 923 P.2d 67 (1996) before stating in part: "… In *Rinck*, this court set aside the defendant's sentence on appeal. The matter was remanded for resentencing and, based upon the same two convictions…, the defendant received a more severe sentence than the sentence originally imposed." 260 Kan. at 638. Relying on *Pearce*, we concluded that where resentencing resulted in seemingly unjustified enhancement of sentences, there is a presumption of vindictiveness. 260 Kan. at 642. Where such a presumption applies, the sentencing judge or prosecutor must rebut the presumption that the increased sentence resulted from actual vindictiveness. 260 Kan. at 642."

"Cooper's reliance on *Pearce* and *Rinck* is unavailing as those cases are readily distinguishable from the facts in this case. Cooper's penalty was not increased upon resentencing, and he cites

no precedent for the *Pearce* presumption being applied in these circumstances."

State v. Vandervort, 276 Kan. 164, 72 P.3d 925 (2003). Review of an unpublished Court of Appeals opinion filed on November 27, 2002. The offender was convicted of two counts of rape, one count of attempted rape, three counts of criminal sodomy and seven counts of indecent liberties with a child, all involving his three daughters. At the sentencing hearing the offender's attorney was handed an amended presentence investigation report (PSI), did not object to the amended PSI and the offender was then sentenced to 586 months for one of the rape counts, with the remaining offenses made concurrent. The offender appealed.

The Court of Appeals held that the offender failed to provide written objection of any claimed errors in the PSI pursuant to K.S.A. 21-4715(c). In addition, the Court of Appeals treated the remarks of defense counsel at the sentencing hearing as the offender's admission to the correctness of his criminal history. The offender filed a Petition for Review.

The Supreme Court noted that the record on appeal did not indicate whether the sentencing court addressed the offender regarding his criminal history or that the offender had reviewed the amended PSI. The Court noted K.S.A. 21-4721(e) and also *State v. Pope*, 23 Kan. App.2d 927 P.2d 503 (1996) and *State v. Mosley*, 25 Kan. App. 2d 519, 965 P.2d 848 (1998) as the basis to consider the offender's appeal.

The Court then noted *State v. Jackson*, 239 Kan. 463, 721 P.2d 232 (1986) and reviewed the issue of when the offender committed one of the offenses and stated in part: "In this case, it is uncertain when the acts occurred which the jury relied upon to convict Vandervort. Without that determination, Vandervort may have been convicted for acts which occurred prior to July 1, 1998. The State charged Vandervort with acts that occurred during a period between November 1, 1996, and September 17, 2000. The jury was instructed to consider this expansive period. With this uncertainty as to when each act relied upon by the jury occurred, Vandervort must be sentenced with the lower criminal history."

Pieplow v. State, 31 Kan. App. 2d 998, 76 P.3d 1069, *rev. denied*, 277 Kan. 925 (2003). The offender was convicted of one count of burglary of a non-residence and sentenced to probation with an underlying sentence of 29 months imprisonment. Although the presumptive sentencing range was 25-27-29 months, the sentencing court did not provide any reason for the 29 months sentence. Three month's later the offender's probation was revoked and the offender ordered to serve his sentence. The offender appealed based upon K.S.A. 2002 Supp. 21-4704(e)(1).

The Court reviewed K.S.A. 2002 Supp. 21-4704(e)(1) and stated in part: "…This provision directs a district court to sentence a defendant to the center number of the presumptive range in the usual case. The upper and lower numbers are for aggravating and mitigating factors insufficient to warrant a departure. Yet, contrary to Pieplow's argument, the plain language of the statute does not require a court to cite to such factors when determining what presumptive sentence to impose. Pieplow's argument would impose a requirement on the sentencing court that is not imposed by statute."

The Court also reviewed K.S.A. 2002 Supp. 21-4716(a) and K.S.A. 21-4721 but found that 21-4716(a) did not apply and 21-4721 provides that a presumptive sentence is not subject to appeal. The Court noted that the offender's sentence was a presumptive sentence.

***State v. Campbell*,** 31 Kan. App. 2d 1123, 78 P.3d 1178 (2003), *rev. granted*, 277 Kan. 925 (2004). The offender's cases, 00CR779 and 01CR147 were not consolidated, but were heard at one bench trial on stipulated facts and the testimony and record of the suppression and preliminary hearings. The offender was convicted in Case No. 00CR779 of possession of methamphetamine. In Case No. 01CR147, he was convicted of manufacture of methamphetamine, possession of ephedrine or pseudoephedrine with the intent to manufacture methamphetamine, possession of methamphetamine with intent to sell, possession of drug paraphernalia with intent to manufacture methamphetamine, and felony possession of marijuana. All sentences were to run concurrently. On appeal, the offender raised the issue of an illegal sentence under K.S.A. 65-7006(a).

The offender claimed he was illegally sentenced to a drug severity level 1 felony in Case No. 01CR147 for his conviction of possession of ephedrine under K.S.A. 65-7006(a). That argument was based on *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied*, 274 Kan.1115 (2002), which held that a statute prohibiting possession of drug paraphernalia, K.S.A. 2001 Supp, 65-4152(a)(3), a drug severity level 4 felony, had identical elements to the crime of possession of ephedrine under K.S.A. 2001 Supp. 65-7006(a), a defendant convicted of either crime may be sentenced only under the lesser penalty provision.

The Court's analysis included a review of the legislative history and language of K.S.A. 65-4152 and 65-7006. After review of those statutes, the court noted K.S.A. 65-4152(a)(3) and K.S.A.1999 Supp. 65-7006(a) are not identical offences and that the statutes use different language to describe the respective offenses. K.S.A. 1999 Supp. 65-7006(a) prohibits possession of drugs used to make methamphetamine. K.S.A. 65-4152(a)(3) prohibits possession of drug paraphernalia.

The court in its opinion stated in part: "We understand the valid argument of *Frazier* that the generic language of "products and materials" of K.S.A. 65-4152 may include the named substances set forth in K.S.A. 65-7006, but it is also equally logical to look to one statute as generally relating to tools or equipment necessary for manufacturing controlled substances and the other to more specifically cover the precursors to methamphetamine, and thus, find the elements do in fact differ." The Court held that the clear legislative intent in K.S.A. 65-7006 was to criminalize the specific items found in Campbell's possession and that he was correctly sentenced. The Court declined to follow *Frazier* and respectfully suggested it was wrongfully decided.

NOTE: The original Supreme Court opinion upon review of this case was withdrawn and superseded by ***State v. Campbell***, 279 Kan. 1, 106 P.3d 1129 (2005), which held that the crimes of possession of ephedrine under K.S.A. 65-7006, a drug severity level 1 felony, and possession of drug paraphernalia under K.S.A. 65-4152(a)(3), a drug severity level 4 felony, were identical offenses, thus a defendant must be sentenced to the lesser penalty.

Wilson v. State, 31 Kan. App. 2d 728, 71 P3d. 1180 (2003). Defendant appealed the district courts' denial of his motion to correct sentence pursuant to *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188 (2002). The Court of appeals noted that the defendant had pled no contest to the crime, was sentenced, and did not appeal before *Frazier* was decided. Applying *Easterwood v. State*, 273 Kan. 361, 44 P.3d 1209 (2002), the Court held that the defendant was not entitled to retroactive application of *Frazier*.

State v. Huff, 277 Kan. 195, 83 P.3d 206 (2004). The offender was convicted of attempted robbery, felony possession of marijuana following a prior conviction, misdemeanor theft, and two counts of misdemeanor child endangerment. The trial court's sentence on the two felony crimes ran concurrently, resulting in a controlling prison term of 16 months. In addition, the trial court also imposed consecutive 12-month jail sentences on each of the three misdemeanor offenses, to run consecutive to the primary offense of attempted robbery. Probation was granted on the felony convictions with a postrelease supervision period of 36 months.

The defendant appealed her sentence to the Court of Appeals, arguing that the trial court did not have authority to impose consecutive jail sentences on her misdemeanor offenses and if authority did exist, the court abused its discretion by imposing consecutive jail sentences on the misdemeanor offenses and that her increased postrelease supervision period was an unconstitutional departure sentence under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001).

The Court noted that the terms imprisonment and confinement are used interchangeably throughout the Kansas Criminal Code (Code) and the Kansas statutes defining misdemeanor crimes outside the Code. The Court's analysis included a review of K.S.A. 21-4608, which allows the court to direct whether sentences will run consecutively or concurrently when separate sentences of imprisonment for different crimes are imposed on a defendant on the same date.

After review, the Court concluded that the trial court had statutory authority to impose consecutive imprisonment sentences on the misdemeanor offenses under K.S.A. 21-4608(a), that the trial court did not abuse its discretion by imposing consecutive jail sentences, and that the increased postrelease supervision term was not a departure under *Apprendi* or an appealable sentence under K.S.A. 2002 Supp. 21-4611(c) (5). *State v. Huff*, 31 Kan. App. 2d at 719, 721, 723-24.

State v. Honton, 32 Kan. App. 2d 623, 87 P.3d 328, *rev. denied*, 278 Kan. 849 (2004). The offender, a former C.P.A. was hired by a couple involved in a tax dispute with the Internal Revenue Service. In 1989, the offender's clients wired him $58,000 for a tax shelter and investment plan. In 1991, without the knowledge or consent of his clients, the offender spent his client's money on an investment and personal business expenses. The fraud was not discovered until 1993 when the offender's former clients filed a complaint with the Kansas Securities Commissioner.

The offender was convicted in January 1996 of one count of securities fraud (K.S.A. 17-1253) a class D felony and received an indeterminate sentence of 3 to 10 years. The offender received two years probation in lieu of incarceration and was ordered to pay restitution. The offender's convictions were affirmed by the Court of Appeals in *State v. Honton*, No. 77,317, unpublished opinion filed May 1, 1998. The offender's probation was extended in January 1999 and later revoked in November 2001 when he was ordered to serve his indeterminate sentence.

In July 2002, the offender filed a motion to correct an illegal sentence arguing that he had been improperly sentenced to an indeterminate 3 to 10 year sentence under K.S.A.1991 Supp. 17-1267 and that he should have been sentenced under K.S.A. 17-1267 which provided for a maximum sentence of 3 years. The district court denied the offender's motion.

An illegal sentence is defined as: "a sentence imposed by a court without jurisdiction; a sentence which does not conform to the statutory provision, either in the character or the term of the punishment authorized; or a sentence which is ambiguous with respect to the time and manner in which it is to be served." *State v. Sisk*, 266 Kan. 41, 934 P.2d 38 (1997).

The offender appealed the district court's denial of his motion to correct an illegal sentence. The offender contended that he should have been sentenced for his securities fraud violation under the lesser 1989 penalty rather than the 1990 penalty. The Court affirmed the district court's denial of the offender's motion because the offender's misappropriation of funds took place in January 1991 therefore the 1990 penalty applied. The court concluded that the offender did not receive and illegal sentence and was properly sentenced under the penalty section in effect when his crime was completed.

State v. McCoin, 32 Kan. App. 2d 638, 87 P.3d 325 (2004) (*withdrawn from publication*) **(Retroactive application of State v. McAdam)**. The offender appealed the sentence he received as a result of a guilty plea to one count of attempted unlawful manufacture of methamphetamine a drug severity level 1 felony. The offender's criminal history score was C. The State, as part of a plea agreement, dropped charges of conspiracy to manufacture methamphetamine, felony possession of drug paraphernalia, possession of methamphetamine, and misdemeanor possession of drug paraphernalia. No direct appeal was taken. The offender received a durational departure from the presumed sentencing range of 169 to 187 months down to 48 months imprisonment.

The offender filed a motion for summary disposition based on the Kansas Supreme Court decision in *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004). After review of the record on appeal the Court of Appeals concluded that *State v. McAdam* will not be applied retroactively to those cases where the defendant took advantage of a favorable guilty plea and then failed to raise the sentencing issue on direct appeal." *Wilson v. State*, 31 Kan. App. 2d 728, 71 P.3d 1180, *rev. denied*, 276 Kan. 974 (2003).

In addition the court stated: "As in *Wilson*, we decline to hold that *McAdam* applies retroactively to those cases on collateral review because to do so would give the defendant the double benefit of a favorable plea agreement, with a significant downward durational departure, and then the benefit of an issue he failed to raise at the trial court on direct appeal".

NOTE: The Supreme Court granted review and dismissed the appeal. The Court held that the "proper procedure for raising the application of *McAdam* to McCoin's sentence would be by filing a motion pursuant to K.S.A. 2003 Supp. 60-1507." ***State v. McCoin***, 278 Kan. 465, 101 P.3d 1204 (2004).

See also: ***State v. Singleton***, 33 Kan. App. 2d 478, 104 P.3d 424 (2005) holding that *State v. McAdam* will not be applied to cases which were final prior to the date of the *McAdam* decision. ***Collins v. State***, 33 Kan. App. 2d 460, 103 P.3e 988 (2005) holding that the decision of *State v. McAdam* will not be retroactively applied in a collateral attack of an unappealed sentence.

Gaudina v. State, 278 Kan.103, 92 P.3d 574 (2004). The offender contended that the Kansas Supreme Court's interpretation of the United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), which was applied in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), required that his enhanced sentence be vacated.

The offender was convicted of aggravated battery, aggravated burglary, and aggravated kidnapping. The trial court dismissed the aggravated kidnapping conviction because the complaint contained a fatal error. The trial court granted the State's motion for an upward durational departure and sentenced the offender to double the maximum presumptive sentences and ordered that the sentences be served consecutively for a total prison term of 150 months. The offender appealed claiming ineffective assistance of counsel.

The court's decision in this cases depended on whether the offender's appeal was final at the time he raised the 60-1507 motion on appeal. The court concluded that the offender's time to appeal was not final because he was still able to file a petition for writ of certiorari with the United States Supreme Court. Therefore, the offender's appeal was still pending at the time of *Apprendi*. The court ultimately reversed and remanded the offender's case for resentencing.

State v. Barnes, 278 Kan.121, 92 P.3d 578 (2004). Pursuant to a plea agreement, the offender pled guilty to aiding and abetting the manufacture of methamphetamine, possession of methamphetamine, possession of methamphetamine with intent to sell, possession of drug paraphernalia and endangering a child.

In *State v. Barnes*, No. 89,628, unpublished opinion filed November 7, 2003 the Court of Appeals upheld the offender's sentence, holding in part that there was no error in sentencing her to a drug severity level 1 felony pursuant to K.S.A. 65-4159(a) rather than drug severity level 3 pursuant to K.S.A. 65-4161(a). The Kansas Supreme Court granted review on the sole issue of whether *State v. McAdam* applied.

The State contended that *McAdam* did not control the offender's case because the offender received the benefit of a favorable plea agreement. The offender argued that her guilty plea is of no significance because, under *McAdam*, the imposition of a drug severity level 1 felony sentence was an illegal sentence. The Court found the sentence in *McAdam* was not an illegal sentence. The problem was that, under *McAdam*, two statutes have identical elements.

Like *McAdam*, the offender failed to raise the sentencing issue before the trial court. In this opinion the Court stated in pertinent part: "The district court had jurisdiction to find Barnes guilty and impose sentence. Further, Barnes sentence conformed to K.S.A. 65-4159 as to both its character and term of punishment. Her sentence was not ambiguous in the time or manner in which it was to be served. Thus, Barnes sentence was not "illegal"."

The Court further stated: "The conclusion that Barnes' sentence was not illegal does not, however, deprive this Court of jurisdiction to hear Barnes' appeal because K.S.A. 21-4721(e) provides: "In any appeal, the appellate court may review a claim that… (3) the sentencing court erred in ranking the crime severity level of the current crime."

The offender argued that *McAdam* should apply to any appeal pending at the time of the decision. (The offender's appeal was pending on direct appeal when McAdam was decided.)

The State requested the Court to consider the application of Substitute for HB 2777. Addressing the retroactive provision (New section 3), the Court stated: "Despite this statement (New section 3) of legislative intent, there are limitations upon the retroactivity of legislation. In this situation, Substitute for HB 2777 increases the penalty to which Barnes would be subject if the legislation is applied to her. Without the legislation, she must be sentenced for a drug severity level 3 felony under the *McAdam* decision. Therefore, the retroactivity provision cannot

be constitutionally applied to Barnes. The *McAdam* rule should apply to this case which was a direct appeal pending as of the date of the *McAdam* decision."

State v. Mebane, 278 Kan. 131, 91 P.3d 1175 (2004). In 1985, the offender was convicted of two counts of aggravated kidnapping, two counts of aggravated sodomy, and one count each of rape and aggravated burglary. The offender was originally sentenced to life on each aggravated kidnapping conviction, 45 years to life on each aggravated sodomy conviction, 45 years to life on the rape conviction, and 15 to 45 years on the aggravated burglary conviction. All of the offender's sentences were enhanced pursuant to the Habitual Criminal Act, K.S.A. 21-4504 and ordered to run consecutive.

On direct appeal, the court affirmed the offender's convictions but reversed for resentencing because the district court had failed to order that the offender's sentences run consecutive to a sentence from which the offender was on parole at the time of the offenses. See *State v. Mebane*, No. 59,601, unpublished opinion filed March 27, 1987.

The offender was resentenced on May 12, 1987. The district court reimposed the same sentences it had originally imposed, except that it ordered all of the sentences to run concurrent with one another but consecutive to sentences imposed in two 1982 cases.

The offender filed additional motions claiming that he received an illegal sentence. The court ultimately decided that the offender did not receive an illegal sentence and that the offender must serve his entire 45 year minimum sentence before he is eligible for parole.

***State v. Pottoroff*,** 32 Kan. App. 2d 1161, 96 P.3d 280 (2004). The offender pled no contest to one count of failure to register, a level 10 felony pursuant to K.S.A. 2001 Supp. 22-4903. In exchange for the plea, the State agreed to recommend the "low number in the appropriate sentencing grid box" and probation. The presentence investigation report (PSI) indicated that the offender had one previous conviction of attempted aggravated indecent liberties with a child resulting in a criminal history score of "C". The offender objected to the use of this prior conviction in calculating his criminal history score, arguing that this conviction was an element of his crime of failure to register. The district court agreed and excluded the prior conviction resulting in a criminal history score "G". The state appealed.

The court, affirming the district court's decision, stated in pertinent part: "The inescapable conclusion from an analysis of the statutory scheme including definitions is that a defendant is not an "offender" and has no duty to register unless he or she has been convicted of or adjudicated a juvenile offender for committing one of the referenced offenses. Accordingly, the conviction that created the need for registration under the scheme is necessarily an element of the offense of failure to register and cannot be counted in determining the criminal history score under K.S.A. 21-4710(d)(11)."

***State v. Post*,** 32 Kan. App. 2d. 1222, 96 P.3d 662 (2004), *rev'd*, 279 Kan. 664 (2005). The offender was convicted of aggravated indecent liberties with a child, attempted aggravated indecent solicitation of a child and felony obstruction of official duty. The trial court sentenced the offender to 73 months incarceration and ordered that he have no contact with the victim, witnesses and the victim's mother during the time of his incarceration. The offender appealed the denial of his motion to allow visitation with the victim's mother. The sole issue on appeal was whether the trial court had statutory authority to impose the no contact order under K.S.A. 2003 Supp. 21-4603d.

The court affirming the district court's decision stated in pertinent part: "Under the unique facts of this case, the trial court was able to impose the no contact order during Post's incarceration by combining K.S.A. 2003 Supp. 21-4603d(a)(1) with K.S.A. 2003 Supp. 21-4603d(a)(3). Under K.S.A. 2003 Supp. 21-4603d(a)(3), the trial court can release a defendant on probation "subject to such conditions as the court may deem appropriate." Although Post's sentence was incarceration and not probation in this case, K.S.A. 2003 Supp. 21-4603d(a)(11) allows a trial court to impose any appropriate combination of (1) and (3). As a result, the trial court had the authority to combine incarceration with the no contact order that it entered in this case."

NOTE: Reversed per *State v. Chilcote*, 7 Kan. App. 2d 685, 647 P2d 1349, *rev. denied*, 231 Kan. 801 (1982).

Thompson v. State, 32 Kan. App. 2d 1259, 96 P.3d 1115 (2004), *rev. denied*, 278 Kan. 852 (2005). The offender was convicted of a severity level 1 offense under K.S.A. 65-4160 based on two prior convictions for possession of methamphetamine under that statute. The offender raised three issues on appeal. Those issues were: his two prior convictions were both sentenced as first offenses and therefore could not be used to elevate his possession of methamphetamine charge from a severity level 4 offense to a severity level 1 offense under K.S.A. 65-4160, the complaint failed to allege his prior convictions and therefore he should be resentenced to a severity level 4 offense, and ineffective assistance of counsel.

Citing the language of K.S.A. 65-4160, the Court stated in pertinent part: "The plain language of K.S.A. 65-4160 does not require that a defendant be sentenced to a severity level 4 offense, then to a severity level 2 offense, and then to a severity level 1 offense. The level of the offense is dependent solely on the number of previous convictions." The Court determined the offender was properly sentenced under K.S.A. 65-4160 to a level 1 offense based on two prior convictions under that statute.

The Court also determined that the State is required to set forth in the complaint the severity level of the charged offense under K.S.A. 65-4160, however the State was not required to bring forth evidence of the offender's prior convictions that enhance the offense from a severity level 4 offense to a severity level 1 offense until the sentencing phase of the case. The amended complaint contained the offense the offender was charged with as a severity level 1 offense and therefore the offender was adequately notified of the severity level of the offense to which he plead to and was convicted.

The Court did not address the offender's ineffective assistance of counsel claim based on their determination that the offender was notified of the severity level of the offense and that he was properly sentenced.

State v. Walker, 277 Kan. 849, 89 P.3d 920 (2004), defendant appealed the district court's denial of his motion to correct an illegal sentence. Defendant was convicted in 1985 for first degree murder, aggravated kidnapping, aggravated robbery, and conspiracy. The sentences were to run consecutively, and the sentences for the conspiracy and aggravated robbery were tripled pursuant to the Habitual Criminal Act.

The Supreme Court held that the defendant could not have the sentence tripled because his previous conviction for felon in possession of a firearm included as an element of the crime, the prior conviction of a felony. This was a specific exception to the enhancement procedures

under K.S.A. 1984 Supp. 21-4504(d)(1). The Court also concluded that the defendant's sentence for conspiracy was incorrectly classified as a level C felony where the district court was unable to determine which of the possible objects of the conspiracy was relied upon in the jury's verdict. Citing to *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998), the Court remanded the case for re-sentencing as a level E felony.

State v. Boley, 279 Kan. 989, 113 P.3d 248 (2005). Defendant appealed his sentencing for attempted manufacture. He pled no contest to attempted manufacture and the State agreed to drop other charges pending in the case. Defendant was sentenced to a 48 month prison sentence after the State recommended a downward durational departure as part of the plea agreement. On appeal, the Defendant sought resentencing pursuant to *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004). The Court of Appeals agreed with the defendant but also held that the State could unilaterally withdraw from the plea agreement and reinstate the dropped charges on remand.

On review, the Supreme Court pointed out that plea agreements are generally interpreted using contract analysis and also applied the "frustration of purpose" doctrine to evaluate whether the State could withdraw from the plea agreement. The elements of the frustration of purpose doctrine consist of: 1) that the frustrated purpose must be so completely the basis of the contract that without it the transaction would make little sense, 2) that the frustration be substantial, which means frustration so severe it cannot be fairly regarded within the risks assumed under the contract, and 3) that the nonoccurrence of the intervening act must have been a basic assumption upon which the contract was made.

The Court noted that Kansas does not have binding sentencing agreements and since the State has still avoided the uncertainty of a trial, had obtained a conviction, the defendant had served time in prison, and the State bore the risk that the defendant would appeal his sentence, the State could not unilaterally withdraw from the plea agreement.

Bryant v. State, 280 Kan. 2, 118 P.3d 685 (2005). On appeal, defendant was refused resentencing pursuant to *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004). Defendant had pled guilty to attempted manufacture and had been sentenced to 81 months in prison. Defendant did not file a direct appeal rather he filed a K.S.A. 60-1507 motion seeking relief. The trial court and the Court of Appeals held that *McAdam* would not be applied retroactively to cases that were final before *McAdam* was filed.

The Supreme Court reiterated its holding in *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004) and concluded that cases clarifying existing law, such as McAdam, are distinguished from those setting forth a new rule of law; the latter but not the former support resentencing on collateral attack. The Court held the defendant did not have a right to a lesser sentence under either the Equal Protection Clause or the Due Process Clause and affirmed the trial court decision.

State v. Herbison, 34 Kan. App. 2d 709, 125 P.3d 561 (2005). The trial court applied the 6-month reduction mandated in K.S.A. 22-3301(d) when sentencing the defendant for attempted manufacture under K.S.A. 65-4159 and the State appealed. The State argued that K.S.A. 65-4159 does not allow application of K.S.A. 22-3301. The defendant argued that he should have been sentenced under K.S.A. 65-4161 since it prohibits the same conduct as K.S.A. 65-4159 and in such cases, the crime with the lesser penalty should control. The Court of Appeals concluded that, pursuant to *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004), the defendant was actually sentenced under K.S.A. 65-4161(a), a severity level 3 offense rather than a severity level 1

offense which does allow for the application of K.S.A. 21-3301, and thus the defendant was entitled to the 6-month reduction in sentence.

State v. Walker, 280 Kan. 513, 124 P.3d 39 (2005). Defendant appealed his sentence for a drug severity level 2 offense and a count of possession of pseudoephedrine. Defendant argued that under *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188 (2002), the court should use drug severity level 4 when calculating the pseudoephedrine count but, because that count was a drug severity level 1 offense, the criminal history should be applied to that count as the primary offense pursuant to K.S.A. 21-4720(b)(2).

The Supreme Court reviewed prior cases and held that a drug severity level 1 offense remains such; under the identical offense doctrine, a defendant merely receives a lesser sentence. However, the provisions of K.S.A. 21-4720(b)(2) governing the determination of the primary offense were uncertain and ambiguous when dealing with circumstances where the severity level of the offense does not match the sentence imposed. Therefore, the Court looked to the intent of the statute and held that the statute should be construed to require that the primary crime be the one with the *highest severity level used at sentencing*.

State v. Schoonover, 281 Kan. ___, 133 P.3d 48 (2006). The defendant in this case was found passed out in a vehicle found to be a "rolling meth lab." The defendant was subsequently convicted on seven counts arising from the manufacture and possession of methamphetamine. The defendant appealed and raised the issue of multiplicity in his argument that his multiple convictions, arising from the same course of conduct in obtaining the materials for and engaging in the manufacture of meth, violated his right to be protected from double jeopardy.

The Court in its opinion concluded that "the singe act of violence/merger analysis should no longer be applied when analyzing double jeopardy or multiplicity issues in the context of multiple description cases where a defendant has been convicted of violations of multiple statutes arising from the same course of conduct." The Court explicitly held that "the test to determine whether charges in a complaint or information under different statutes are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense; if so, the charges stemming from a single act are not multiplicitous." The Court further held that this same-elements test will determine whether there is a double jeopardy issue when a defendant is charged with violation of multiple statutes arising from the same course of conduct.

NOTE: This holding disapproves of *State v. Vontress*, 266 Kan. 248, 257, 970 P.2d 42 (1998) mentioned in this Appendix A on p.129 and in note following ***State v. Walker***, 277 Kan. 849, 89 P.3d 920 (2004).

State v. Phinney, 280 Kan. 394, 122 P.3d 356 (2006). Defendant pled no contest to possession of pseudoephedrine and was sentenced at severity level 1, to 150 months in prison. However, defendant was granted probation as a dispositional departure. At a revocation hearing, defendant sought application of *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188 (2002), which had been decided after defendant's sentencing but before revocation. Defendant also filed a direct appeal from the original sentence. The Supreme Court followed its decision in *Bryant v. State*, 30 Kan. 2, 118 P.3d 685 (2005) with regard to the probation revocation appeal which held that a defendant could not assert an identical offense doctrine claim except on direct appeal.

The Court went on to allow the direct appeal pursuant to *State v. Ortiz*, which allows a defendant to file a late direct appeal if: 1) the defendant is no fully notified of the right to appeal, 2) the defendant is furnished an attorney who fails to perfect an appeal, or 3) the defendant is not furnished with an attorney to perfect an appeal. The Court held that the Court of Appeals had retained the direct appeal based on the first exception and remanded the case for resentencing under the application of *Frazier*.

State v. Wendler, 280 Kan. 753, 126 P.3d 1124 (2006). Defendant was sentenced at a drug severity level 4 offense for possession of pseudoephedrine pursuant to *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188 (2002) and at the same time sentenced at a drug severity level 1 for a manufacture offense. The State appealed the drug severity level 4 offense and while the case was on appeal *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004) was decided. The defendant then filed an appeal seeking resentencing under *McAdam*. The Court of Appeals did not rule on the defendant's appeal and affirmed the sentence regarding the State's appeal.

The Supreme Court noted that the Appellate Court had the authority to review a claim that the sentencing court erred in ranking the severity level of a crime "in any appeal." And, since the issue had been raised properly before the Court of Appeals, the Supreme Court could reach the issue of the defendant's appeal if the Court of Appeals had not. The Court then concluded that any party that takes an appeal in any case implicitly accepts the risk that the law could change or evolve in a manner advantageous to the opponent before the appeal is finally adjudicated and because this case was on direct appeal (the State's) the Court applied *McAdam* and remanded for resentencing.

State v. Miles, 35 Kan. App. 2d 211, 130 P.3d 1198 (2006). Pursuant to a plea agreement, defendant pled nolo contendere to a charge of conspiracy to manufacture methamphetamine (meth). Defendant had originally been charged with the manufacture of meth (K.S.A. 65-4159), or attempted manufacture of meth (K.S.A. 21-3301 and K.S.A. 65-4159(a); unlawful possession of ephedrine or pseudoephedrine (K.S.A. 2001 Supp. 65-7006(a); and possession of drug-manufacturing paraphernalia (K.S.A. 65-4152(a)(3). Consistent with the holding of *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004), the district court sentenced the defendant on a severity level 3 drug felony charge. Defendant appealed contending that he should have been sentenced for a severity level 4 offense instead.

For the purpose of identifying identical proscribed conduct under different statute, the test is whether the same conduct, as defined by the elements contained within each statute, is proscribed. The Court reasoned that K.S.A. 65-4159(a) was intended to criminalize the act of producing a controlled substance while K.S.A. 65-4152(a)(3) was intended to criminalize the possession, collection, or application of non-controlled substances or products with the intent to produce a controlled substance. Since the statutes proscribe different conduct, even though the conduct is connected, the Court held that the rule of *McAdam* does not require resentencing of the defendant.

CRIME SEVERITY LEVELS (GENERAL)

State v. Fifer, 20 Kan. App. 2d 12, 881 P.2d 589, *rev. denied*, 256 Kan. 996 (1994). The offender argued on appeal that the sentencing court erred in listing his prior conviction of attempted burglary of a dwelling as a person felony in his criminal history. At the time of sentencing, the legislature had not yet amended K.S.A. 1993 Supp. 21-4711 to read that a prior felony conviction of an attempt, conspiracy or solicitation shall be treated as a person or

nonperson crime in accordance with the designation assigned to the underlying crime. The Court held that it is reasonable to assume that the legislature intended that the designation of a crime as person or nonperson, depends upon the nature of the offense. Thus, it is logical that an attempt to commit any crime should be designated person or nonperson depending on the designation assigned to the underlying crime.

See also ***State v. LaGrange***, 21 Kan. App. 2d 477, 901 P.2d 44, *rev. denied*, 258 Kan. 861 (1995).

State v. Alires, 21 Kan. App. 2d 139, 895 P.2d 1267 (1995). The offender pled guilty to attempted sale of marijuana. The underlying crime of sale of marijuana is was a severity level 3 felony. The sentencing court found that the offender's criminal history score was H and the court imposed a sentence based upon the middle sentence in block 3-H of the drug grid, then reduced the sentence by 6 months as provided by K.S.A. 1993 Supp. 21-3301(d). On appeal the offender argued that K.S.A. 21-3301(d) should be construed to mean that the sentencing court is to first reduce the sentence by six months, then assign a crime severity level based on the reduced sentence.

The Court concluded that it could not believe the legislature intended such a result, that K.S.A. 21-3301(d) does unambiguously provides the sentence for an attempted drug felony is computed by reducing the sentence for the underlying crime by six months. To adopt the offender's interpretation would require the addition of something not found in the statute's clear language.

State v. Shaw, 259 Kan. 3, 910 P.2d 809 (1996). The offender pled nolo contendere to one count of aggravated indecent liberties with a child. At the plea hearing the district court relying on the complaint, informed the offender that the offense charged was a severity level 4 felony, which carries a sentencing range of 38 to 86 months of imprisonment, and that his sentence within that range would be determined by his prior criminal history. Actually, the offender's crime was a severity level 3 felony which carries higher penalties. The offender was sentenced to 41 months of imprisonment, even though the presumptive sentence for his crime was 49 months. The offender filed a motion to withdraw his plea shortly after sentencing, alleging the ineffective assistance of counsel and due process violations. The district court denied the motion.

The Court of Appeals reversed the district court's denial of the offender's motion to withdraw his plea. The Supreme Court subsequently granted the State's petition for review. The Supreme Court reversed the Court of Appeals' finding that there was an insufficient factual basis for the district court's acceptance of the offender's plea. Nevertheless, the Supreme Court affirmed the decision of the Court of Appeals. Not only did the district court impose a clearly illegal sentence when it sentenced the offender to less than the presumptive sentence for his crime, but more than that the offender's plea was not knowing and voluntary, because he was misinformed as to the maximum penalty for his crime before entering his plea. Because the offender did not understand the consequence of his plea, his conviction was set aside and he was allowed to withdraw his plea.

State v. Gray, 22 Kan. App. 2d 875, 924 P.2d 647 (1996). The offender was convicted in 1994 of theft of property of a value under $500, which was enhanced to a felony based upon two prior municipal court convictions for theft. A 1992 amendment to K.S.A. 21-3701 deleted the paragraph that counted municipal ordinance convictions for theft as prior convictions of theft for classification purposes under the theft statute. Because of this, the Court reversed the offender's

conviction, holding that absent a clear expression of legislative intent, a city ordinance conviction cannot be used as a basis for an enhanced penalty for a subsequent violation of a similarly worded state statute.

State v. Crank, 262 Kan. 449, 939 P.2d 890 (1997). In separate criminal actions the offenders were charged with felony possession of marijuana under K.S.A. 1996 Supp. 65-4162(a). Each offender had a previous conviction for possession of marijuana but the earlier convictions had been under amended versions of K.S.A. 65-4127b(a). The sentencing court ruled in both cases that a prior conviction of possession of marijuana under K.S.A. 65-4127b does not constitute a prior conviction under this section for purposes of K.S.A. 1996 Supp. 65-4162(a), so as to enhance a possession of marijuana charge from a misdemeanor to a felony. The Court reversed after finding that the legislature has clearly expressed its intent to use previous similar drug convictions to enhance the severity level of subsequent drug crimes. The Court ruled that a prior conviction under this section in K.S.A. 1996 Supp. 65-4162(a) does not mean a prior conviction under this section number. Rather, a prior conviction under this section, in accordance with legislative intent, means a prior conviction under the contents of this section regardless of the section number.

The Court found that earlier cases that dealt with violations of city ordinances, where the court had refused to allow those convictions to enhance charges or sentences, were not particularly helpful in resolving the issue before us, as the rationale for not using municipal convictions to enhance a charge is not present here. The Court held the earlier "municipal convictions" case law to be inapplicable based on the facts that acts resulting in convictions under K.S.A. 65-4127b clearly were prohibited under state law, those same acts are prohibited under the current statute, and because "the legislature has specifically expressed an intent to allow all offenses of substantially similar character to enhance charges, even if the convictions resulted from violations of a city ordinance, county resolution, or substantially similar offense from another jurisdiction."

State v. Walker, 24 Kan. App. 2d 145, 942 P.2d 649 (1997). A plea of guilty for the purpose of applying the KSGA to a charge of simple possession of cocaine, which is not enhanced by a previous conviction for possession of cocaine, fixes the severity level of the crime pled to. For the purposes of applying the sentencing guidelines, a plea of guilty to simple possession of cocaine cannot be sentenced as a conviction for possession after a previous conviction, even if it could have been charged at that level due to a previous conviction for possession of cocaine.

State v. Riley, 26 Kan. App. 2d 533, 989 P.2d 792 (1999). The offender appealed his conviction for attempted second-degree murder claiming in part, that his receiving the same punishment for attempted second-degree murder as he would have received for attempted first-degree murder (both first and second-degree murder were off-grid offenses) constituted disproportionate punishment. Since a conviction for both attempted first-degree murder or second-degree murder resulted in a sentence at severity level 1 on the nondrug sentencing grid, the offender argued that his possibly receiving identical sentences for two degrees of the same crime results in disproportionate punishment, violating the Eighth Amendment to the United States Constitution prohibition against cruel and unusual punishment. The Court disagreed and held that the offender's sentence for attempted second-degree murder is not disproportionate merely because the presumptive sentence for attempted first-degree murder was equivalent.

State v. Edwards, 28 Kan. App. 2d 379, 15 P.3d 855 (2000). The offender was charged with driving while suspended for the second time with the date of the crime on May 5, 1999. The

offender was convicted after July 1, 1999, with the applicable statute, K.S.A. 1998 Supp. 8-262 (a), being amended on July 1, 1999, and changed from a level 9 nonperson felony for a second conviction, to a class A nonperson misdemeanor. The sentencing court found that the date of the conviction controlled as to the severity level and dismissed the felony charge without prejudice. The State appealed.

The interpretation of a statute is a question of law in which an appellate court has unlimited review. The Court ruled that the amendment of the statute was not retroactive and stated in part: "In this case, at the time defendant committed the crime, it was a felony. We have examined the language of K.S.A. 1999 Supp. 8-262 (a), and it does not clearly state an intention on the part of the legislature for retroactive application. In accordance with the Supreme Court decision in *State v. Dailey*, the form of the statute that was in effect at the time the crime was committed applies. This means that in the event defendant is convicted of the charges, she will be convicted of a felony. We hold the trial court erred in dismissing the charge, and we reverse that decision and we remand the matter with instructions to reinstate the felony charge against defendant and proceed to trial."

State v. Hartpence, 30 Kan. App. 2d 486, 42 P.3d 1197 (2002). Although a juvenile at the time of the offenses, the offender was charged with rape and aggravated criminal sodomy as an adult after the juvenile court granted the State's motion to prosecute as an adult. The offender entered an *Alford* plea to two counts of aggravated indecent liberties with a minor and was sentenced to 74 months imprisonment. The offender appealed.

The offender argues on appeal that his conviction as an adult increased the penalty for his sentence and that such a decision should have been made by a jury applying the beyond a reasonable doubt standard. The Court declined to apply *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), holding instead that K.S.A. 38-1636(e) has eight statutory factors that are considered in determining if a juvenile will be tried as an adult. The Court also pointed out that the basis for *Gould*, namely *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) involved an increase in the maximum prison sentence, not as here, where the juvenile court decided in which court the offender would be tried (i.e., juvenile court or the district court).

CRIMINAL SEVERITY LEVELS (JUVENILE CONVICTION ISSUES)

In re J.E.M., 20 Kan. App. 2d 596, 890 P.2d 364 (1995). In this case a juvenile offender appealed the district court's determination that his prior juvenile adjudications should be counted as convictions for purposes of enhancing a misdemeanor to a felony conviction. The juvenile, J.E.M., was adjudicated a juvenile offender for theft, which the court determined was a severity level 9 nonperson felony based on two prior theft adjudications within the previous five years. Without the prior convictions, the theft in this case (under $500) would be a class A misdemeanor. See K.S.A. 1993 Supp. 21-3701.

The Court noted the distinction between the Kansas Juvenile Offenders Code, specifically K.S.A. 38-1601 which states that no order of the district court in any proceeding under the provisions of the Code shall be deemed to import a criminal act on the part of any juvenile and the provisions of the KSGA, which allow juvenile adjudications to be used in the computation of criminal history scores. Thus the critical question before the Court was whether the adoption of the sentencing guidelines evinces a change in the legislative intent to mandate that juvenile adjudications are now synonymous with criminal convictions. The Court

acknowledged that under K.S.A. 1993 Supp. 21-4711(f), for purposes determining an offender's criminal history classification, "juvenile adjudications will be applied in the same manner as adult convictions." However, the sentencing guidelines consist of two components, crime severity level and criminal history. The provisions of the theft statute elevating theft of property less than $500 to a level 9 nonperson felony deals with crime severity level, not criminal history. Further, unlike the criminal history statutes under the KSGA, the theft statute does not specifically include juvenile adjudications.

Citing longstanding law in Kansas that criminal statutes are to be construed strictly against the State and that courts are to give effect to the plain language of a statute, the Court stated that the plain language of the theft statute indicates only prior theft *convictions* may be used to enhance the severity level of the crime and the plain language of the Juvenile Offenders Code provides that juvenile *adjudications* are not criminal convictions. Had the legislature meant for juvenile adjudications to be counted as convictions for purposes of enhancing severity level it could have included them in the statute but did not. Thus the Court held that by specifically including juvenile adjudications in the guidelines statutes relating to criminal history classification and by not including similar language in the theft statute, the legislature has demonstrated its intention that juvenile adjudications not be used to enhance the severity level of theft.

State v. Murray, 22 Kan. App. 2d 340, 916 P.2d 712 (1996). At issue was the sentencing court's inclusion of three expunged felony juvenile adjudications in the offender's criminal history, and the court's refusal to allow the offender to withdraw his guilty plea.

Although the Court stated that the KSGA does allow for the inclusion of expunged juvenile adjudications in criminal history, the Court nevertheless reversed. A prosecutor may not induce a plea of guilty or nolo contendere by withholding from defense counsel otherwise unavailable information that is relevant to the consequences of the plea. Without knowledge of any expunged juvenile adjudications, the offender's attorney could not fulfill his obligation to the offender to advise him of the consequences of pleading guilty. The defense attorney must have and the prosecutor must share with the defense attorney, knowledge of any expunged juvenile adjudications that will be used in the offender's criminal history.

In re J.C., 260 Kan. 851, 925 P.2d 415 (1996). J.C., a juvenile, was prosecuted as an adult for a felony, based upon a prior juvenile adjudication. See K.S.A. 38-1602. J.C. moved to set aside the prior adjudication, arguing that the judge who accepted his stipulation to the charge was required to but failed to inform him that the charge would be classified as a felony if committed by an adult and that his stipulation to a felony adjudication would affect his juvenile offender status should he be charged with a future felony offense.

The Court held that due process does not require a judge to inform a juvenile that a stipulation to a felony offense may be used to determine his or her juvenile offender status in the future. The possibility that such a stipulation may be used to enhance the sentence for a later crime is a collateral consequence of which an offender need not be informed prior to entering a stipulation or plea.

State v. Presha, 27 Kan. App. 2d 645, 8 P.3d 14, *rev. denied*, 269 Kan. 939 (2000). Under the KSGA the criminal history worksheet satisfies the State's burden to prove an offender's criminal history unless the offender contests the criminal history worksheet. If the offender disputes the criminal history, the sentencing court determines the criminal history by a preponderance of the

evidence. The State is allowed to produce evidence that establishes the disputed portion of the criminal history by a preponderance of the evidence. While a certified copy of a journal entry that complies with K.S.A. 22-3426 is proof of a prior felony conviction when the criminal history is disputed, the State is not limited in its proof to presenting *only* the certified copy of the journal entry of conviction. In this case, the State was able to produce documentation in addition to the journal entry that was sufficient for the sentencing court to find substantial competent evidence that an out-of-state offense should be included in the offender's criminal history.

The KSGA requires that juvenile adjudications only, not diversions, be included in the criminal history under K.S.A. 21-4710(a). Under K.S.A. 1999 Supp. 21-4711(f), out-of-state juvenile adjudications are treated as juvenile adjudications in Kansas.

State v. Jones, 273 Kan. 756, 47 P.3d 783, *cert. denied*, 537 U.S. 980 (2002). Refer to the Syllabus. Syl. ¶ 2. "The standard for reviewing the decision to authorize prosecution of a juvenile as an adult is whether the decision is supported by substantial evidence. Substantial evidence is evidence which possesses both relevance and substance, and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. It is not for this court to reweigh the evidence, substitute its evaluation of the evidence for that of the trial court, or pass upon the credibility of the witnesses."

Syl. ¶ 5. "Procedural safeguards provided in the juvenile justice system, and specifically those safeguards in K.S.A. 38-1636, are sufficient to support a determination that certification proceedings of juveniles fall outside the dictates of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)."

Syl. ¶ 6. "The juvenile tried as an adult will be subjected to the statutory maximum sentence under the applicable criminal statute only after a jury has determined his or her guilt beyond a reasonable doubt."

State v. Carter, 278 Kan. 74, 91 P.3d 1162 (2004). The offender was convicted in a second trial of first-degree felony murder, aggravated robbery, and criminal possession of a firearm. The offender was originally convicted of first-degree premeditated murder, aggravated robbery, and criminal possession of a firearm. The convictions from his first trial were reversed on a claim of ineffective assistance of counsel. See *State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (2000).

One of the issues the offender raised on appeal was that including his juvenile adjudications in calculating his criminal history score violated *Apprendi v. New Jersey*, 540 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). On this issue the court stated in pertinent part: "In *State v. Hitt*, 273 Kan. 224, 236, 42 P.3d 732 (2002), *cert. denied*, 537 U.S. 1104 (2003), we held that juvenile adjudications "enjoy ample procedural safeguards" and are therefore encompassed in the *Apprendi* exception for enhancement of criminal sentences because of prior crimes." The offender's convictions and sentences were affirmed.

CRIMINAL HISTORY ISSUES (DEFINITION OF "PRIOR CONVICTION")

State v. Austin, 20 Kan. App. 2d 950, 901 P.2d 9 (1995), *rev. denied*, 257 Kan. 1093 (1995). The offender appealed from the district court's determination that he was not eligible for retroactive application of the KSGA. The offender was actively serving sentences entered in 1980, 1988 and 1993. On appeal, the offender contended that under the KSGA, it is error to use convictions that

he is actively serving in computing criminal history. The Court held that there is nothing in the KSGA that prohibits use of an active conviction in compiling an offender's criminal history and the only requirement is that the conviction be a prior conviction. Under K.S.A. 1994 Supp. 21-4710(a), a prior conviction is any conviction that occurs prior to sentencing in the current case.

State v. Chronister, 21 Kan. App. 2d 589, 903 P.2d 1345 (1995). The offender was charged in the current case with aggravated incest and sexual exploitation of a child, and subsequently pled nolo contendere to the charges. Prior to the charges in the current case, the offender had been charged in another jurisdiction with sexual exploitation of a child. The offender pled nolo contendere to that charge prior to his sentencing in the current case. The offender appealed from the sentencing court's determination that the sexual exploitation of a child conviction in the other jurisdiction constituted a prior conviction under the KSGA.

The Court affirmed, reasoning that the KSGA defines "criminal history" as convictions possessed by an offender at the time such offender is sentenced and because the offender had already been convicted in the other jurisdiction at the time of his sentencing in the current case, the offender possessed a prior person felony conviction at the time of sentencing. K.S.A. 1994 Supp. 21-4703(c).

State v. Roderick, 259 Kan. 107, 911 P.2d 159 (1996). On the same day in the same sentencing court, the offender entered guilty pleas in three separate cases for four offenses committed on different dates. At sentencing, the sentencing court held that none of the convictions could be included in the offender's criminal history score, on the basis that under longstanding law under the habitual criminal act, cases pled to on the same day are considered to be one conviction. The State appealed the sentencing court's determination.

The Court reversed, holding that the legislature by defining prior conviction in K.S.A. 1994 Supp. 21-4710(a), did not intend for the habitual criminal act rule to apply to the criminal history classification under the KSGA. The Court adopts the "inclusive rule" suggested by the State and finds that a prior conviction as defined in K.S.A. 1994 Supp. 21-4710(a) includes multiple convictions entered on the same date in different cases, for purposes of sentencing for any of those convictions. The Court notes that under the 1995 amendment to the definition of "prior conviction", multiple convictions in separate cases consolidated for trial pursuant to K.S.A. 22-3203 cannot be counted as "prior convictions" for criminal history purposes.

State v. Taylor, 262 Kan. 471, 939 P.2d 904 (1997). The issue brought on appeal by the State was when an offender is in lawful custody from a sentence imposed for cases which were consolidated for trial and commits a new crime of aggravated escape from custody, which requires as an element a conviction for a crime and one of the convictions is used to supply that element, the remaining counts which were previously consolidated may be used in determining the offender's criminal history for his new crime.

In deciding the matter the Court held that the resolution of a criminal history sentencing issue involves the interpretation of various provisions of the KSGA. The interpretation of statutes is a question of law and thus the Court's scope of review is unlimited. The Court found that the intent of the legislature is to include all prior convictions on an offender's criminal history score unless prohibited by statute. Further, the Court stated that the provisions of K.S.A. 1994 Supp. 21-4710(a) and (d)(1) expressly indicate that for purposes of determining an offender's criminal history category, all prior convictions are to be considered if they occurred before commission of the current offense or conviction in the current case and are not used as an

element of the present crime, do not enhance the severity level or applicable penalties, or do not elevate the classification from misdemeanor to felony.

The Court sustained the State's appeal and ordered the case remanded for resentencing. The Court based its decision on the fact that only one count from the consolidated cases that Taylor had been previously sentenced for was used as an element of the crime that Taylor was being sentenced for in the instant case. The Court concluded the other counts that Taylor had previously been sentenced on as part of the consolidated case were applicable to scoring Taylor's criminal history for the instant case.

State v. Bolin, 266 Kan. 18, 968 P.2d 1104 (1998). Resolving the conflict between the Court of Appeals' decisions in the cases of *State v. Bolin* 24 Kan. App. 2d 882, 955 P.2d 130 (1998) and *State v. Christensen*, 23 Kan. App. 2d 910, 937 P.2d 1239 (1997), concerning the proper application of K.S.A. 21-4720(b) for sentencing in multiple conviction cases, the Court extended the holding from *State v. Roderick*, 259 Kan. 107, 911 P.2d 159 (1996) and stated in part as follows: "… A multiple conviction case is a case involving multiple crimes arising under a single charging document. The definition applies for all provisions of K.S.A. 21-4720(b)." *Bolin* is affirmed. We disapprove of the conflicting language in *Christensen*…" 266 Kan. at 19.

Bolin had pled guilty to two counts of forgery in a 1994 case and on the same date and in the same district court had also pled guilty to three counts of vehicle burglary and one count of felony obstruction in another case. At sentencing the district court sentenced Bolin first on the 1994 case, assigning a primary crime and a criminal history score of "E" with each of the nonprimary crimes being sentenced at criminal history "I". The district court then sentenced Bolin on the separate case involving the vehicle burglary and felony obstruction charges. Once again the district court assigned a primary crime and a criminal history score of "E" and sentenced the remaining nonprimary crimes at criminal history "I".

Bolin later filed a motion to correct an illegal sentence claiming that the district court had erred by applying his full criminal history to his burglary/obstruction sentence. Bolin contended that under K.S.A. 21-4720(b)(5) and the holding in *Christensen*, that his full criminal history score should have been applied only to the primary crime in his 1994 forgery case and that the criminal history score for all his other crimes, including those in the separate burglary/obstruction case, should have been sentenced at criminal history score "I". The Court of Appeals rejected Bolin's argument and reasoned that under the rationale of *Roderick*, K.S.A. 21-4720(b)(5) applies only to "multiple counts within *an* (the same) information, complaint, or indictment." See 24 Kan. App. 2d at 885. The Supreme Court concurred and approved the Court of Appeals' decision in *Bolin.*

State v. Rapp, 26 Kan. App. 2d 595, 992 P.2d 226 (1999). Only a felony charge and not a conviction, is an essential element of aggravated failure to appear as defined in K.S.A. 21-3814. Consequently, any conviction, otherwise to be scored under the KSGA, should be scored in the offender's criminal history.

State v. Daniels, 28 Kan. App. 2d 364, 17 P.3d 373 (2000). The offender was convicted of possession of cocaine in March 1998 in violation of K.S.A. 1999 Supp. 65-4160(a) for the second time and pursuant to K.S.A. 1999 Supp. 65-4160(b), this would enhance the sentence from a drug severity level 4 felony to a drug severity level 2 felony. The offender's Criminal History Worksheet showed a 1996 conviction for the possession of cocaine contrary to K.S.A. 65-4161a. However, this reference presumably was to K.S.A. 1995 Supp. 65-4161(a) instead.

The offender argued a violation under a separate statute did not constitute a "prior" conviction under K.S.A. 1999 Supp. 65-4160. The sentencing court disagreed and enhanced the offender's sentence. This issue involved the interpretation of a statute so the Court's scope of review was unlimited. The Court noted criminal statutes are to be construed in favor of the accused and any reasonable doubt about the meaning of a statute is also to be decided in favor of the accused. There were no previous cases addressing this sentencing enhancement under K.S.A. 1999 Supp. 65-4160(b) and a strict reading of the statute indicates a "prior" conviction for enhancement purposes would have to involve a violation of K.S.A. 1999 Supp. 65-4160(a). The offender's conviction was affirmed but the case was remanded for resentencing.

State v. Hernandez, 29 Kan. App. 2d 522, 28 P.3d 1031 (2001), *rev. denied*, 272 Kan. 1421 (2001). The offender pled guilty to criminal damage to property (a nonperson felony) and then to criminal threat (a person felony) which had been filed in a separate case. The apparent reasoning for this exercise was that the person felony would not be a factor for sentencing purposes for the nonperson felony. At the sentencing hearing the offender moved to strike the criminal threat conviction from his criminal history. The State objected but the sentencing court granted the offender's motion stating in part "… that was the anticipation of the parties entering the plea." This changed the offender's criminal history Category from a "D" to an "I". The State appealed this ruling pursuant to its objection and the reservation of this question under K.S.A. 2000 Supp. 22-3602(b)(3).

The Court reviewed K.S.A. 21-4713(f) and K.S.A. 21-4710(a) in addressing the issue of whether or not the sentencing court could strike the offender's criminal threat conviction for sentencing purposes involving the criminal damage to property conviction. K.S.A. 21-4713(f) specifically prevents a prosecutor from making "… any [plea] agreement to exclude any prior conviction from the criminal history of the defendant." K.S.A. 21-4710(a) defines prior convictions as "… any conviction, other than another count… which occurred prior to sentencing in the current case regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case." Based upon the legislature's clearly expressed intent in enacting these two statutes as part of the Kansas Sentencing Guidelines Act, the Court held that the State had no authority to enter into any plea agreement that would alter the offender's criminal history. The plea agreement entered into here was invalid and set aside.

The Court vacated the sentence for the criminal damage to property offense and remanded the case for resentencing. However, based upon the sentencing court's specific finding that the offender entered his plea relying upon the State's promise not to count the person offense for sentencing purposes against the nonperson offense, the Court also directed the sentencing court to allow the offender to withdraw his pleas if he should chose to file the appropriate motions.

State v. Bussart, 29 Kan. App. 2d 996, 35 P.3d 281 (2001). The offender pled guilty in Sedgwick County on March 1, 2000 to possession of methamphetamine and also no tax stamp. The plea agreement included a provision for the State to recommend the minimum guidelines sentence and probation. At the plea hearing the offender's attorney stated that she believed the criminal history score was a Category F. However, the offender's presentence investigation report indicated a Category C because it included a March 10, 2000 conviction in Butler County for contributing to a child's misconduct. The offender objected to the criminal history score because the plea for the Sedgwick County case was entered before the plea in the Butler County

case. The sentencing court denied the motion and the offender appealed.

The offender raised two arguments on appeal, namely that the State should have listed his prior convictions in the Sedgwick County complaint or they should have been submitted to a jury. In addition, the offender also argued that the Butler County conviction could not be included in the Sedgwick County sentencing because he had not yet been sentenced and thus there was not yet any conviction.

The Court briefly reviewed *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) and *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) and held that the State need not plead an offender's prior convictions in the complaint or for the convictions to be submitted to a jury. The Court reviewed K.S.A. 21-4710(a) regarding the date of the Butler County conviction and held that a plea entered on March 10, 2000 in the Butler County case was sufficient to qualify as a conviction prior to the April 20, 2000 sentencing date in the Sedgwick County case. The offender need not actually be sentenced in the Butler County case before it counted as a conviction for criminal history scoring purposes in the Sedgwick County case. Instead, the relevant date for the criminal history scoring in the Sedgwick County case was the date of the sentencing in the Sedgwick County case.

State v. Pollard, 273 Kan. 706, 44 P.3d 1261 (2002). The offender pled guilty in Missouri in July 1999 to first-degree attempted burglary and the Missouri Court ordered suspended imposition of sentence and placed the offender on 2 years' probation. Under the conditions of probation, the offender was specifically prohibited from possessing firearms. In December 2000 in Kansas, the offender was charged with criminal possession of a firearm and unlawfully altering the identification marks of a firearm. The District Court granted the offender's motion to dismiss based upon the argument that the Missouri suspended imposition of sentence does not constitute a conviction and the State appealed.

The sole issue on appeal was: If a suspended imposition of sentence is not considered a conviction in the jurisdiction where such disposition was rendered, can it be considered a conviction under Kansas law for purposes of establishing the prior conviction element under K.S.A. 2001 Supp. 21-4204(a)(3)? Both parties agreed under Missouri law, the disposition of a "suspended imposition of sentence" did not constitute a conviction as it is not a final judgment. However, the issue turned on which state's law defined the term "conviction" and also upon the choice of law resolution (i.e., Missouri or Kansas).

The Court focused its opinion upon the "choice of law" question and stated in part: "If the statute were interpreted to require a foreign jurisdiction's definition of conviction, the interest in protecting the public would be undermined. Essentially, if such construction controlled the outcome of a particular case, it would, as here, create an unintended gap in the statutory scheme designed to protect the public safety…"

"Furthermore, a person who commits the predicate offense in Kansas, pleads guilty, receives probation, and possesses a weapon, suffers more severe consequences than their counterpart who commits the predicate offense in Missouri. This is not a logical result. It is more logical to conclude the legislature intended to treat all persons coming before the Kansas courts the same in order to address the problem of keeping weapons from certain felons and to advance the policy interest of protecting the public…"

"We conclude Kansas law should apply. The question then becomes whether or not

Pollard had the equivalent of a conviction at the time he is alleged to have possessed the firearm in Kansas. Three lines of reasoning lead to the conclusion this question should be answered in the affirmative: (1) the legal definition of conviction under statute and case law; (2) the procedural posture of Pollard's predicate felony, and; (3) the construction of the term "conviction" for criminal history scoring purposes…"

The Court also pointed to three recent Court of Appeals decisions where this would also be counted as a conviction, namely: ***State v. Presha***, 27 Kan. App. 2d 645, 8 P.3d 14, *rev. denied*, 269 Kan. 939 (2000); ***State v. Hodgden***, 29 Kan. App. 2d 36, 25 P.3d 138, *rev. denied*, 271 Kan. 1040 (2001); and ***State v. Macias***, 30 Kan. App. 2d 79, 39 P.3d 85, *rev. denied*, 273 Kan. 1038 (2002).

CRIMINAL HISTORY ISSUES (CRIMINAL HISTORY SCORING)

State v. Dunn, 21 Kan. App. 2d 359, 900 P.2d 245 (1995). Although the 1994 amendment in K.S.A. 1994 Supp. 21-4710(d)(7) makes it clear that a municipal ordinance conviction that is comparable to a state misdemeanor is to be considered in arriving at an offender's criminal history, this amendment only applies when the present crime of conviction was committed on or after July 1, 1994. If the present crime of conviction was committed before that date, the provisions of 1993 Supp. 21-4710(d)(7) apply. The 1993 provision does not authorize the use of a municipal ordinance conviction or a county resolution in computing criminal history.

State v. LaGrange, 21 Kan. App. 2d 477, 901 P.2d 44, *rev. denied*, 258 Kan. 861 (1995). On appeal the offender argued that the sentencing court erred in classifying a prior Colorado conviction of third-degree assault as a prior battery conviction for purposes of the criminal history. The original presentence investigation (PSI) scored the prior conviction as an assault conviction under Kansas law (a class C misdemeanor) which was not counted in the criminal history. The State objected to the PSI and the sentencing court agreed with the State's argument that the Colorado conviction should be scored as a person misdemeanor because it was the equivalent of a battery conviction in Kansas.

As a consequence, the offender had a total of three person misdemeanors that count as one prior person felony conviction for criminal history purposes. See K.S.A. 21-4711(a). The Court found that the Colorado conviction was comparable to the Kansas offense of aggravated battery, a person felony. The Court further found under the plain language of K.S.A. 1994 Supp. 21-4711(e), this statute while providing that an out-of-state conviction must be scored as a felony or as a misdemeanor depending on the designation of the convicting state, does not prevent a Kansas sentencing court from considering a Kansas felony as a comparable offense to the out-of-state conviction, for the purpose of determining whether an out-of-state misdemeanor offense is a person or a nonperson crime.

State v. Landon, 21 Kan. App. 2d 486, 900 P.2d 254, *rev. denied*, 258 Kan. 861 (1995). The offender appealed from the sentencing court's scoring of two prior residential burglaries as prior person felony convictions. Specifically, the offender argued that at the time he was convicted of the burglaries, simple burglary was designated as a property crime, and that he was thus not advised at the time he pled guilty to the burglaries that those convictions would count as person felonies in his criminal history in the future. The Court held that an offender need not be informed of the collateral consequences of a plea and it follows that defense counsel need not anticipate changes in the law in order to advise an offender of some potential future consequence

of the plea.

The offender also argued that the re-designation of his burglary convictions as person crimes for purposes of his criminal history violates the constitutional prohibition against an *ex post facto* law. Reasoning that the offender was not being punished for his prior burglary convictions, but instead that the convictions merely establish a sentencing classification for his current offense, the designation of the prior burglary convictions as person felonies for purposes of criminal history does not violate the prohibition against *ex post facto*.

State v. Schultz, 22 Kan. App. 2d 60, 911 P.2d 1119 (1996). The Court agreed with the offender's argument that his prior conviction from Missouri for burglary of a gas station should have been classified as a nonperson felony for criminal history purposes. Under K.S.A. 21-3715, normally a gas station would not be considered a "dwelling" as contemplated by our legislature absent some proof that the gas station either is used or is intended for use as a human habitation, home, or residence.

State v. Beard, 22 Kan. App. 2d 877, 924 P.2d 1268, *rev. denied*, 261 Kan. 1084 (1996). The offender challenged the constitutionality of K.S.A. 21-4711(a) directing that three prior class A or class B person misdemeanors convert to one person felony for criminal history purposes under the KSGA. Specifically, the offender argued that the provision violates due process and the prohibition against ex post facto laws. The Court held that this case was controlled by *State v. LaMunyon*, 259 Kan. 54, 911 P.2d 151 (1996) and that therefore the statutory provision is constitutional.

State v. Ford, 23 Kan. App. 2d 248, 930 P.2d 1089 (1996), *rev. denied*, 261 Kan. 1087 (1997). During plea negotiations, the State and the defense relied on an "NCIC read-out," which indicated the offender had one prior person felony conviction. The offender pled guilty to one count of attempted robbery and two counts of theft. When the presentence investigation (PSI) report was issued, it showed the offender had two prior person felony convictions, excluding him from the presumptive probation grid block. The offender filed a motion to withdraw his plea, arguing he pled guilty believing he had a chance of getting probation and it was unfair to shift the burden of classifying prior felony convictions to the offender prior to entering his guilty plea. On appeal of the sentencing court's denial of the offender's motion to withdraw his plea, the offender argued an abuse of discretion.

The Court affirmed the sentencing court's decision to refuse to allow the offender to withdraw his plea based on the offender's mistaken belief about his criminal history. K.S.A. 22-3210(a)(2) requires the sentencing court to inform the offender of the severity level of the crime and the maximum sentence that may be imposed prior to accepting offender's plea of guilty. Further, K.S.A. 21-4704(c)(4) requires that prior convictions discovered after the plea has been accepted be counted in an offender's criminal history. Since the sentencing court followed those provisions, no abuse of discretion occurred.

State v. Strickland, 23 Kan. App. 2d 615, 933 P.2d 782, *rev. denied*, 262 Kan. 968 (1997). The Court vacated the offender's sentence in *State v. Strickland*, 21 Kan. App. 2d 12, 900 P.2d 854 (1995). There, the Court held where the State attempts to establish an offender's criminal history using copies of official court documents, those documents must meet the authentication requirements under K.S.A. 60-465 to be admissible as an exception to the hearsay rule. With respect to documents from Kansas courts, certification is sufficient to meet the authentication requirements under K.S.A. 60-465(3). However, copies of documents coming from courts in

other states must be certified or "attested" and accompanied by the certificate required by K.S.A. 60-465(4) to meet the requirements for authentication. The Court further held that a statement by the offender to a court services officer during a presentence investigation is not sufficient, standing alone, to meet the State's burden of proving criminal history. The offender's sentence was remanded to the sentencing court for resentencing.

At resentencing, the offender objected to the state introducing a properly authenticated copy of the offender's out-of-state conviction. The offender argued that had the conviction been properly excluded in the original sentencing hearing, the appeal, and thus the resentencing, would not have taken place because the offender would have fallen into a presumptive probation grid box. The sentencing court admitted the newly authenticated copy of the out-of-state conviction and sentenced the offender to prison.

The offender appealed the new sentence. The issue was whether, upon remand for resentencing where the sentencing court erred in admitting out-of-state conviction evidence that did not meet the authentication requirements of K.S.A. 60-465, the State is precluded from presenting properly authenticated copies of the out-of-state convictions at the resentencing hearing. The Court found what occurred at the offender's original sentencing was mere technical error and upon remand for resentencing, the sentencing process is to take place again. Therefore, upon remand for resentencing, the State is not precluded from introducing properly authenticated copies of the offender's out-of-state convictions.

State v. Hernandez, 24 Kan. App. 2d 285, 944 P.2d 188, *rev. denied*, 263 Kan. 888 (1997). The offender's criminal history included three prior convictions under the Uniform Code of Military Justice (UCMJ). K.S.A. 21-4711(e) required the sentencing court to include military convictions in the offender's criminal history. The sentencing court found that the prior convictions under the UCMJ should be counted as felony convictions for the offender's criminal history. Because UCMJ convictions are not designated as either a felony or a misdemeanor, the offender contended that those convictions must be scored as misdemeanors under the KSGA.

The Court found that the KSGA does not provide how to classify prior convictions when the convicting jurisdiction does not classify the crime as felony or misdemeanor and that the decision on how to classify such convictions represented a question of first impression. The Court held that while criminal statutes are generally strictly construed against the State, that principle is subordinate to the rule that judicial interpretations must be reasonable and sensible to effectuate the design and the true intent of the legislature. See also ***State v. Schlein***, 253 Kan. 205, 854 P.2d 296 (1993).

On the question of how to designate prior convictions from a jurisdiction which does not designate convictions as misdemeanors or felonies, the Court found the rationale from *State v. Fifer*, 20 Kan. App. 2d 12, 881 P.2d 589, *rev. denied*, 256 Kan. 996 (1994) to be applicable. In *Fifer*, the Court dealt with the question of how to classify "attempts" as either person or nonperson crimes. The Court in construing the KSGA *in pari materia*, concluded that the legislature intended the sentencing court to compare a prior conviction to the most comparable Kansas offense to make a felony or misdemeanor determination when such conviction occurred in a jurisdiction that does not distinguish between felonies and misdemeanors.

Additionally, the Court upheld the statutory rules that when sentences are entered consecutively, the full criminal history is to be applied to the base sentence, with nonbase sentences computed at criminal history category "I" and that a sentencing court's findings of fact

and reasons justifying departure must be supported by substantial competent evidence and constitute substantial and compelling reasons for departure as a matter of law.

State v. Swilley, 25 Kan. App. 2d 492, 967 P.2d 339, *rev. denied*, 266 Kan. 1115 (1998). Swilley had prior convictions under military law that were included in the KSGA criminal history calculation for Swilley's Kansas sentence on aggravated indecent solicitation of a child. Swilley argued on appeal that it was an error for the sentencing court to classify his military convictions as felonies for criminal history purposes under the KSGA. The Court affirmed Swilley's conviction, and stated in part: "When classifying a prior conviction for criminal history purposes under the Kansas Sentencing Guidelines Act, K.S.A. 21-4701 *et seq.*, the sentencing court should compare the prior conviction to the most comparable Kansas offense to make a felony or misdemeanor determination when such conviction occurred in a jurisdiction that does not distinguish between felonies and misdemeanors." The Court found two of the specifications of Swilley's military convictions to be most comparable to the Kansas criminal statutes dealing with indecent liberties with a child (K.S.A. 21-3503 and K.S.A. 21-3504) and thus Swilley's criminal history had been properly scored as containing two prior person felonies.

See also ***State v. Hernandez***, 24 Kan. App. 2d 285, 944 P.2d 188, *rev. denied*, 263 Kan. 888 (1997).

State v. Vega-Fuentes, 264 Kan. 10, 955 P.2d 1235 (1998). Vega-Fuentes' criminal history included prior misdemeanors and prior municipal ordinance violations. Two of the prior municipal ordinance violations had been for person crimes and one of the misdemeanors had been a person crime. The sentencing court converted those three prior convictions to a person felony pursuant to K.S.A. 1994 Supp. 21-4711(a), giving Vega-Fuentes a criminal history score of category "D". Vega-Fuentes appealed, arguing in part, that the prior municipal ordinance violations should not have been scored in his criminal history.

The Court of Appeals found that while K.S.A. 1994 Supp. 21-4710 sets forth the types of prior convictions which are to be scored in determining an offender's criminal history score and that subsection (a) of that statute specifically provides for municipal ordinances which are comparable to misdemeanors to be considered and scored, that does not mean that such municipal convictions may be aggregated to constitute a person felony under K.S.A. 1994 Supp. 21-4711.

The Supreme Court reversed the Court of Appeals decision and held that violations of municipal ordinances shall be treated in the same manner as comparable misdemeanors for purposes of calculating criminal history, including aggregation under K.S.A. 1994 Supp. 21-4711(a).

NOTE: ***State v. Vega-Fuentes***, 24 Kan. App. 2d 93, 942 P.2d 42 (1997) was reversed and remanded.

State v. Messinger, 25 Kan. App. 2d 339, 967 P.2d 1081 (1998). Violations of municipal ordinances are to be treated as comparable misdemeanors for calculation of criminal history and aggregation of misdemeanors under K.S.A. 1997 Supp. 21-4711(a). Every three prior adult convictions or juvenile adjudications of class A and class B person misdemeanors in an offender's criminal history, or any combination thereof, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. However, a municipal conviction comparable with a class C misdemeanor may not be aggregated with two

misdemeanor convictions comparable to A or B misdemeanors to form one felony under K.S.A. 1997 Supp. 21-4711(a).

See also ***State v. Vega-Fuentes,*** 264 Kan. 10, 955 P.2d 1235 (1998).

State v. Patry, 266 Kan. 108, 967 P.2d 737 (1998). The offender appealed the sentencing court's decision at a resentencing hearing to use additional convictions that occurred after the offender's original sentencing but before the resentencing, to calculate the offender's criminal history score. As a result of utilizing the convictions that occurred between the date of the original sentencing and the date of the resentencing, the offender's criminal history score rose from a "D" to a "C" and the offender received a longer sentence. The offender's original sentence had contained an upward departure, which was reversed by the Court of Appeals on the grounds that the sentencing court did not have substantial and compelling reasons for the departure. The case was then remanded for resentencing.

The Court affirmed the sentencing court's decision to include the additional convictions in the offender's criminal history and held that under the facts of this case, criminal convictions occurring in a separate case subsequent to the initial sentencing in this case are to be utilized in determining criminal history when a resentencing results from the ruling of an appellate court. The Court also held that allowing the inclusion of such convictions for criminal history purposes does not violate due process, nor does this practice constitute a violation of the Double Jeopardy Clauses of the Kansas and the United States constitutions.

State v. Bandy, 25 Kan. App. 2d 696, 971 P.2d 749 (1998), *rev. denied*, 266 Kan. 1110 (1999). The offender was arrested in February 1995 for driving with a suspended license. Subsequent to the arrest but prior to a conviction on the charge, the offender was arrested and convicted on at least two other charges of driving while his license was suspended. On August 1, 1996, the offender pled guilty to driving with a suspended license for the February 1995 violation and the offender was sentenced under the provisions of K.S.A. 1997 Supp. 8-262 for a third and subsequent conviction. The offender appealed his conviction and sentence claiming that at the time he was charged in February 1995, he had only one prior conviction for driving with a suspended license and thus he should only have been convicted and sentenced under this statute for a second offense.

The Court disagreed, holding that when the KSGA became law on July 1, 1993, the intent of the legislature was established as providing for any prior convictions in an offender's criminal history to be utilized when the offender is sentenced for a felony, regardless of whether or not the prior convictions occurred before or after the events which led to the sentencing for the current conviction. The Court stated in part on page 700: "The intent of the legislature in determining a defendant's criminal history in the KSGA is to allow all prior convictions regardless of the timing of the previous offenses (s). We extend by analogy this intention and apply it to other self-contained habitual violator statutes, such as the driving with a suspended license statute, K.S.A. 1997 Supp. 8-262(a)(1). This provides a harmonious application of all habitual violator statutes regardless of whether as individual statute is silent as to the timing of prior offenses."

Neal v. State, 25 Kan. App. 2d 705, 971 P.2d 748 (1998), *rev. denied*, 266 Kan. 1109 (1999). In this case the offender was serving indeterminate sentences for crimes committed prior to the effective date of the KSGA (i.e., July 1, 1993). The offender filed a motion seeking conversion of his sentence to a determinate sentence under the KSGA and the State originally agreed that

the offender was eligible for conversion based on the understanding that the offender's pre-guidelines crimes had a criminal severity level of 5. Following the hearing in which the offender was granted conversion of his pre-guidelines sentences, the State filed a motion to vacate the conversion arguing that the offender's crime severity level should properly have been listed as either a 3 or 4. The sentencing court found that the offender's crime severity level should have been a 4 and that the offender was therefore ineligible for conversion. The sentencing court then vacated the conversion.

The Court reversed stating in part: "When the State agrees to a defendant's criminal history, even if the criminal history is incorrect, the sentence imposed based on that criminal history is not illegal because it is a proper sentence for the agreed upon grid block. Similarly, the State cannot challenge the severity level of petitioner's crime after so stipulating earlier." At Syl. ¶ 1.

See also ***State v. Tolliver***, 22 Kan. App. 2d 374, 379-80, 916 P.2d 725 (1996).

State v. Taylor, 27 Kan. App. 2d 62, 998 P.2d 123, *rev. denied*, 269 Kan. 940 (2000). Unless allowed by a statutory exception, K.S.A. 21-4710(d)(11) prohibits use of a prior conviction when determining an offender's criminal history category when that same conviction has been separately used in a way that either enhances the severity level of the crime or the applicable penalties. In light of this statutory restriction, the Court held that a prior conviction upon which an offender has been classified as a predatory sex offender under K.S.A. 1998 Supp. 21-4716(b)(2)(F)(ii), may be used in determining that offender's criminal history category. However, the Court also held that a prior conviction upon which an offender has been classified as a persistent sex offender under K.S.A. 1998 Supp. 21-4704(j) may not be used in determining that offender's criminal history category.

NOTE: The Supreme Court specifically approved this decision in ***State v. Zabrinas***, 271 Kan. 422, 24 P.3d 77 (2001).

State v. Hodqden, 29 Kan. App. 2d 36, 25 P.3d 138, *rev. denied*, 271 Kan. 1040 (2001). The offender pled guilty to attempting to flee or elude a police officer and also to endangering a child. During the presentence investigation report a 1993 conviction from the state of Alaska was included in the offender's criminal history. The offender objected to having this conviction included because Alaska had set it aside in a procedure that operated as a dismissal. The sentencing court agreed. A second presentence investigation report was prepared for use at the offender's sentencing but without the Alaska conviction and the State appealed.

The Court noted that the State's right to an appeal in a criminal case is strictly statutory pursuant to K.S.A. 21-4721. Because this appeal involved a sentence within the presumptive sentence for the crime, this statute should have applied. However, K.S.A. 21-4721 (e)(2) provides an exception for errors that either include or exclude the recognition of a prior conviction or juvenile adjudication for criminal history purposes and this was the basis for the Court's review.

In addressing the issue of the exclusion of the prior conviction the Court applied Kansas law, specifically K.S.A. 21-4710. Although the procedure used by Alaska to set aside the offender's conviction was similar to a diversion, in Kansas a diversion is proposed before a conviction, not afterwards. On this point the Court stated in part: "A setting aside of a conviction in Alaska and the entering into a diversion agreement in Kansas differ in one pivotal aspect.

Under diversion law in Kansas, a diversion agreement is proposed to the defendant *prior* to conviction on the charges. K.S.A. 22-2907(1). If the defendant fulfills the terms of the agreement, no conviction is entered, and the charges are dismissed with prejudice. K.S.A. 2000 Supp. 22-2911 (b)."

"Kansas, unlike Alaska, does not have a process whereby after a suspended sentence, successful probation, and discharge by the court, a defendant's conviction can be set aside and not be counted in a defendant's criminal history. Clearly, the Kansas Legislature, by enacting the language of K.S.A. 21-4710, intended to include all prior adult felony convictions in criminal history scoring. The legislature even specifically noted that this includes expungements. K.S.A. 21-4710 (d)(2)…"

State v. Zabrinas, 271 Kan. 422, 24 P.3d 77 (2001). Prior to the present conviction for the offense of the sexual exploitation of a child (K.S.A. 21-3516), the offender had been convicted of two person felonies, namely indecent liberties with a child (K.S.A. 21-3503) and aggravated indecent solicitation of a child (K.S.A. 21-3511). Both of the offender's prior person felony convictions were then used to establish a criminal history Category B on the nondrug offense grid and the offender was then sentenced to the maximum mandatory term of imprisonment of 128 months. Then pursuant to the persistent sex offender statute [K.S.A. 1996 Supp. 21-4704(j)], the offender's sentence was doubled to 256 months. The offender appealed his sentence based upon a violation of K.S.A. 21-4710(d)(11).

An interpretation of a statute involves a question of law and the Court's review is unlimited. The Court reviewed K.S.A. 1996 Supp. 21-4704(j) and agreed that it applied to these facts to classify the offender as a persistent sexual offender. However, since one of the offender's two previous person felony convictions was used to subject the offender to the persistent sexual offender classification, it could not also then be scored in the offender's criminal history. Thus the Category B designation that was used for sentencing purposes became a Category D designation and the case was remanded for resentencing.

The Court also pointed out that subsequent to the offender's sentencing the Court of Appeal's had decided this same issue in *State v. Taylor*, 27 Kan. App. 2d 62, 998 P.2d 123, *rev. denied*, 269 Kan. 940 (2000) and the Court then approved both the analysis and the holding in *Taylor*.

State v. Armstrong, 29 Kan. App. 2d 822, 33 P.3d 246, *rev denied*, 272 Kan. 1420 (2001). The offender entered into a plea agreement of no contest to two counts of aggravated indecent liberties with a minor and also acknowledged in the agreement that his criminal history score would likely be Category "A". The presentence investigation report reflected the offender had six prior convictions for statutory rape 2 and one prior conviction for statutory rape 3 from the State of Washington. The offender objected to his criminal history score although he admitted that it had the correct number of prior offenses. The sentencing court applied the persistent sexual offender statute, namely K.S.A. 2000 Supp. 21-4704(j), assigned a criminal history Category of "A" and imposed a 272 month sentence for Count I (which was double the standard presumptive sentence for the grid box 5-A, as required by the statute), and also imposed a 34 month consecutive sentence for Count II based upon a Category "I". The offender appealed.

The sole issue on appeal was whether or not the sentencing court was barred under K.S.A. 21-4710(d)(11) and K.S.A. 2000 Supp. 21-4704(j) from including any of the offender's seven prior sex crime convictions from his criminal history score since the offender had been

found to be a persistent sexual offender. The Court declined to apply the recent ruling in *State v. Taylor*, 27 Kan. App. 2d 62, 998 P.2d 123, *rev. denied*, 269 Kan. 940 (2000) because in that case the offender only had one prior sex crime conviction and here the offender had seven. Instead the Court applied *State v. Taylor*, 262 Kan. 471, 939 P.2d 904 (1997) and said in part: "… The sentencing guidelines specifically provide that all prior convictions are to be considered in a defendant's criminal history score unless otherwise excluded. K.S.A. 21-4710(c)….

In this case, a defendant may be sentenced as a persistent sex offender if he or she "has at least one conviction for a sexually violent crime." K.S.A. 2000 Supp. 21-4704(j). By the plain terms of the statute, only one prior conviction of a sexually violent crime is necessary to support an enhanced sentence as a persistent sex offender. When read in conjunction with K.S.A. 21-4710(c) and K.S.A. 21-4710(d)(11), the trial court is required to include in the criminal history any other convictions beyond that necessary to trigger the enhancement." The Court affirmed the sentence.

State v. Spates, 29 Kan. App. 2d 1089, 36 P.3d 839 (2001), *rev. denied*, 273 Kan. 1039 (2002). The offender entered a plea to aggravated assault and the issue raised for appeal involved the offender's criminal history score having included a juvenile adjudication that had not yet decayed. The offender objected based upon several grounds which included his not having the right to a jury trial in the juvenile adjudication and he argued that *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) should apply.

The Court noted that it was unclear just which statute the offender was challenging as being unconstitutional and the Court assumed that it was K.S.A. 21-4710. However, the Court held that *Apprendi* did not apply and stated in part: "Clearly, the courts in *Apprendi* and *Gould* limited the requirement for a jury determination to *facts other than a prior conviction* and Spates complaint only involves a prior conviction…"

The Court then reviewed the decision in *Almendarez-Torrez v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) as it applied to the issue of recidivism, however, it held that *Almendarez-Torrez* did not apply because here the offender's prior juvenile adjudication was not an element of his current offense (i.e., aggravated assault). There was also a discussion of *State v. LaMunyon*, 259 Kan. 54, 911 P.2d 151 (1996) but the Court held it did not apply because the offender had not shown that his juvenile adjudication was unconstitutional. As for the offender's argument that the Kansas Juvenile Offender's Code prohibits the use of a juvenile adjudication for criminal history scoring purposes, the Court noted that the statute in question in *LaMunyon*, namely K.S.A. 38-1601, was amended in 1996.

State v. Ivory, 273 Kan. 44, 41 P.3d 781 (2002). The offender pled guilty to one charge of theft and the sentencing court imposed an aggravated sentence of 13 months' imprisonment to be served consecutive to the case for which the offender was on parole at the time of this offense. An order for restitution was also entered for the value of the stolen items. The offender appealed both the sentence and the order for restitution.

The Court of Appeals in an unpublished opinion filed July 20, 2001, held that the sentence was within the presumptive range of the guidelines but that there was no evidence in the record to support the finding of the value of the stolen item, set aside the restitution order and remanded that issue for further consideration. The offender filed a Petition for Review on the issue of his sentence.

The standard of review was the constitutionality of the Kansas Sentencing Guidelines Act (KSGA) nondrug sentencing grid, found at K.S.A. 2001 Supp. 21-4704. The offender argued that *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), prevented the use of prior convictions to increase a sentence beyond the statutory maximum unless proof of the prior conviction was proven to a jury beyond a reasonable doubt. The offender's argument was based in part upon the language in *Apprendi* referring to *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) as being a mistake.

However, the Supreme Court declined to open this door and stated very clearly: "The KSGA builds criminal history into the calculation of a presumptive sentence, rather than using criminal history as an enhancement. The determination of a felony sentence is based upon 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. K.S.A. 2001 Supp. 21-4704. See *State v. Gould*, 271 Kan 394, 409, 23 P.3d 801 (2001)." 273 Kan. at 46.

The Supreme Court also noted the reasoning in *U.S. v. Pacheco-Zepeda*, 234 F.3d 411, 414 (2001) as that decision dealt with the interplay between *Almendarez-Torres* and *Apprendi*.

Further in the opinion though, the Supreme Court added in part: "Counsel has not cited a case nor has our research discovered one extending *Apprendi* to hold that increasing a sentence based on the fact of prior convictions is unconstitutional. See *State v. Wheeler*, 145 Wash. 2d 116, 123, 34 P.3d 799 (2001). The Tenth Circuit Court of Appeals has also rejected the notion that prior convictions should be treated as essential elements to be presented in an indictment and decided by a jury. *U.S. v. Wilson*, 244 f.3d 1208, 1216-17 (10th Cir. 2001)." *Id.* at 47.

See also ***State v. Hitt***, 273 Kan. 224, 42 P.3d 732 (2002), *cert. denied*, 537 U.S. 1104 (2003).

State v. Graham, 272 Kan. 2, 30 P.3d 310 (2002). Refer to the Syllabus. Syl. ¶ 2. "*Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), does not apply where the defendant's prior convictions were used to increase the severity level of the current crime and thus the sentence."

Syl. ¶ 3. "Under the facts of this case and based on the evidence of two prior convictions, the district court did not err in finding that defendant's otherwise severity level 4 crimes became severity level 1 crimes under K.S.A. 2001 Supp. 65-4160(c). Combined with defendant's Kansas Sentencing Guidelines Act criminal history score of "H", defendant properly received a presumptive sentence of 150 months."

State v. Perez-Moran, 276 Kan. 830, 80 P.3d 361 (2003). The offender, an inmate at the Kansas Department of Corrections, was convicted of two counts of attempted battery against a law enforcement officer. The trial court excluded two prior person felonies from his criminal history because the prior convictions were necessary to establish that he was in the custody of the Secretary of Corrections. The Court of Appeals reversed, holding that the defendant's previous convictions were not elements of the present charge and should be included in his personal criminal history.

The offender argued the Court of Appeals erred in finding that his two prior felony convictions should be used in calculating his criminal history score under K.S.A. 21-

4710(d)(11). The offender reasoned that the convictions were an element of the crime of battery against a law enforcement officer, that they enhanced the severity level and the applicable penalties, and that they elevated the classification of the crime from a misdemeanor to a felony.

The offender's criminal history score was "B" based on the two person felonies for which he was incarcerated and seven misdemeanors. Prior to sentencing, the offender challenged his criminal history score, arguing that his prior felony convictions should be excluded under K.S.A. 21-4710(d)(11), which states: "Prior convictions of any crime shall not be counted in determining the criminal history category if they enhance the severity level or applicable penalties, elevate the classification from misdemeanor to felony, or are elements of the present crime of conviction. Except as otherwise provided, all other prior convictions will be considered and scored."

The court's analysis of this issue included a review of K.S.A. 2002 Supp. 21-3413. Examining the statute in its entirety, the court stated in part: "It is evident that the legislature wanted to discourage confined persons from committing battery against law enforcement officers in correctional facilities by elevating the severity level of the crime to a felony. Its intent does not appear to punish those with prior convictions more severely, as a person with prior convictions who batters a law enforcement officer outside a correction facility would still only be charged with a misdemeanor. See K.S.A. 2002 Supp. 21-3413(a)(1),(b). Rather, the structure of the statute demonstrates an intent to promote order and safety in prisons…, by providing a stronger deterrent to inmates contemplating battering an officer or employee."

The court further stated: "No dispute exists that the defendant's acts satisfied every element of K.S.A. 2002 Supp. 21-3413(a)(2). Violation of that statute is a severity level 5 felony. To facilitate the intent of the legislature, the penalty is enhanced based on the status of both the offender and the victim. The misdemeanor offense of attempted battery against a law enforcement officer is a completely separate offense involving a completely different status of the offender and the victim. The defendant's prior convictions did not enhance the applicable penalty or elevate the crime from a misdemeanor to a felony under K.S.A. 21-4710(d)(11). The Court of Appeals correctly found that the defendant's prior convictions should be used in scoring his criminal history."

State v. Hatchel, 31 Kan. App. 2d 725, 71 P.3d 1191 (2003). The offender was to be re-sentenced as the result of the ruling in *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied*, 274 Kan. 1115 (2002). However at the resentencing hearing the State requested that two intervening nonperson felony convictions be added to the offender's criminal history score, which would change the criminal history category. The sentencing court denied the request and the State appealed pursuant to K.S.A. 2002 Supp. 22-3602(b)(3).

The Court reviewed *State v. Patry*, 266 Kan. 108, 967 P.2d 737 (1998) and stated in part: "Hatchel recognizes *Patry's* applicability under the facts of his appeal. However, he urges us to disregard *Patry*. We have no indication that Kansas Supreme Court, given the opportunity, would depart from its previous position. Consequently, we are duty bound to follow *Patry*. See *Mueller v. State*, 28 Kan. App. 2d 760, 763, 24 P.23d 149, *rev. denied*, 271 Kan. 1037 (2001), *cert. denied*, 535 U.S. 997 (2002). Accordingly we reverse the judgment of the district court, vacate Hatchel's sentence, and remand for resentencing consistent with our opinion."

***State v. Goeller*,** 276 Kan. 578, 77 P.3d 1272 (2003). The offender pled guilty to one count of felony possession of methamphetamine and one count of felony possession of marijuana and entered a no contest plea to one count of misdemeanor driving under the influence. The offender

received a controlling sentence of 17 months imprisonment with 12 months post release supervision. On appeal the offender claimed he received an illegal sentence based on an incorrect criminal history score.

The offender stipulated to a criminal history score of F. The offender's prior drug record resulted in an increased penalty for possession of marijuana. His sentence on that crime, 11 months, was ordered to run concurrent to his 17 months for the possession of methamphetamine.

The offender claimed the district court erred by including a felony conviction in his criminal history that either was or could have been used to increase the severity level of his possession of marijuana sentence. The court noted jurisdiction under K.S.A. 21-4721(e) to consider whether the district court erred in determining the appropriate classification of Goeller's prior convictions. *State v. Vandervort*, 276 Kan. 164, 72 P.2d 925 (2003). The court in its opinion stated in part: " [a] defendant who invites error by stipulating to his or her criminal history cannot request a correction of sentence under 22-3504 after pronouncement of sentence." *Vandervort*, 276 Kan. 164, 72 P.3d at 933 (quoting *State v. McBride*, 23 Kan. App. 2d 302, 903 P.2d 681 [1996]).

***State v. Reed*,** 31 Kan. App. 2d 1025, 77 P.3d 153 (2003). The offender appealed the reimpostition of a criminal history score of C based upon the aggregation of several misdemeanor offenses based on the mandate in *State v. Roderick Reed*, unpublished opinions, Nos. 86,458, 86,459, 86,469, filed February 1, 2002.

In *Reed I*, the defendant contested his criminal history score of C, alleging that the sentencing court improperly used a class C misdemeanor conviction in aggregation with two class A misdemeanor convictions to form a person felony. In that case the State conceded that the sentencing court had improperly calculated the defendant's criminal history score. The court affirmed in part, vacated the sentence and remanded the case for resentencing. The court mandated the sentencing court resentence the defendant using a criminal history score of E.

Upon remand, the sentencing court reimposed the original sentence, based on a criminal history score of C. The court in its opinion stated in part: "When the decision of a district court has been reversed and remanded for further proceedings, the district court is obliged to effectuate the mandate from the appellate court and may not consider matters which are not essential to the implementation of the ruling of the appellate court. Interpretation of the mandate and a determination of the district court's compliance with that mandate involve questions of law, over which this court has unlimited review." See *In Marriage of Bahr*, 29 Kan. App. 2d 846, 32 P.3d 1212 (2001), *rev. denied*, 273 Kan. 1035 (2002) (citing *Kansas Baptist Convention v. Mesa Operating Ltd. Partnership*, 258 Kan. 226, 898 P.2d 1131 (1995)).

The court further stated, "When the State has acquiesced in a determination of a defendant's criminal history, even if the determination is incorrect or illegal, the State is not permitted to collaterally attack the determination. Where a party, by its own acts, invites error, the law prevents relitigation of the matter." See *Neal v. State*, 25 Kan. App. 2d 705, 971 P.2d 748 (1998), *rev. denied*, 266 Kan. 1109 (1999). The court reversed and remanded for further proceedings before a different judge.

State v. Pennington, 276 Kan. 841, 80 P.3d 44 (2003). The offender was convicted of first-degree murder, burglary, attempted theft, and criminal damage to property. The offender argued that the trial court violated his constitutional rights by using his criminal history score to increase

his sentence and that his criminal history should have been pled to in the complaint and determined by a jury beyond a reasonable doubt. The offender further argued that the court violated his rights by using his juvenile adjudications to increase his sentence.

The district court determined the offender's criminal history score was "B" and sentenced him to life imprisonment for the first-degree murder conviction, 29 months for the burglary conviction with this sentence to run consecutive to the life sentence, 12 months for the misdemeanor theft conviction to run concurrent with the burglary sentence, and 6 months for the criminal damage to property conviction, also to run concurrent with the burglary sentence.

The offender based his claim on the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The court in its opinion stated in part: "This issue, has previously been decided against Pennington. In *Ivory* this court held that *Apprendi* does not apply when the sentence imposed is based on the defendants criminal history score." The *Ivory* court noted that the United States Supreme Court carved out an exception for prior convictions and reasoned that a sentence within the presumptive sentencing range was not subject to being challenged on appeal pursuant to K.S.A. 21-4721(c)(1). *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002).

The offender further argued that the *Apprendi* exception for prior crimes required a trial by jury to ensure that the defendant's right to due process is not infringed. On this issue the court stated in part: "Because juveniles are not given the right to trial by jury, the use of juvenile adjudications does not fall within the *Apprendi* exception." In addition, this issue had also been resolved against the offender. The court applied its ruling in *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002), *cert. denied*, 537 U.S. 1104 (2003) that juvenile adjudications "enjoy ample procedural safeguards" and are encompassed in the *Apprendi* exception for prior crimes. *Hitt*, 273 Kan. at 236.

Jenkins v. State, 32 Kan. App. 2d 702, 87 P.3d 983, *rev. denied*, 278 Kan. 845 (2004). The offender was convicted of aggravated burglary, theft and criminal damage to property. The offender filed a motion alleging ineffective assistance of trial and appellate counsel and a motion to correction an illegal sentence. His motions were consolidated on appeal. The Court of Appeals concluded that the offender's trial and appellate counsel were not ineffective with respect to any issues raised.

The Offender's motion to correct an illegal sentence was based on a Department of Corrections (DOC) report generated in 1993. That report was prepared to determine if the offender was eligible for retroactive application of the sentencing guidelines for robbery and felony theft convictions in 1987. The report determined the offender's criminal history score was C and DOC determined the offender was not eligible for retroactive application of the guidelines.

The offender was convicted of his current offenses in 1998. The presentence investigation report included two additional nonperson felonies the offender had been convicted of in Missouri in 1993. Therefore, the offender had a criminal history score of A.

The Court rejected the offender's claims stating in pertinent part: "the DOC report in 1993 was prepared to determine whether Jenkins' 1987 convictions were subject to retroactive provisions. Obviously, the 1993 convictions were not yet part of Jenkins criminal history as it existed in 1987. Simply because the DOC report was dated after the 1993 convictions does not mean the report should have listed them…" The Court ultimately decided, "The State can rely

upon newly discovered convictions to enhance a defendant's criminal history if the convictions are found prior to sentencing and the defendant is afforded an opportunity to contest the alleged criminal history in a hearing accordance with K.S.A. 21-4715."

State v. Scheuerman 32 Kan. App. 2d 208, 82 P.3d 515, *rev. denied*, 276 Kan. 973 (2003). The offender plead guilty to involuntary manslaughter while driving under the influence of alcohol (DUI). The offender's first pre-sentence investigation (PSI) showed a criminal history score of "A" based on the inclusion of a 1995 DUI and a DUI conviction from Oklahoma. The offender objected to that criminal history score, claiming that the 1995 DUI conviction belonged to his father and that the inclusion of the Oklahoma DUI violated *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The court services officer filed an amended PSI omitting the father's DUI but added a conviction for aggravated assault on a law enforcement officer, which left the criminal history score unchanged.

The offender continued to object to his criminal history at sentencing. Specifically, the offender objected to inclusion of the aggravated assault and Oklahoma DUI convictions on *Apprendi* grounds and asserted that the Oklahoma conviction had been for reckless driving, not DUI. The district court included the aggravated assault conviction but found that the state had failed to prove by a preponderance of the evidence that the offender was convicted of DUI in Oklahoma. Therefore, the Oklahoma conviction was not used in the calculation of his criminal history. The Court determined the offender's criminal history was "B" and sentenced him accordingly.

State v. Sedillos, 279 Kan. 777, 112 P.3d 854 (2005). Defendant appealed the Court of Appeal's decision affirming his conviction and sentence for a third DUI. He argues that the use of his prior convictions under K.S.A. 2002 Supp. 8-1567(l)(3) was erroneous and that the classification of his current DUI as a felony third offense violated due process. Defendant argues that the Court of Appeals violated several rules of statutory construction by interpreting K.S.A. 2002 Supp. 8-1567(l)(3) as mandating the use of his prior DUI convictions to enhance his current DUI offense.

Under K.S.A. 2002 Supp. 8-1567(l)(3), now K.S.A. 2004 Supp. 8-1567(m)(3), "any conviction or diversion agreement occurring during a person's lifetime shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth or subsequent offender." The Court held that the Court of Appeals was correct in it's affirmation of the district court's use of the defendant's prior conviction and diversion agreement in sentencing. The language of the statute is plain and unambiguous and any other reading of the statute would render it unreasonable and meaningless. In addition, the Court held that the use of the defendant's prior convictions to enhance his sentence was not a violation of due process citing its reasoning in *State v. LaMunyon*, 259 Kan. 54, 911 P.2d 151 (1996).

State v. Welty, 33 Kan. App. 2d 122, 98 P.3d 664 (2005). Defendant appealed his sentence for his conviction of attempted manufacture of methamphetamine (meth) and claimed the court erred in including in his criminal history a prior conviction which was not included in a PSI criminal history report adopted by the court at a prior sentencing. In addition, he claims his conviction should be reclassified as a drug level 3 offense pursuant to *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004).

In Riley County District Court, Welty pled non contest to one count of attempted manufacture of meth in violation of K.S.A. 65-4159(a) and at sentencing objected to his criminal

history score. He argued that the State was bound to the criminal history score established in a prior PSI prepared for him and adopted by a court in a Shawnee County case. The Riley County PSI included a prior person misdemeanor conviction that had not been scored in the Shawnee County case even though it had existed at the time of sentencing in Shawnee County.

The issue is whether the Riley County sentencing court was precluded from including the prior conviction in Welty's criminal history when it was overlooked in a prior criminal history report.

Prior criminal convictions, which are proven in court, are to be included in the criminal history classification. K.S.A. 2003 Supp. 21-4715. All prior convictions must be included n a defendant's criminal history score unless they are an element of the present crime, enhance the severity level or applicable penalties, or elevate the classification from misdemeanor to felony. K.S.A. 21-4710(d)(11); *State v. Perez-Moran*, 276 Kan. 830, 833, 80 P.3d 361 (2003). Furthermore, prior convictions cannot be "plea bargained" away. K.S.A. 21-4713.

Welty argued that the State is precluded from including the prior conviction by collateral estoppel. However, the issue had already been decided in *State v. Prater*, 31 Kan. App. 2d 388, 65 P.3d 1048, *rev. denied*, 276 Kan. 973 (2003). In *Prater*, the court rejected the defendant's argument. Since no evidence was presented on the legitimacy of the prior misdemeanor convictions, there was no judgment on the merits entered as to the existence of the prior convictions and, therefore, collateral estoppel did not apply. Following the same reasoning, no judgment on the merits had been entered on the existence of Welty's prior misdemeanor conviction. The fact that it was overlooked on a previous PSI criminal history report did not preclude the State from including it in Welty's criminal history for a subsequent sentence.

Welty then argued, on the basis of *State v. Hatt*, 30 Kan. App. 2d 84, 38 P.3d 738, *rev. denied*, 273 Kan. 1038 (2002), that if a defendant is bound by a prior PSI criminal history report based on a failure to object, the State should also be so bound. The Court of Appeals noted that the issue in *Hatt* was not analyzed under the doctrine of collateral estoppel and found that the reasoning in *Prater* was more persuasive. The Court of Appeals held that the doctrine of collateral estoppel does not preclude a sentencing court from including in a defendant's criminal history a prior conviction which was overlooked in a previous PSI criminal history report.

As to the issue of resentencing pursuant to *State v. McAdam*, Welty's case was on direct appeal when the *McAdam* case was decided. Therefore, the Court of Appeals remanded the case to the district court for resentencing pursuant to *McAdam* and *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004), which held that the *McAdam* ruling applied because the case was on direct appeal at the time of the *McAdam* decision.

State v. Lackey, 280 Kan. 190, 120 P.3d 332 (2005). Defendant was convicted of premeditated first-degree murder and one count of rape and subsequently sentenced to two consecutive terms of life and 45 years to life under the Habitual Criminal Act (HCA), K.S.A. 1982 Supp. 21-4504. Defendant appealed on several grounds including the trial court's error in applying HCA and that HCA violated the ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 123 S. Ct. 2348 (2000). The Supreme Court affirmed the defendant's conviction, vacated his sentence and remanded the case for resentencing.

At sentencing the State submitted certified copies of a couple out-of-state journal entries wherein "Robert H. Lackey, Jr." had pled guilty to assault with intent to commit rape and assault with

intent to commit sexual battery. The defense objected on grounds that the journal entries failed to identify that the person named was the same as the defendant. The State relied on *State v. Baker*, 237 Kan. 54-55, 697 P.2d 1267 (1985) in its argument that a properly authenticated journal entry of a prior conviction for a person with the same name is sufficient and did not require further proof. The district court overruled the objection which resulted in the sentence the defendant now challenges. The issue then became whether the defendant's name on the journal entries was sufficient to prove identity when he contested that fact and the State provided no supporting evidence.

Certified journal entries are sufficient to prove prior convictions absent a denial of identity or rebuttal evidence. See *State v. Staven*, 19 Kan. App. 2d 916, 918, 881 P.2d 573 (1994); *State v. Presha*, 27 Kan. App. 2d 645, 646-47, 8 P.3d 14, *rev. denied*, 269 Kan. 939 (2000); *State v. Hankins*, 19 Kan. App. 2d 1036, 1049, 880 P.2d 271 (1994)("Under the Habitual Criminal Act, a certified or attested copy of a journal entry of a conviction constituted sufficient proof of a prior offense in the event a defendant did not deny identity.")

In this case, the defendant contested that he was the same person named in the out-of-state journal entries, but the State presented no corroborating evidence to support its contention. Therefore, the Supreme court vacated the defendant's sentence under the HCA and remanded for resentencing.

As to the defendant's argument questioning the constitutionality of the HCA after *Apprendi*, the Court pointed out that "*Booker, Blakely, Apprendi, Williams, Gonzalez-Huerta, Moore, Aguirre-Leon, Lopez* and *Ivory*, all provide the fact of a prior conviction does not have to be submitted to a jury to be proved beyond a reasonable doubt." See *United States v. Booker*, ___ U.S. ___, 160L. ed. 2d 621, 125 S. Ct. 738 (2005); *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 123 S. Ct. 2348 (2000); *United States v. Williams*, 403 F.3d 1188, 1198 (10th Cir. 2005); *United States v. Gonzales-Huerta*, 403 F.3d 727, 731 n.1 (10th Cir. 2005); *United States v. Moore*, 401 F.3d 1220, 1224 (10th Cir. 2005); *United States v. Aquirre-Leon*, 2005 WL 806700, *3 n.1 (D. Kan. 2005)(unpublished opinion filed April 7, 2005); *Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005); and *State v. Ivory*, 273 Kan. 44, 47 41 P.3d 781 (2001)("Counsel has not cited a case nor has our research discovered one extending *Apprendi* to hold that increasing a sentence based on the fact of prior convictions is unconstitutional."). Held: The use of prior convictions under the HCA is not unconstitutional under *Apprendi*.

SEE ALSO: *State v. Wilson*, 35 Kan. App. 2d 333, 342, ___ P.3d ___ (2006)(citing *Ivory* and holding that criminal history need not be proven beyond a reasonable doubt to a jury in order to determine where defendant falls on the sentencing grid.)

CRIMINAL HISTORY ISSUES (JUVENILE CONVICTIONS ISSUES)

State v. Delacruz, 258 Kan. 129, 899 P.2d 1042 (1995). Uncounseled misdemeanor convictions that do not result in incarceration may be included in an offender's criminal history score under the KSGA, even though the conviction has the effect of enhancing the guidelines sentence. Before a misdemeanor conviction that results in imprisonment may be included in an offender's criminal history, either the record must demonstrate or the State must establish by a preponderance of the evidence that the offender was either represented by counsel or that the offender waived counsel. A valid felony conviction that arises due to prior misdemeanor

convictions and becomes part of an offender's criminal history may not be challenged on the basis that one or several of the underlying misdemeanor convictions were uncounseled. The last possible time for challenging the underlying misdemeanor convictions is when they are used to enhance the felony conviction. When an offender objects to any part of the criminal history, the State has the burden to establish the criminal history by a preponderance of the evidence. The offender should also be given the opportunity to present evidence regarding criminal history.

State v. LaMunyon, 259 Kan. 54, 911 P.2d 151 (1996). Prior to July 1, 1993, the offender pled *nolo contendere* to one count of possession of marijuana with intent to sell. After the KSGA became effective, the Kansas Department of Corrections (KDOC) issued a guidelines report, determining that the offender's conviction was a drug severity level 3 felony and that, based upon two juvenile adjudications for theft and one for attempted criminal damage to property, his criminal history score was a category "H". The report stated the offender was eligible for conversion. See K.S.A. 1993 Supp. 21-4724(b). The State filed a motion challenging the criminal history in the guidelines report. The district court found the offender's criminal history included an additional juvenile adjudication for burglary that the KDOC had not considered and that the offender's criminal history score should be a "D" based upon a juvenile adjudication for a person felony.

The offender appealed [*State v. LaMunyon*, 21 Kan. App. 2d 281, 898 P.2d 1182 (1995)], arguing that the use of juvenile adjudications in criminal history conflicts with the Juvenile Offenders Code, that consideration of juvenile adjudications violates due process because there is no right to a jury trial in juvenile proceedings, and that consideration of juvenile adjudications violates the *ex post facto* clause of the constitution. The Court of Appeals rejected the offender's arguments and subsequently the Supreme Court granted the offender's petition for review.

Affirming the judgment of the Court of Appeals, the Supreme Court found that because the legislature specifically provided in the KSGA that juvenile adjudications would be used in calculating an offender's criminal history score, it logically follows that the legislature intended the KSGA to be controlling. Citing case law from other states, the Court stated that the mere fact that a juvenile adjudication is not a criminal conviction does not prohibit using a juvenile adjudication in calculating a criminal history score for purposes of sentencing an adult under the KSGA. Just as due process does not require that an offender be informed of all collateral consequences that may result from a guilty plea, due process does not require that a juvenile be informed that his uncontested or stipulated adjudication could be used to determine the sentence for a future crime. The Juvenile Offenders Code is a general statement of public policy as to the effect of juvenile adjudications, whereas the KSGA sets out specific exceptions to K.S.A. 38-1601.

Second, the Court found the offender's juvenile adjudications were constitutional even though he had no right to a jury trial in the juvenile proceedings and therefore could be used in calculating his criminal history score in the current case. Finally, the Court concluded that the use of juvenile adjudications in calculating criminal history does not violate the constitutional prohibition against *ex post facto* laws, relying on the Court of Appeals' reasoning the offender was not being punished for his prior juvenile adjudications when calculating his criminal history score under the KSGA because the consequence of the offender's ineligibility for conversion results in the offender only serving the sentence imposed under the prior law. The Court stated that the KSGA does not operate retrospectively to punish the activity which occurred prior to the effective date of the KSGA and thus does not violate the prohibition against *ex post facto*.

The Supreme Court nevertheless ordered that the case be remanded to the district court insofar as the record was not clear on whether or not the offender's prior juvenile adjudication for burglary was of a dwelling.

State v. Lanning, 260 Kan. 815, 925 P.2d 1145 (1996). The offender was a juvenile who was prosecuted as an adult based upon a prior juvenile adjudication pursuant to K.S.A. 38-1602(b)(3). The offender argued that K.S.A. 21-4710(d)(11), which provides that "[p]rior convictions of any crime shall not be counted in determining the criminal history category if they enhance the severity level or applicable penalties...," precludes the use of his juvenile adjudication to authorize his prosecution as an adult and then to enhance his criminal history category. The sentencing court found that the presentence investigation report properly included the prior juvenile adjudication in the offender's criminal history score.

The Court, relying on *State v. LaMunyon*, 259 Kan. 54, 911 P.2d 151 (1996), held that K.S.A. 21-4710(d)(11) refers to prior *convictions* rather than juvenile adjudications and therefore the statute is inapplicable to prior juvenile adjudications. Further, the Court concluded that the use of a prior juvenile adjudication in determining whether to prosecute as an adult does not enhance the severity level of a crime but only determines when a juvenile may no longer be classified as a juvenile offender.

State v. Macias, 30 Kan. App. 2d 79, 39 P.3d 85, *rev. denied*, 273 Kan. 1038 (2002). The offender was sentenced for aggravated robbery with a criminal history worksheet that included six Texas juvenile adjudications, five for aggravated assault of a public servant and one for aggravated robbery.

Under Texas law, there is a "deferred adjudication" procedure in which the court doesn't enter a judgment of guilt following the determination at trial or by an offender's plea. Instead the Texas court may defer the adjudication and place the offender on community supervision. If the community supervision is successfully completed, then the case is dismissed. The offender argued that this procedure is the same as a diversion in Kansas and should not have been counted in his criminal history.

This appeal involved the determination of a statute (K.S.A. 21-4710) and the Court's scope of review was unlimited. The Court pointed out under the Texas "deferred adjudication" law the Texas courts deferred adjudication *after* a determination of guilt, however, in Kansas with a diversion the offender enters the diversion agreement *instead of* any determination of guilt. This distinction is crucial because under the Kansas Sentencing Guidelines Act it is the determination of guilt that controls for criminal history purposes. In addition, the Court noted that under Texas law the offender's "deferred adjudications" would still be counted for criminal history purposes for any offenses that the offender committed at a later point in time.

State v. Hatt, 30 Kan. App. 2d 84, 38 P.3d 738, *rev. denied*, 273 Kan. 1038 (2002). The offender entered a plea for two counts of forgery and his criminal history worksheet contained information that had been used in a previous conviction. This information included a California burglary that was listed as a person felony and the offender objected. The sentencing court denied the offender's motion, took judicial notice of the previous presentence investigation report and sentenced the offender to 18 months probation based on a category "C" criminal history score. The offender appealed.

The Court's opinion is best stated in paragraphs 2, 3, 4 and 5 of the Syllabus. "Syl. ¶ 2.

K.S.A. 2000 Supp. 21-4714(f) and K.S.A. 21-4715(c) are construed and found not to be in conflict. Syl. ¶ 3. "A trial court may take judicial notice of a defendant's presentence report filed in a previous case without objection instead of requiring the State to produce evidence to establish the disputed portion of the criminal history by a preponderance of the evidence." Syl. ¶ 4. "The inclusion of a defendant's prior juvenile adjudication in his or her criminal history violates neither the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), nor *State v. Gould*, 271 Kan.394, 23 P.3d 801 (2001)." Syl. ¶ 5. "Opinions from the federal Court of Appeals are instructive to this court, but they are not binding on this court."

See also ***State v. Jarvis***, 30 Kan. App. 2d 64, 38 P.3d 742, *rev. denied*, 273 Kan. 1038 (2002).

State v. Hitt, 273 Kan. 224, 42 P.3d 732 (2002), *cert. denied* 537 U.S. 1104 (2003). The Court of Appeals in an unpublished opinion filed on August 24, 2001, held that the offender's juvenile adjudications were correctly included in his criminal history score. The offender filed a Petition for review on the issue of his sentence and raised the issue for the first time on appeal, of whether his 6 juvenile adjudications (1 person felony, 4 nonperson felonies and 1 nonperson misdemeanor) should have been included in his criminal history score. The Court granted the offender's petition for review because this was a case of first impression.

The basis for review was the attack on the constitutionality of a statute that presented a question of law and thus the Court's review was unlimited. Here the offender specifically argued that a juvenile adjudication is not a "prior conviction" and in addition, that a juvenile adjudication does not result from a proceeding in which an offender has the right to a trial by jury. The offender basically challenged the Kansas Sentencing Guidelines Act (KSGA) as being unconstitutional on its face.

The Court reviewed *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S.Ct. 1219 (1998), *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S.Ct. 1215 (1999), *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), *U.S. v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), *State v. Lamunyon*, 259 Kan. 54, 911 P.2d 151 (1996), *State v. Spates*, 29 Kan. App. 2d 1089, 36 P.3d 839 (2001), *rev. denied*, 273 Kan. 1039 (2002) and *State v. Hatt*, 30 Kan. App. 2d 84, 38 P.3d 738, *rev. denied*, 273 Kan. 1038 (2002), before addressing these issues in the analysis portion of its opinion. In upholding the Court of Appeals' decision, the Supreme Court stated in part: "More importantly, in *Gould*, the dictates of *Apprendi* clearly applied to the Kansas departure statute. Here, neither *Apprendi* nor any other binding case precedent clearly or cleanly applies to the issue at hand. It is difficult to justify upending the KSGA without an unmistakable mandate from the United States Supreme Court."

In addressing the issue regarding prior juvenile adjudications having to be charged in the indictment, the Court stated: "The indictment argument is the same whether the criminal history involves adult convictions or juvenile adjudications. We encountered and resolved the indictment argument in *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002). At issue in *Ivory* was whether, in light of *Apprendi*, prior adult convictions may be used as part of the criminal history score under the KSGA. We concluded that they may be included. *Ivory* controls the issue here."

See also ***State v. Cameron***, 30 Kan. App. 2d 1156, 56 P.3d 309, *rev. denied*, 275 Kan. 966 (2002), *cert. denied*, ___ U.S. ___ (2003).

State v. Clemons, 273 Kan. 328, 45 P.3d 384 (2002). Following a bench trial the offender was

convicted of premeditated first-degree murder, attempted first-degree murder and criminal possession of a firearm. The offender was sentenced to life imprisonment with the possibility of parole after 25 years and 732 months (61 years) on the first two convictions with the same to run consecutively, and 8 months on the firearm conviction to run concurrently with the 732 months sentence. The offender appealed both the convictions and the 732 months sentence.

The offender's argument regarding his 732 months sentence for the attempted first-degree murder conviction was that it was disproportionate the first-degree murder sentence and thus resulted in cruel and unusual punishment. The Court disposed of this argument by noting that this was a presumptive sentence and pursuant to K.S.A. 21-4721(c)(1), it had no jurisdiction to hear an appeal on this issue. Please refer to the Syllabus. Syl. ¶ 4. "An appellate court does not have jurisdiction to review a sentence that is within the presumptive range of sentences for the crime for which the defendant is convicted. K.S.A. 21-4721(c)(1)."

Syl. ¶ 5. "Juvenile adjudications are within the exception of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), for prior convictions and may be used in calculating a defendant's criminal history score under the Kansas Sentencing Guidelines Act." The offender's appeal was denied.

In re J.M., 273 Kan. 550, 44 P.3d 429 (2002). The juvenile offender pled no contest to one count of burglary and one count of theft on December 28, 2000. The sentencing court sentenced the juvenile offender to 12 months' probation, however, in April 2001 the State filed a motion to modify the sentence based upon the juvenile offender's having committed new offenses and requested commitment to a juvenile correctional facility. The sentencing court then determined that the juvenile offender was a "chronic II escalating felon" pursuant to K.S.A. 38-16,129 and sentenced him to 12 months in a juvenile correctional facility.

In making the "chronic II escalating felon" determination, the sentencing court considered the juvenile offender's 1998 no contest pleas to one count of criminal trespass and one count of criminal damage to property, to be counted as two prior misdemeanor adjudications under K.S.A. 38-16,129(a)(3)(B)(i). The Juvenile Justice Authority (JJA) appealed the sentencing court's adjudication and commitment determinations.

The Court reviewed K.S.A. 21-4710(a), K.S.A. 2001 Supp. 4711(f), K.S.A. 38-16,129(a)(3)(B)(i), K.S.A. 38-1622(a)(1)(E), K.S.A. 38-1625(a), K.S.A. 38-1634, K.S.A. 38-1655, *State v. Magness*, 240 Kan. 719, 732 P.2d 747 (1987) and *State v. Fultz*, 24 Kan. App. 2d 242, 943 P.2d 938 (1997), *rev. denied*, 263 Kan. 888 (1997) and then affirmed the sentencing court's decision. In its opinion, the Court stated in part: "Given the provisions in Chapter 38 of the Kansas Statutes Annotated, which contemplate multiple counts in a single juvenile case, it is logical to give meaning to such multiple adjudications for purposes of K.S.A. 38-16,129. Further, the legislature's failure to expressly require separate proceedings, when it has done so in the past, compels the finding that separate proceedings were not intended in K.S.A. 38-16,129."

State v. Jones, 273 Kan. 756, 47 P.3d 783, *cert. denied*, 537 U.S. 980 (2002). Refer to the Syllabus. Syl. ¶ 2. "The standard for reviewing the decision to authorize prosecution of a juvenile as an adult is whether the decision is supported by substantial evidence. Substantial evidence is evidence which possesses both relevance and substance, and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. It is not for this court to reweigh the evidence, substitute its evaluation of the evidence for that of the trial court, or pass upon the credibility of the witnesses."

Syl. ¶ 5. "Procedural safeguards provided in the juvenile justice system, and specifically those safeguards in K.S.A. 38-1636, are sufficient to support a determination that certification proceedings of juveniles fall outside the dictates of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)."

Syl. ¶ 6. "The juvenile tried as an adult will be subjected to the statutory maximum sentence under the applicable criminal statute only after a jury has determined his or her guilt beyond a reasonable doubt."

State v. Kemp, 30 Kan. App. 2d 657, 46 P.3d 31, *rev. denied*, 274 Kan. 1116 (2002). This case is noted only as an additional footnote to this section because the Court noted that *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) did not apply to preclude the use of juvenile adjudications in the determination of a criminal history score.

CRIMINAL HISTORY ISSUES (PROOF OF CRIMINAL HISTORY)

State v. Hankins, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994). The State may amend or challenge the criminal history score listed in a presentence investigation report but due process requires that such an amendment or challenge must be made in writing prior to the time of sentencing, and the sentencing court and the offender or his/her defense counsel shall be provided copies in sufficient time for the amended history to be reviewed by the offender prior to sentencing. If it is impossible for the State to make its challenges to the criminal history worksheet prior to the date of sentencing, the sentencing court must provide the offender with time to challenge the amended history in compliance with K.S.A. 1993 Supp. 21-4715.

State v. Strickland, 21 Kan. App. 2d 12, 900 P.2d 854 (1995). When the State attempts to establish an offender's criminal history using copies of official court documents, those documents must meet the authentication requirements under K.S.A. 60-465 in order to be admissible as an exception to the hearsay rule. With respect to documents from a Kansas court, certification is sufficient to meet the authentication requirements under K.S.A. 60-465(3). Copies of documents coming from courts in other states must be certified or "attested" and accompanied by the certificate required by K.S.A. 60-465(4) in order to meet the requirements for authentication. A statement by an offender to a court services officer during a presentence investigation is not sufficient, standing alone, to meet the State's burden of proving the offender's criminal history.

State v. Perez, 21 Kan. App. 2d 217, 897 P.2d 1048 (1995). The criminal history worksheet prepared as part of the presentence investigation (PSI) report shall satisfy the State's burden to prove an offender's criminal history unless the offender contests the criminal history worksheet. Under K.S.A. 1994 Supp. 21-4715(c), if an offender objects to the accuracy of a criminal history worksheet the State shall have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part or parts of the criminal history. Here, the offender made a sufficiently specific objection on one important issue, the identity of the person named in the criminal history, to require the State to be put on strict proof as to at least that specific issue.

State v. Tolliver, 22 Kan. App. 2d 374, 916 P.2d 725 (1996). There is no provision in the KSGA that requires an offender to come forward and provide the State with his/her accurate criminal history. Neither is there any provision in the KSGA which prohibits an offender from

misrepresenting his or her identity during a presentence investigation, or which specifies what happens if an offender does so (although a misrepresentation by an offender may constitute criminal conduct which could result in additional charges).

In this case the offender was originally sentenced under grid block 7-I based in part on the misrepresentation of his identity and his criminal history during a presentence investigation and the sentencing court resentenced the offender under grid block 7-B, when the offender's true identity and criminal history was discovered. The sentencing court erred in resentencing the offender because the original sentence fell within the presumptive range for a 7-I offense and was therefore not illegal.

State v. Turner, 22 Kan. App. 2d 564, 919 P.2d 370 (1996). The Court held that a sentencing court may take judicial notice of a prior presentence investigation (PSI) report in a subsequent felony proceeding. Here the offender pled no contest to credit card fraud. While on probation the offender was charged with four counts of forgery and he subsequently pled guilty to two of the counts. After his plea was entered the offender acceded to the use of the presentence investigation report prepared in the credit card fraud case and the offender then expressly waived his right to a new PSI report. The Court specifically noted that a new report would not have changed anything in the offender's criminal history. The Court then held that even if the provisions of K.S.A. 21-4714 were taken together to require the production of a new PSI report and the offender expressly waived his right to the production of a new report. Further, the offender failed to show any prejudice resulted from the use of the prior report insofar as he did not contend that the report inaccurately represented his criminal history or that his crime severity level was miscalculated.

State v. Lakey, 22 Kan. App. 2d 585, 920 P.2d 470 (1996). When ruling on an offender's challenge to his/her criminal history score contained in a presentence investigation report, the better practice is for a sentencing court to make a finding specifying precisely which prior convictions have been adequately proven and to state that any other crimes listed in the worksheet have not been proven and are not being considered as part of the offender's criminal history score. This will allow a subsequent sentencing court taking judicial notice of a prior criminal history worksheet to determine exactly which prior crimes were sufficiently proven to justify taking judicial notice.

State v. Davis, 22 Kan. App. 2d 776, 922 P.2d 453 (1996). An offender who wishes to contest the identity of the person involved in the convictions which are used in the determination of a criminal history score, must raise the issue before the sentencing court because it cannot be raised for the first time on appeal.

State v. White, 23 Kan. App. 2d 363, 931 P.2d 1250, *rev. denied*, 261 Kan. 1089 (1997). Prior to sentencing, the offender filed a general written notice of his objection to two of the three prior person felonies shown in the presentence investigation report. The sentencing court conducted a hearing on the objection pursuant to K.S.A. 21-4715(c). At the hearing the offender specifically objected to the documentation of his two California convictions as insufficient. The sentencing court overruled the offender's objection and included the two convictions in the offender's criminal history when pronouncing sentence. The offender appealed the sentencing court's determination of his criminal history. On appeal the State argued the offender's objection to the criminal history score was not sufficient to put the State to its burden of proof. The Court held when an offender generally objects to his proposed criminal history in writing and then subsequently raises specific objections to his criminal history at the hearing to determine his

criminal history, the requirements of K.S.A. 21-4715(c) are met and the State must prove its allegations of the offender's criminal history.

State v. Hudson, 267 Kan. 381, 985 P.2d 1167 (1999). In an unpublished opinion the Court of Appeals held the sentencing court had considered inadmissible documents from California in determining the offender's criminal history. The Court had held the California documents were not properly authenticated and certified and had vacated the offender's sentence.

The Supreme Court reversed the Court of Appeals' decision. The documents in question show the offender's convictions. Each page of each document bears the seal of the Superior Court of the County of Sacramento, California, and certifies it is a copy of the official records and that the attesting officer has custody of the records. The Supreme Court held that while the documents in question were introduced into evidence on April 25, 1987, under the 1998 amendments to K.S.A. 60-465 the documents would be admissible. The Court held that it would be a useless act to reverse a case when the evidence being objected to, is now admissible due to the amendment of the statute that is procedural in nature.

DEPARTURE SENTENCING (GENERAL DEPARTURE ISSUES)

State v. Mares, 20 Kan. App. 2d 971, 893 P.2d 296, *rev. denied*, 257 Kan. 1095 (1995). If the sentencing court imposes a sentence that deviates from the presumptive sentence, the court shall make findings of fact as to the reasons for departure regardless of whether a hearing is requested. If the sentencing court does not depart from the presumptive sentence, then it is not required to state its reasons for refusing to depart.

State v. Grady, 258 Kan. 72, 900 P.2d 227 (1995). The final analysis in reviewing a departure sentence is not whether any departure factor in isolation can be a substantial and compelling reason for departure, but whether as a whole the factors are substantial and compelling reasons for imposing a departure sentence in light of the offense of conviction, the defendant's criminal history and the purposes of the KSGA.

State v. Heath, 21 Kan. App. 2d 410, 901 P.2d 29 (1995). In an appeal from a departure sentence the appellate court must determine whether the sentencing court's findings of fact and reasons justifying the departure are supported by substantial competent evidence and also constitute substantial and compelling reasons for departure as a matter of law. Following *State v. Richardson*, 20 Kan. App. 2d 932, 901 P.2d 1 (1995).

Statements of victims of the crime and/or their families may constitute substantial and compelling reasons for departure. Here the statements of the victim's parents in support of the offender constituted substantial and compelling reasons for a downward departure. In addition, the age of an offender's prior convictions and/or the fact that the prior convictions are not related to or similar to the current conviction, may be substantial and compelling reasons for departure.

State v. Marble, 21 Kan. App. 2d 509, 901 P.2d 521, *rev. denied*, 258 Kan. 861 (1995). The offender argued that the sentencing court failed to grant his request for a downward departure sentence due to partiality and prejudice and also that the sentencing court had failed to make any finding that substantial and compelling reasons to depart did not exist. The Court held that where a sentencing court denies a motion for departure and does not depart from the presumptive sentence, the court is not required to state its reasons for refusing to depart.

State v. Favela, 259 Kan. 215, 911 P.2d 792 (1996). The Supreme Court reversed the decision of the Court of Appeals [*State v. Favela*, 21 Kan. App. 2d 202, 898 P.2d 1165 (1995)] that had held that the sentencing court's reasons for a downward departure were not substantial and compelling. In this case the offender pled guilty to a charge of second-degree murder, stemming from a fight in which the offender's brother was stabbed by another whom the offender subsequently threatened to kill.

The offender's conviction carried a presumptive sentence of imprisonment. The offender filed a timely motion for departure from the presumptive sentence. Finding mitigating factors, the sentencing court granted a downward durational departure and then granted a downward dispositional departure, placing the offender on probation. The sentencing court relied on the same mitigating factors to justify both departures.

The Court of Appeals concluded that the legislature intended that sentencing courts provide separate reasons for both durational and dispositional departures. The Supreme Court disagreed, holding that while K.S.A. 1994 Supp. 21-4719 requires a sentencing court to specifically define separate substantial and compelling reasons for both a durational and dispositional departure granted in one sentence, this requirement only applies if a prison term is imposed as a dispositional departure which is also combined with an upward durational departure. The Supreme Court also stated that while an appellate court has the authority to review the extent of a downward durational departure, review of the extent of a downward durational departure should be limited to the weakest type of review that is for an abuse of discretion.

State v. Windom, 23 Kan. App. 2d 429, 932 P.2d 1019, *rev. denied*, 262 Kan. 969 (1997). The offender entered a *Brady* plea to a cocaine possession charge in exchange for an agreement from the State to recommend the minimum sentence and to not oppose offender's motion for downward departure. The offender filed a motion for a durational departure and a pleading entitled "Proposed Findings of Fact and Conclusions of Law", which set forth the offender's reasons for a departure sentence. The offender's argued that defendant's crime was a victimless crime, that he cooperated with police, and that he did not use a weapon as reasons to depart. At sentencing, defendant also argued for departure based on the minimal amount of cocaine involved. The sentencing court denied the departure motion and sentenced defendant to the presumptive guidelines sentence.

On appeal the offender argued the sentencing court must consider the substantial and compelling reasons for departure and the court failed to seriously consider the mitigating factors presented to it in this case. The Court found there was not sufficient evidence to overcome the legislative presumption that the sentence imposed was not the result of partiality, prejudice, oppression, or corrupt motive. When the sentencing court sentenced the offender to the presumptive sentence, it stated it had a copy of offender's proposed findings of fact and conclusions of law. The sentencing court is not required to state its reasons for refusing to depart when a presumptive sentence is imposed.

State v. Eisele, 262 Kan. 80, 936 P.2d 742 (1997). "The term "substantial" means something that is real, not imagined, something with substance and not ephemeral. The term "compelling" implies that a court is forced, by the facts of a case, to leave the status quo or go beyond what is ordinary. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. The court's comments at the time of

sentencing govern as to the reasons for departure." At Syl. & 2.

State v. Ware, 262 Kan. 180, 938 P.2d 197 (1997). Ware's sole issue on appeal was his claim that the sentencing court abused its discretion in running his sentences for felony murder and aggravated robbery consecutively instead of concurrently. The court dismissed his appeal finding that it was without jurisdiction to consider the issue.

The Court stated K.S.A. 22-3602(e) provides that appeals from sentences imposed under the KSGA for crimes committed on or after July 1, 1993, are only as provided by K.S.A. 21-4721. Where K.S.A. 21-4721 applies an appellate court's jurisdiction to consider a challenge to a sentence is limited to those grounds authorized by the statute or a claim that the sentence is illegal. The Court then defined a departure sentence under the KSGA as a sentence that is inconsistent with the presumptive sentence for an offender. A consecutive sentence is not inconsistent with the presumptive sentence and is not a departure sentence. The Court concluded by finding if an offender challenges his or her presumptive sentencing on the ground that the running of multiple sentences consecutively constitutes an abuse of judicial discretion, no ground for appeal authorized by K.S.A. 21-4721 is asserted and the appellate court lacks jurisdiction to consider the issue.

State v. Mitchell, 262 Kan. 434, 939 P.2d 879 (1997). In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the sentencing grid for a crime, appellate review shall be limited to whether or not the sentencing court's findings of fact and reasons justifying a departure, are supported by evidence in the record and also constitute substantial and compelling reasons for departure. K.S.A. 21-4721(d)(1) and (2).

The Court found the sentencing court's findings of fact and reasons justifying departure (which were based upon findings the offender had repeatedly committed crimes while on supervised parole and that the offender had knowingly lied in an affidavit which he had presented to the sentencing court) constituted substantial and compelling reasons for the departure sentence.

State v. Rush, 24 Kan. App. 2d 113, 942 P.2d 55, *rev. denied*, 262 Kan. 968 (1997). This involved a downward durational departure sentence in a statutory rape case. The standard of review for determining if the sentencing court properly granted a departure sentence is stated and applied (i.e., is a sentencing court's findings of fact and reasons justifying departure supported by substantial competent evidence and also do the findings constitute substantial and compelling reasons for departure.)

State v. Soler, 25 Kan. App. 2d 1, 957 P.2d 516 (1998). In regards to departure sentences under the KSGA, the Court held that K.S.A. 21-4716(b)(2) contains a nonexclusive list of aggravating factors to be used in determining whether substantial and compelling reasons exist for a departure sentence. Factors not specifically listed in the statute may be considered by the sentencing court when considering whether to grant a departure.

The Court went on to state that acts connected with the underlying crime of conviction that could also be an element of a different offense may constitute aggravating circumstances to support a departure sentence. A sentencing court is free to consider the real facts in determining

whether to depart, even if those facts would also support elements of an uncharged or dismissed offense. However, if the conviction is pursuant to a plea agreement as to the crime of conviction, a departure cannot be based on facts that would if proven, establish a higher offense sub classification for that crime.

State v. Peterson, 25 Kan. App. 2d 354, 964 P.2d 695, *rev. denied*, 266 Kan. 1114 (1998). In *State v. Peterson*, 22 Kan. App. 2d 572, 920 P.2d 463 (1996), the Court affirmed Peterson's conviction and dealt extensively with the "double-double rule" of consecutive sentencing, but the Court remanded the case for resentencing based on the fact the sentencing court had not cited "substantial and compelling reasons" on the record for the departure sentences imposed. Upon resentencing, the sentencing court did cite "substantial and compelling" reasons for departure and reimposed Peterson's original departure sentence. Peterson filed the present appeal contending the sentencing court was without the authority to cite new reasons for a departure on a remand for resentencing, when the sentencing court had failed to do so at the original sentencing hearing.

The Court held in part: "Under present Kansas law, appellate review of a departure sentence is limited to whether the sentencing court's findings of fact and reasons justifying a departure are supported by evidence in the record and constitute substantial and compelling reasons for departure. When a court fails to meet the requirements for the imposition of a departure sentence, on remand the court may cite appropriate reasons justifying the imposition of a departure sentence and impose such a sentence subject to the usual review process." The Court also noted: "To the best of our knowledge, the argument that the court may not state reasons for departure on remand when it did not do so in the first hearing has not been previously raised in the appellate courts of Kansas. We note that many cases have appeared before us where the trial court has remedied an earlier failure to comply with appropriate procedure. We see no difficulty with this process."

The Court also cited the United States Supreme Court decision, *Monge v. California*, 524 U.S. 721, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998) to illustrate that Kansas likewise does not object to this process in noncapital cases.

State v. Tiffany, 267 Kan. 495, 986 P.2d 1064 (1999). The Court's syllabus for this case restates and reinforces a number of points concerning the appellate review of departure sentences. A sentencing court's comments at the time of sentencing govern as to the reasons for departure. A claim that sentencing guidelines departure factors are not supported by evidence in the record should be reviewed to determine whether there is substantial evidence supporting the sentencing court's findings or whether the court's findings are clearly erroneous. A claim that the departure factors relied upon by the sentencing court do not constitute substantial and compelling reasons for a departure is a question of law.

The question in this analysis is twofold. First, is a particular reason given by the sentencing court a valid departure factor? Second, are the reasons as a whole substantial and compelling enough reasons for departure in a given case? Reasons that may in one case justify a departure may not in all cases justify a departure. Rather, the inquiry must evaluate the crime and the departure factors as a whole to determine whether departure in a particular case is justified. It is a question of what weight to give each reason stated and what weight to give the reasons as a whole in light of the offense of conviction and the offender's criminal history.

The inquiry also considers the purposes and principles of the Kansas Sentencing Guidelines Act (KSGA). Our statutory list of aggravating and mitigating factors found at K.S.A.

21-4716, is nonexclusive. Consequently, the sentencing court may use other factors when imposing a departure sentence as long as there is evidence in the record to support such factors and the use of the factors would be consistent with the intent and purposes of the KSGA. When there is a reasonable doubt as to whether the legislature necessarily considered a factor in establishing the standard sentencing range, the sentencing court has discretion to use that factor as a reason for issuing a departure sentence. Using a history of unpunished sexual exploitation as a factor to justify a departure is consistent with the purposes of the KSGA. Under an abuse of discretion standard of review, the question is whether the extent of the sentencing court's durational departure (upwards or downwards) is consistent with the enacted purposes and principles of the sentencing guidelines and proportionate to the severity of the crime of conviction and the offender's criminal history.

State v. Chrisco, 26 Kan. App. 2d 816, 995 P.2d 401 (1999). Upon review of a downward dispositional departure sentence, the Court held there was not substantial and compelling evidence on the record to support the dispositional departure. Dealing with expert testimony that was cited by the sentencing court as one basis for the departure sentence, expert testimony that excludes consideration of the crime committed should not, as a matter of law, be relied upon by the sentencing court as justification for granting a departure. The Court held that reliance upon such testimony could be viewed as an abrogation of the jury's verdict.

The Court further held that a plan of treatment of an offender as a factor in favor of departing from the presumptive sentence must necessarily include treatment for the behavior that caused the crime. The Court also held that the fact that victims of the crime of aggravated indecent liberties with a child are absent from the home does not constitute a mitigating factor of granting probation when there are other children of tender years still at home who are at risk and the victims express a desire to return to the home.

State v. Sampsel, 268 Kan. 264, 997 P.2d 664 (2000). A departure sentence is subject to appeal by either the offender or the State. The burden is on the party claiming error to show a departure sentence resulted from partiality, prejudice, oppression or corrupt motive. The Court interpreted K.S.A. 21-4719(b)(1) to give an appellate court the authority to review the extent of downward durational departure sentences under an abuse of discretion standard of review. [See K.S.A. 21-4719(b)(1) which reads in part: "When a sentencing judge departs in setting the duration of a presumptive term of imprisonment: (1) The judge shall consider and apply the enacted purposes and principles of sentencing guidelines to impose a sentence which is proportionate to the severity of the crime of conviction and the offender's criminal history;"] The Court also held when a sentencing court relies upon statutory aggravating or mitigating factors to depart, those reasons should be given great deference by a reviewing court.

The statutorily listed mitigating departure factors at K.S.A. 21-4716(b) include: "(A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction. (E) The degree of harm or loss attributed to the crime of conviction was significantly less than typical for such an offense." The Court held in this case the minor female victim's aggressiveness and actions leading up to an act of sexual intercourse are not defenses to a charge of aggravated indecent liberties with a child pursuant to K.S.A. 21-3504(a)(1), such facts may properly be considered by the sentencing court in imposing punishment. The Court further held that under the facts of this case, the sentencing court's downward durational departure was based on facts and reasons supported by evidence in the record that constituted substantial and compelling reasons for departure and was not an abuse of the sentencing court's discretion.

The Court also noted that some of the legislative purposes for enacting the KSGA included (1) reducing prison overcrowding, (2) protecting public safety, and (3) standardizing sentences so similarly situated offenders are treated the same in order to reduce the effects of racial or geographic bias.

See K.S.A. 74-9101 *et seq*., and ***State v. Minor***, 268 Kan. 292, 997 P.2d 648 (2000).

Whisler v. State, 272 Kan. 864, 36 P.3d 290 (2001). The sole issue was whether or not the holding in *Apprendi* should be applied retroactively to the offender's sentence. The offender had been convicted of rape following a jury trial in 1995 and an upward durational departure sentence of 120 months was imposed instead of the presumptive prison term of 86 to 77 months. The offender's direct appeal was affirmed by the Court of Appeals in an unpublished opinion. The Supreme Court denied the Petition for Review of that decision and a mandate was issued on April 30, 1997. See *State v. Whisler*, No. 74,336, *rev. denied*, 262 Kan. 968 (1997). In October 2000, the offender filed a K.S.A. 60-1507 motion based upon the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The sentencing court denied the motion and the Supreme Court transferred this appeal from the Court of Appeal's docket based upon the offender's motion.

One of the offender's arguments was that he had preserved the *Apprendi* issue in his direct appeal in 1997. However, after reviewing the background of the offender's direct appeal the Court concluded in part: "…His argument was that the factors could not be considered for both conviction and sentence. His argument was not that the jury had to find that the factors had been proved beyond a reasonable doubt in order for them to be considered for sentencing."

The Court discussed its cutoff date of June 26, 2000 for the retroactive application of the *Apprendi* holding as had been stated in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), with the retroactive effect only applying to those cases which were still on direct review. The fact that neither the federal district court in the district of Kansas or the 10th Circuit Court of Appeals have held that *Apprendi* applies retroactively to cases involving collateral review was also noted. See *United States v. Moss*, 137 F.Supp.2d 1249 (D. Kan. 2001) and *United States v. Keeling*, 235 F.3d 533, 538 (10th Cir. 2000) respectively.

The Court concluded its opinion by stating: "We agree with the rationale of the majority of courts which have concluded that the new rule announced ruled in *Apprendi* is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial. Thus, neither *Teague* exception applies and based on our holding in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), the *Apprendi* rule does not retroactively apply to Whisler's sentence, and he is not entitled to relief."

State v. Dean, 272 Kan. 429, 33 P.3d 225 (2002). Refer to the Syllabus. Syl. ¶ 2. "Generally, when constitutional grounds are asserted for the first time on appeal, they are not properly before this court for review. Under the facts of this case, the recognized exceptions to the general rule are applied to reach the defendant's *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), constitutional sentencing claim."

Syl. ¶ 3. "A "departure" is a sentence which is inconsistent with the presumptive sentence. K.S.A. 21-4703(f). Under the facts, because defendant's prison sentence is not considered a departure, it is a presumptive sentence. As such, it does not exceed the statutory maximum punishment for his crime, and *Apprendi* does not apply."

DEPARTURE SENTENCING (STATUTORY DEPARTURE REASONS)

State v. Atkinson, 21 Kan. App. 2d 276, 898 P.2d 1179, *rev. denied*, 258 Kan. 859 (1995). This involved an *Alford* plea to a charge of indecent liberties with a child. The Court held if a crime is "sexually violent" or "sexually motivated", no other aggravating factor need be cited or found by the sentencing court to justify imposition of a departure sentence of up to 60 months' postrelease supervision for such crime as is provided by K.S.A. 1993 Supp. 22-3717(d)(1)(C)(i).

State v. Zuck, 21 Kan. App. 2d 597, 904 P.2d 1005, *rev. denied*, 258 Kan. 863 (1995). The offender pled guilty to one count of attempted rape, two counts of aggravated incest, and one count of indecent liberties with a child, all stemming from crimes allegedly committed against his two stepchildren. The sentencing court granted an upward durational departure on the attempted rape conviction, finding that the victims were particularly vulnerable due to their ages and also that their ages were significantly different from the usual crime of this type.

The offender first argued on appeal that the ages of the victims could not be used as aggravating factors because age was an element of the crime. Citing cases from Washington and Minnesota the Court agreed, concluding that the legislature did not intend to treat attempted rape of an 8 years old victim differently than attempted rape of any other victim under 14 years old.

Next the offender argued that the sentencing court erred in departing based on a finding that the victims had suffered great emotional harm far in excess of that normally associated with attempted rape. However, the Court affirmed the sentencing court's finding that it found to be supported by the record. The Court also stated that in Kansas there is no legal requirement that all the reasons given by a sentencing court to support a departure sentence be substantial and compelling, so long as one or more of such factors relied upon is substantial and compelling.

State v. Keniston, 21 Kan. App. 2d 818, 908 P.2d 656 (1995). The offender appealed from a departure sentence following his plea of nolo contendere to one count of rape. The sentences from his other convictions were not appealed. At issue was whether or not there were substantial and compelling reasons for the durational departure. The victim was an 80 years old female, who suffered either a fractured pelvis or femur during the rape. As a consequence of the rape, she is unable to care for herself, is bound to the use of a walker or wheelchair, and suffers from emotional trauma. The Court held that the sentencing court's finding of the aggravating factor that the victim was vulnerable due to her age that was known, or should have been known by the offender was a substantial and compelling reason for departure.

With respect to the sentencing court's finding the offender's conduct manifested excessive brutality to the victim to a degree not normally present in that offense, the offender argued since the State had charged him originally with aggravated battery on the basis of the victim's broken hip which was subsequently dismissed, his sentence could not be enhanced by facts showing that he could have been convicted of the dismissed charge. The offender cited law from Washington and Minnesota prohibiting the use of facts that establish elements of a higher crime, additional crimes, or dismissed charges as a basis for departure.

The Court rejected the offender's argument, finding that even though physical injury to the victim in this case was certainly an element that could support a charge of aggravated

battery, the sentencing court did not depart on the basis of the battery, but because of the brutality of the rape that included the physical injury. The Court stated in part: “There is a difference between using dismissed or uncharged crimes as a reason to depart and using acts connected with the instant offense which could be an element of a different offense. The former might be objectionable for policy reasons to prevent the imposition of a sentence more appropriate for a more serious crime when the State has only been required to prove a lesser offense. However, the latter does not violate any of the purposes of the sentencing guidelines.” 21 Kan. App. 2d at 822.

State v. Hunter, 22 Kan. App. 2d 103, 911 P.2d 1121, *rev. denied*, 259 Kan. 929 (1996). The sentencing court departed upward, with both a dispositional and a durational departure on the offender’s conviction of aiding a felon. The reasons stated for the departure were that the victim was particularly vulnerable due to her age and reduced physical capacity and that the offender’s conduct was excessively brutal in a manner not normally present in an attempted second-degree murder.

The Court held the sentencing court’s reasons were substantial and compelling and justified an upward departure. In addition, the Court held the sentencing court had stated "independent" reasons for both the dispositional and the durational departures, in that the offender's failure to aid the victim was integrally related to the departure factor regarding the victim's reduced physical capacity, while the excessive brutality factor was strongly tied to the fact that the victim had been rendered unconscious by a gunshot wound to the head.

State v. Salcido-Corral, 262 Kan. 392, 940 P.2d 11 (1997). The offender appealed the upward durational departure sentences he received in connection with his convictions for aggravated criminal sodomy, aggravated indecent liberties with a child and attempted aggravated indecent liberties with a child. The Court held that the applicable standard of review of a departure sentence is keyed to the language of the statute. K.S.A. 21-4721(d)(1) requires an evidentiary test: namely, are the facts stated by the sentencing court in justification of a departure, supported by the record? K.S.A. 21-4721(d)(2) requires a law test: namely, are the reasons stated on the record for departure adequate to justify a sentence outside the presumptive sentence (i.e., do the reasons supported by the record constitute substantial and compelling reasons for departure)?

The Court ruled if a factual aspect of a crime is a statutory element of a crime, or is used to sub-classify the crime on the crime severity scale, then that aspect of the current crime of conviction may be used as an aggravating factor only if the criminal conduct constituting the same is significantly different from the usual criminal conduct captured by the aspect of the crime. In this case the offender was convicted of aggravated indecent liberties and attempted aggravated indecent liberties, which both required that the victim be under 14 years of age and the offender was also convicted of aggravated criminal sodomy, which required the victim to be under 14 years of age. Because the victim’s age was already a statutory element of the crimes the offender was convicted on, the Court held that using the victim’s age as an aggravating factor to support departure did not constitute a substantial and compelling reason for departure. This was due to the fact that there was nothing in the record to show that the victim was any more vulnerable than any other child her age.

State v. Davis, 262 Kan. 711, 941 P.2d 946 (1997). Davis was sentenced to 24 months imprisonment on a durational departure sentence following guilty pleas to possession of cocaine with intent to sell and possession of proceeds derived from a violation of the Uniform Controlled Substances Act, K.S.A. 65-1401 *et seq.* Davis appealed contending that the sentencing court

erred in imposing a departure sentence and that the sentencing court's factual findings and reasons for justifying the departure sentence were not supported by substantial competent evidence and did not constitute substantial and compelling reasons for departure. The Court affirmed the departure sentence and held that the sentencing court did not err in the imposition of the departure sentence nor in the factual findings and reasons justifying the sentence.

The sentencing court's factual findings and reasons justifying the departure sentence included: that the crimes committed were part of a major organized drug delivery activity; that the defendant was in possession of a large amount of cocaine at the time of his arrest; and that the defendant derived a substantial amount of money or asset ownership from the illegal drug sale activity. The Court reviewed the evidence presented to the sentencing court at the sentencing hearing and the findings that the sentencing court made from the evidence presented, then concluded that the sentencing court's reasons justifying the departure sentence were supported by substantial competent evidence and constituted reasons for departure under K.S.A. 21-4717(a)(1).

State v. Ippert, 268 Kan. 254, 995 P.2d 858 (2000). This case involved an upward durational departure sentence for the crime of aggravated indecent liberties with a child, where the victims were the very young daughters of the offender. The Court held the upward durational departure sentences were appropriate and were supported by substantial and compelling reasons based on substantial evidence. The Court determined that a fiduciary relationship existing between the victims (daughters) and the offender (father) was covered by the statutory aggravating departure factor found at K.S.A. 1998 Supp. 21-4716(b)(2)(D). The Court stated it is not required for all of the reasons given by the sentencing court to support the departure sentence be substantial and compelling, so long as one or more of the factors relied upon is substantial and compelling. The Court added where an offender is not notified of one of the factors that the sentencing court proposes as a basis of departure, the offender must make some proffer of evidence he would present or the argument he would make to refute that factor, before there is reversible error.

State v. McKay, 28 Kan. App. 2d 185, 12 P.3d 924 (2000), *aff'd*, 271 Kan. 725, 26 P.3d 58 (2001). Prior to pleading guilty to five counts of forgery, the offender absconded for two months prior to the date of his trial. After being returned into custody the offender entered into a plea agreement. Although the prosecution agreed to recommend presumptive sentences to be served concurrently, plus probation and also not to request departure, the sentencing court imposed consecutive sentences and denied probation. The sentencing court's reasons for the dispositional departure were the offender's attitude towards the seriousness of the offense and the intentional missing of a court date when the offender had absconded.

The Court noted a twofold standard of review applies for a sentencing departure. First, is there evidence to support the departure findings and second are the departure factors supported by substantial evidence. The majority view of the Court was that there were no substantial and compelling reasons to support a dispositional departure pursuant to K.S.A. 1999 Supp. 21-4716(b)(2), for nonstatutory reasons. The majority relied upon *State v. Grady*, 258 Kan. 72, 900 P.2d 227 (1995) and *State v. Billington*, 24 Kan. App. 2d 759, 953 P.2d 1059 (1998).

The dissenting opinion noted that absconding and failing to appear for trial were facts to be considered by the trier of fact, namely the sentencing court. The dissent referred to *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996), as authority.

State v. Aikman, 29 Kan. App. 2d 1, 26 P.3d 1276 (2001). The offender had been sentenced

previously for possession of drug paraphernalia and also for felony possession of marijuana. Both sentences were appealed and the Court in an unpublished opinion (No. 82,621, filed 12/23/99) remanded this matter back to the sentencing court for resentencing.

At the resentencing hearing the sentencing court sentenced the offender to a harsher sentence than before and the offender appealed the resentencing. The Court relied upon K.S.A. 60-2101 (a) as the basis for review. The Court found that the sentencing court had abused its discretion and had inferred a gang membership based upon the offender's clothing and also upon the offender's failure to deny involvement with the 'Sons of Silence' during the resentencing hearing. The Court found there were no factors in the record to support a departure and pointed to *Mitchell v. United States*, 526 U.S. 314, 315-16, 143 L. Ed. 2d 424, 119 S. Ct. 1307 (1999) regarding the offender's failure to disavow the 'Sons of Silence' at his resentencing hearing. The Court quoted directly from *Mitchell* in part: "A sentencing hearing is part of the criminal case, and the concerns mandating the rule against negative inferences at trial apply with equal force at sentencing…" The Court remanded this matter back to the sentencing court for a second resentencing hearing.

NOTE: This was previously an unpublished opinion but a motion to publish was granted by an order dated 05/01/01. The opinion was then further modified with Syllabus changes on 05/30/01.

State v. Gould, 271 Kan. 394, 23 P.3d 801 (2001). This involved a case of first impression for our Court to address the application of the ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) to the upward departure statute of the Kansas Sentencing Guidelines Act (KSGA). This case was transferred by the Court pursuant to K.S.A. 20-3018(c) on its own motion from the Court of Appeals. The Court found, pursuant to *Apprendi* that: "a factual determination resulting in an increase in the maximum prison sentence for an offense beyond the sentence established in the appropriate grid box under K.S.A. 2000 Supp. 21-4704 be made by a jury beyond a reasonable doubt." Then the Court specifically held: "The Kansas scheme for imposing upward departure sentences, embodied in K.S.A. 2000 Supp. 21-4716 is unconstitutional on its face."

However, the Court found downward departures pursuant to K.S.A. 2000 21-4716 are not affected and the Court declined to apply its ruling on upward departure sentences retroactively. The Court set a cutoff date of June 26, 2000, the date *Apprendi* was decided, as the benchmark for the application of *Apprendi* to upward departure sentences in Kansas.

In the body of its opinion, the Court mentioned two recent federal Court of Appeals decisions, namely *U.S. v. Rogers*, 228 F.3d 1318, (11th Cir. 2000) and *U.S. v. Doggett*, 230 F.3d 160 (5th Cir. 2000), *cert. denied*, *Doggett v. U.S.*, 148 L.Ed. 2d 1014 (2001). In addition, the Court also referenced five state court decisions [*State v. Guice*, 141 N.C.App. 177, 541 S.E.2d 474 (2000), (stay allowed January 18, 2001); *State v. Santiago*, 2000 WL 1196686 (July 25, 2000), a Connecticut Superior Court decision, *People v. Chanthaloth*, 318 Ill. App. 3d 806, 743 N.E.2d 1043, 1050 (2001); *State v. Grossman*, 622 N.W.2d 394 (Minn.App. 2001), *rev. granted*, April 17, 2001; and *Clark v. State*, 621 N.W.2d 576 (N.D. 2001)] although these were only mentioned "… for informational rather than precedential purposes."

The Court noted although K.S.A. 2000 Supp. 21-4716 allowed an upward departure based upon the sentencing court finding one or more aggravating circumstances, "The statute is silent on a burden of proof to be utilized by the district judge to establish a substantial and

compelling reason to depart. Facts "established for use in sentencing require less evidentiary weight than facts asserted for conviction." *State v. Spain*, 263 Kan. 708, 713, 953 P.2d 1004 (1998)…"

In its analysis of our upward departure statute, the Court referred to *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct.1068 (1970) in recognizing that the Due Process Clause of the Fourteenth Amendment of the United States Constitution applies as a basis for its opinion, in that every fact necessary to constitute a crime must be decided by a jury and proven beyond a reasonable doubt. However, the Court declined to address the application of *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), regarding the omission of the sentence enhancement factor being charged in the indictment, because this issue was not "… squarely presented." The Court also declined to address the offender's arguments based on the Kansas Constitution.

The offender's convictions for three counts of child abuse were affirmed, however, the sentence was vacated and this matter was remanded for resentencing.

A dissenting opinion would have affirmed the sentence under the harmless error rule, and also on the basis the sentence didn't exceed the Kansas Sentencing Guidelines Act statutory maximum sentence. The dissent noted that under the KSGA an upward departure only allows a sentencing court to use a statutory maximum that an offender can receive. See *State v. Conley*, 270 Kan. 18, 34-35, 11 P.3d 1147 (2000), *cert. denied*, 149 L. Ed. 2d 308, 121 S. Ct. 1383 (2001).

The dissent also noted the existence of a fiduciary duty between the offender and the victim (parent and child) and the dissent stated in part: "Here a fiduciary relationship existed. K.S.A. 2000 Supp. 21-4716 (b)(2)(D); *State v. Ippert*, 268 Kan. 254, 995 P.2d 858 (2000). Gould recognizes that facts that do not increase a defendant's punishment beyond that authorized by the underlying statute need not be proven to a jury beyond a reasonable doubt citing *McMillan v. Pennsylvania*, 477 U.S. 79, 88, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)."

The dissent further noted that the jury at the offender's trial "was presented with overwhelming evidence that Gould, the mother of the victims, had a fiduciary relationship with S.G., D.G., and L.G." In the dissent's view, it was the manner of this breach of the fiduciary relationship that would have resulted in the factual basis of the offender's actions as having being sufficiently determined by the jury to be "aggravating" before the trial court sentenced the offender with an upward departure.

NOTE: The State's Motion for Rehearing/Clarification filed on 06/14/01 was denied on 07/12/01. The slip-sheet opinion was also later corrected on 07/05/01 to reflect that a second Justice joined in the dissent.

See also ***State v. Wright***, 30 Kan. App. 2d 48, 40 P.3d 304 (2002), ***State v. Campbell***, 30 Kan. App. 2d 70, 39 P.3d 97 (2002), *rev. denied*, 273 Kan. 1037 (2002), ***State v. Hatt***, 30 Kan. App. 2d 84, 38 P.3d 738, *rev. denied* 273 Kan. 1038 (2002), ***State v. Spicer***, 30 Kan. App. 2d 317, 42 P.3d 742, *rev. denied*, 274 Kan. 1117 (2002), ***State v. Boorigie***, 273 Kan. 18, 41 P.3d 764 (2002), ***State v. Hullum***, 273 Kan. 282, 43 P.3d 806 (2002) and ***State v. Clemons***, 273 Kan. 328, 45 P.3d 384 (2002).

State v. McKay, 271 Kan. 725, 26 P.3d 58 (2001). The Court in a 4-3 decision, upheld the Court of Appeals' ruling reversing a dispositional departure sentence from the presumption of probation in *State v. McKay*, 27 Kan. App. 2d 185, 12 P.3d 924 (2000). Here the offender had entered into a plea agreement for five counts of forgery and the State agreed to recommend the presumption of probation in the offender's sentencing. However, before the sentencing hearing the offender absconded for two months.

After the offender had voluntarily returned for sentencing, the sentencing court chose a dispositional departure and sentenced the offender to 13 months imprisonment. The Court of Appeals reversed this dispositional departure because the "totality of the facts" did not support the departure. The Supreme Court agreed and upheld the Court of Appeals ruling that the offender's absconding for two months was not a substantial and compelling reason by itself to warrant the dispositional departure sentence pursuant to K.S.A. 21-4719.

The dissent focused on the ability of a sentencing court to better evaluate the circumstances of the offender based upon closer contact with the offender than an appellant court, although the dissent also noted that the sentencing court "might have been more expansive in enumerating the reasons for imposing an upward dispositional departure in this case,…"

State v. Carr, 29 Kan. App. 2d 501, 28 P.3d 436 (2001), *aff'd*, 274 Kan. 442, 53 P.3d 843 (2002). The offender entered into a plea agreement for criminal possession of a firearm for an arrest 26 days following his release from the Youth Center in Topeka resulting from an earlier juvenile adjudication on drug charges. The agreement recommended the presumption of probation. At the sentencing hearing after verifying that no one objected to the criminal history score or the offense severity level and also after hearing comments from the offender and both counsel, the sentencing court imposed a 15 months dispositional departure. There was no notice of the sentencing court's intention to depart prior to the sentencing hearing.

The Court reviewed K.S.A. 21-4718(b) regarding the notice requirement by a sentencing court and noted that although the offender did not object to a lack of notice in order to prepare a response or a motion for rehearing, or make a proffer of the evidence the offender would have presented to refute the departure, that none of these would not have really mattered because after reviewing the transcript the Court found the sentencing court's mind was already made up.

The Court pointed to the plain language of the statute as the basis that a sentencing court's notice of its intent to depart "… must be reasonable in all of the circumstances." The minimum notice required of a sentencing court that intends to depart on its own "… must be provided at such a time and with such specificity that the defendant and the State and also provide sufficient time to allow for both of the parties to prepare their arguments before the sentence is pronounced…"

The Court then addressed the issue of whether or not the reasons stated for the departure were substantial and compelling, a question of law subject to de novo review. The sentencing court's reasons regarding both the frequency of the offender's past criminal activity and the arrest only a short time following the release from the Youth Center of Topeka both were found to be substantial and compelling because the list contained in K.S.A. 2000 Supp. 21-4716(b)(2) is nonexclusive. Had the sentencing court provided sufficient notice to impose a dispositional departure sentence, the sentence would not have been vacated.

The final issue involved the question of whether or not the Kansas Supreme Court's

holding in *State v. Gould* applied to the sentencing court's dispositional departure. The Court noted that the Supreme Court was silent in *Gould* as to whether or not *Gould* applied to *dispositional* departure sentences, then held that *Gould* did not apply to an upward dispositional departure. The Court stated in part: "Although the Supreme Court stated that the upward departure provision of K.S.A. 2000 Supp. 21-4716 was "unconstitutional on its face," it is difficult to see how a *dispositional* departure such as Carr's fits under the rationale of *Apprendi*. Pending contrary explicit guidance from the Supreme Court, we find *Gould* inapplicable to upward *dispositional* departures. It does not constitute an alternative basis for vacating the sentence in this case. Indeed, we view the Supreme Court's post-*Gould* decision in *State v. McKay*, 271 Kan. 725, 26 P.3d 58 (2001), as implicitly supportive of our reading in *Gould*. In *McKay*, the Supreme Court reached the merits of an upward dispositional departure sentence rather than reversing it immediately as violative of the Sixth and Fourteenth Amendments to the United States Constitution.

Furthermore, our decision on this issue appears philosophically and analytically consistent with that in *State v. Conley*, 270 Kan. 18, 30-35, 11 P.3d 1147 (2000), *cert. denied*, 532 U.S. 932 (2001), which held that a district judge's decision to impose a hard 40 sentence did not run afoul of *Apprendi*. In *Conley*, the hard 40 sentence potentially altered the mode of service of the defendant's life sentence, delaying initial parole eligibility from 25 to 40 years. Here the *dispositional* departure also merely altered the mode of service of Carr's sentence; it did not extend its length. *Gould* did not affect the district judge's power to alter the mode of service of the offender's sentence."

See also ***State v. Seibel***, 29 Kan. App. 2d 489, 28 P.3d 445 (2001) which involved an upward durational departure that was reversed for resentencing based upon the holding in *Gould* and where the concurring opinion also noted the same interpretation of *Gould* not applying to upward dispositional departures as was stated in *Carr*.

State v. McElroy, 29 Kan. App. 2d 990, 35 P.3d 283 (2001), *rev. denied* 273 Kan. 1038 (2002). The offender appealed a conviction for attempted rape following a jury trial which resulted in an upward durational departure sentence of imprisonment for 102 months and also in an increased postrelease supervision sentence of 60 months. The offender's conviction was affirmed but the upward durational departure was set aside for resentencing pursuant to the holding in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), leaving an issue involving the application of K.S.A. 22-3717(d)(1)(A) to the postrelease supervision sentence.

In considering the enhanced postrelease supervision issue, the Court noted the ruling in ***State v. Elms,*** 29 Kan. App. 2d ___, 31 P.3d 991 (2001) however, *Elms* did not apply here. *Elms* did not apply because in this case the aggravating fact that was used to increase the prescribed statutory maximum had been submitted to the jury and decided beyond a reasonable doubt. The Court stated in part: "The instant case, however, is distinguishable from *Elms* because the aggravating fact was submitted to a jury and proved beyond a reasonable doubt. The trial court imposed 60 months of postrelease supervision because McElroy committed attempted rape. Because the jury convicted McElroy of attempted rape, the fact relied upon by the trial court in imposing the increased period of postrelease supervision was submitted to a jury and proved beyond a reasonable doubt. Moreover, we find that McElroy's act of attempted rape constituted a substantial and compelling reason to impose the postrelease supervision…"

State v. Cody, 272 Kan. 564, 35 P.3d 800 (2001). The Court of Appeal's holding in *State v. Cody*, 27 Kan. App. 2d 1037, 10 P.3d 789 (2000) was reversed and remanded for resentencing.

The offender pleaded guilty to drug possession charges and was sentenced to 72 months imprisonment. This sentence twice exceeded the offender's base sentence and at a resentencing hearing, the sentencing court entered an order for a durational departure sentence of 64 months that doubled the offender's presumptive sentence. The offender appealed.

The Court of Appeals upheld the sentencing court based upon the reasoning that *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) did not apply because the aggravating facts for the upward departure were proven upon a reasonable doubt by the offender's admissions and plea. The Supreme Court granted review and issued an order to show cause why *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) should not apply.

The offender relied upon *Apprendi* and argued "…a plea of guilty to the elements of a criminal offense does not constitute either an admission or a waiver of his due process rights." The Supreme Court agreed.

The Supreme Court noted that the record of the sentencing hearing did not specify the statute the sentencing court relied upon for the upward departure sentence. The Court also noted that K.S.A. 2000 Supp. 21-4716(a) contains "the legislature's grant of authority" allowing a sentencing court to depart from a presumptive sentence. In a unanimous decision, the Court held that since K.S.A. 2000 Supp. 21-4716(a) was found to be unconstitutional on its face in *Gould*, it should also be applied here in that "…Where an act of the legislature or a portion thereof is clearly unconstitutional, it is the duty of the courts to so declare and to hold the unconstitutional provision or provisions null and void."

State v. Kneil, 272 Kan. 567, 35 P.3d 797 (2001). The Court of Appeal's holding in *State v. Kneil*, an unpublished opinion filed on December 29, 2000, was reversed and remanded for resentencing. The offender pled guilty to felony theft and an upward durational departure sentence was imposed. The offender appealed and the Court of Appeals affirmed. In her petition for review the offender first raised the issue of whether *Apprendi* and *Gould* should apply to her departure sentence and review was granted to address that single issue.

In the plea agreement the prosecution agreed to recommend the presumptive sentence of probation, a 6 months underlying sentence and no restitution. However, the sentencing court notified both parties that it intended to depart and at the sentencing hearing, imposed an underlying upward durational departure sentence of 14 months with 24 months' postrelease supervision and placed the offender on probation for 24 months.

The offender's probation was later revoked and the underlying upward durational departure sentence was imposed. The offender appealed her sentence and the probation revocation but the Court of Appeal's in an unpublished opinion upheld both. The Supreme Court granted review only on the issue of the underlying durational departure sentence and whether *Gould* should apply to the same.

The offender argued that the statutory scheme for imposing her durational departure was unconstitutional, namely K.S.A. 2000 Supp. 21-4716(a). The State argued that the offender in pleading guilty had not only waived her right to a jury trial but had also waived her right to have a jury determine the aggravating factors beyond a reasonable doubt. In the "Analysis" portion of its opinion the Court noted that K.S.A. 2000 Supp. 21-4716(a) was found unconstitutional on its face in *Gould*, then the Court stated in part: "…we rejected the State's invitation in *Gould* to

work around the flawed sentencing scheme even though Gould did not dispute the existence of a fact supporting her upward departure sentence. The State extends the same invitation here, but in the instant case we have even less motivation to accept. By entering a plea of guilty to felony theft, Kneil did not admit she was not amenable to probation, nor did she admit any other fact which might support an upward departure sentence… The State simply fails to present a valid reason for retreating from our holding in *Gould*."

State v. Baum, 30 Kan. App. 2d 9, 35 P.3d 944 (2001). The offender pled nolo contendere to attempted sexual exploitation of a child that would result in a presumption of probation. The presentence investigation recommended the presumptive sentence and completion of a sex offender program during probation. A psychological evaluation was also completed to evaluate the offender for a sex offender program, however, that evaluation recommended imprisonment instead of probation. The sentencing court on its own motion imposed a dispositional departure based upon the psychological evaluation because the offender had denied committing the offense. The offender appealed.

The issue was whether or not the offender's refusal to admit his guilt was a substantial and compelling reason to support a dispositional departure. The Court's standard of review was de novo with the sentencing court required to state on the record the substantial and compelling reasons for the departure, and with the sentencing court's comments at the time of sentencing hearing governing as to the reasons for the departure. See ***State v. Jackson***, 262 Kan. 119, 936 P.2d 761 (1997).

It its opinion the Court stated in part: "It is indisputable Baum would have been placed on probation but for his protestation of innocence. Conversely an admission of guilt would have been rewarded with probation. Thus, he is to be incarcerated not for what he may have done, but for having the temerity to maintain his innocence. We find this an unacceptable consequence absent any findings that would otherwise support the departure sentence… We find instructive the reasoning of the Montana Supreme Court in *State v. Imlay*, 249 Mont. 82, 813 p.2d 979 (1991)… We adopt the reasoning of the *Imlay* court to support its holding. Here, there was no substantial competent evidence presented as to whether Baum committed the underlying criminal offense. Additionally, the trial court did not find Baum was not candid. We conclude there has been no showing of substantial and compelling reasons to support the dispositional departure sentence imposed by the court."

State v. Boswell, 30 Kan. App. 2d 9, 37 P.3d 40 (2001). The offender pled guilty to possession of drug paraphernalia and also possession of cocaine. The plea agreement jointly recommended a downward dispositional departure to probation and an upward durational departure to twice the base sentence. The sentencing court approved the plea agreement and sentenced the offender accordingly. The offender's probation was later revoked and the underlying prison sentence was imposed.

The Court noted the offender's sentence was without any statutory authority and referred to *State v. Cody*, 272 Kan. 564, 35 P.3d 800 (2001) where the Supreme Court held that *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) still applies when an offender pleads guilty. The Court also noted that it had jurisdiction to consider a sentencing appeal even though the sentence results from a plea agreement that was approved by the sentencing court if there is a claim that the sentence is illegal. See K.S.A. 21-4721(c). Based upon the foregoing, the offender's sentence was vacated.

Regarding the resulting issue of how to address any resentencing of the offender since there was a negotiated plea agreement with recommendations for sentencing, the Court reviewed *State v. McLaren*, 14 Kan. App. 2d 449, 793 P.2d 763 (1990) which was based in part upon a Colorado Supreme Court case, namely *Chae v. People*, 780 P.2d 481 (Colo. 1989). However, both *McLaren* and *Chae* were distinguishable because in this case the sentence was illegal because of the upward durational departure but the upward departure wasn't the basis the offender entered the agreement. Instead, the downward dispositional departure was the basis for the offender entering into the agreement.

In addition, in Colorado an offender may withdraw his/her plea if the sentencing court does not follow the prosecutor's sentencing recommendation. In Kansas though, the sentencing court is not bound to follow the sentencing recommendations of a plea agreement and an offender may not be allowed to withdraw his/her plea. The Court turned to a Florida case to resolve this question, namely *State v. Jolly*, 392 So. 2d 54 (Fla. Dist. App. 1981) and stated in part: "We adopt the holding of *Jolly* and hold that when a plea agreement includes an agreement to recommend to the court an illegal sentence, the sentencing court imposes the recommended but illegal sentence, and the illegal sentence impermissibly *increases* the defendant's term of imprisonment, the State may either allow the defendant to withdraw his or her guilty plea, *or* agree that the illegal portion of the sentence be vacated and the defendant be resentenced to the proper term." See also ***Cleveland v. State***, 394 So. 2d 230 (Fla. Dist. App. 1981) and ***Forbert v. State***, 437 So. 2d 1079 (Fla. 1983).

The Court next addressed the issues of the length of the offender's probation and postrelease supervision. The probation issue was moot because the probation had been revoked although the Court noted pursuant to the holding in *State v. Whitesell*, 29 Kan. App. 2d 905, 33 P.3d 865 (2001), a sentencing court has the jurisdiction to modify an offender's sentence within the bounds of K.S.A. 2000 Supp. 21-4611(c)(5). However, as for the offender's postrelease supervision period issue, the Kansas Department of Corrections not the sentencing court has the authority pursuant to K.S.A. 2000 Supp. 21-3717(t) to reduce the offender's postrelease supervision time.

State v. Jarvis, 30 Kan. App. 2d 64, 38 P.3d 742, *rev. denied*, 273 Kan. 1038 (2002). The offender entered a plea to aggravated indecent liberties with a child and also sexual exploitation of a child. The offender's criminal history worksheet included a 1962 juvenile conviction for larceny. The sentencing court gave notice of its intent to impose an upward durational departure sentence and after a departure hearing, imposed an upward durational departure sentence. The offender appealed.

The Court applied both *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) and *State v. Cody*, 272 Kan. 564, 35 P.3d 800 (2001) in vacating the offender's upward durational departure sentence. The fact the offender had entered into a plea agreement did not waive his right to having a jury determine any factors that might enhance a maximum sentence.

The offender's equal protection argument regarding his 1962 juvenile conviction was based upon the fact that the juvenile law at that time defined a "delinquent child" differently for each sex. A "delinquent child" was defined as a male under the age of 16 and a female under the age of 18. The offender was 16 years old at the time of his juvenile conviction. In 1965 this Kansas juvenile law was amended to define a "delinquent child" as a male or a female under the age of 18. The offender argued that this change was retroactive in application.

The Court applied the analysis from *State v. Augustine*, 197 Kan. 207, 416 P.2d 281 (1966) and held that the 1965 amendment was not retroactive. This matter was then remanded for resentencing.

State v. McClennon, 273 Kan. 652, 45 P.3d 848 (2002). This involved the review of an unpublished Court of Appeals' decision filed August 31, 2001. The offender was convicted of 11 counts of rape, 5 counts of aggravated battery, 3 counts of aggravated criminal sodomy, 4 counts of kidnapping, 3 counts of robbery, 2 counts of aggravated sexual battery and 1 count of aggravated battery. The sentencing court selected the Count IV rape conviction as the primary crime, then doubled the maximum presumptive sentence from 772 months to 1,544 months, imposed presumptive sentences on all of the other counts and then ran all 29 sentences consecutive. The offender appealed.

The Court's opinion is best stated in the Syllabus. Syl. ¶ 1. "Under K.S.A. 2001 Supp. 21-4716(b)(3), if a factual aspect of a crime is a statutory element of the crime, that aspect of the current crime of conviction may be used as an aggravating factor for sentencing purposes only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by that aspect of the crime."

Syl. ¶ 2. "Sexual intercourse and the absence of consent are elements of the crime of rape. Under K.S.A. 2001 Supp. 21-4716(b)(3), the district court may not use the fact of nonconsensual sexual intercourse to establish a "crime of extreme sexual violence" unless the nonconsensual sexual intercourse is "significantly different" than the usual criminal conduct involved in such an act."

Syl. ¶ 3. "The conclusion that the nonconsensual sexual intercourse involved in a rape was "significantly different" from the usual crime of rape is one to be drawn, under K.S.A. 2001 Supp. 21-4716, without the benefit of a jury verdict beyond a reasonable doubt. This procedure violates a defendant's Sixth and Fourteenth Amendment rights and is part of the scheme for imposing upward departure sentences held unconstitutional on its face in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001).

Syl. ¶ 4. "Under the facts of this case, following *Gould*, the defendant's upward durational departure sentence is vacated and remanded to the district court for resentencing within the presumptive range."

State v. Anthony, 273 Kan. 726, 45 P.3d 852 (2002). The offender was convicted by a jury of the offense of aggravated indecent liberties with a child. The sentencing court imposed a sentence of 92 months imprisonment, plus 60 months postrelease supervision (the presumptive postrelease supervision was 36 months) based upon findings made pursuant to K.S.A. 1998 Supp. 22-3717(d)(1)(C)(i) [now K.S.A. 2001 Supp. 22-3717(d)(1)(D)(i)]. The offender appealed.

The Court held that there was no violation of either *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) or *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), because the factual determination (i.e., the "nature of the offense") which the sentencing court used as the basis to increase the postrelease supervision period beyond the prescribed maximum, had already been submitted to a jury and proved beyond a reasonable doubt.

The Court's opinion stated in part: "… Here the district court simply used the fact that Anthony was convicted of aggravated indecent liberties, by definition a sexually violent crime,

to impose an extended postrelease supervision period under K.S.A. 2001 Supp. 22-3717(d)(1)(D)(1). In doing so, the court was not required to make an additional finding of fact beyond that made by the jury..."

The district court's "nature of the offense" finding is sufficient to comply with K.S.A. 2001 Supp. 22-3717(d)(1)(D)(i). *However, the better practice for a district court in imposing a durational postrelease supervision departure under these circumstances is to state specifically and on the record the "substantial and compelling reasons to impose a departure," i.e., that the current crime of conviction was sexually violent*." (Emphasis supplied.)

In addition, the Court noted in its opinion that: "… The question that we raise *sua sponte* is whether the length of Anthony's sentence is dictated by the presumptive range in effect on the date of his offense or on the date of his sentencing. See K.S.A. 22-3504 (the court may correct an illegal sentence at any time).

The controlling penalty provisions are those in effect at the time the offense is committed. *State v. Patterson*, 257 Kan. 824, 825, 896 P.2d 1056 (1995)… Anthony's underlying sentence of imprisonment is vacated, and the case is remanded for resentencing according to the KSGA grid in effect on the date of his offense."

State v. Kemp, 30 Kan. App. 2d 657, 46 P.3d 31, *rev. denied* 274 Kan. 1116 (2002). This case is noted as an additional footnote to *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001). The Court noted that *Gould* did not apply to preclude the use of juvenile adjudications in the determination of a criminal history score.

NOTE: On 05/20/02 the United States Supreme Court decided ***United States v. Cotton***, 535 U.S. 625 (2002) and held that the omission from an indictment of a fact that would enhance a statutory maximum sentence, did not justify the reversal of the enhanced sentence. In ***Cotton*** the offender did not object to this omission at trial and irregardless of whether or not there was any objection, "the fairness, integrity, or public reputation of judicial proceedings" were not affected.

On 06/24/02 the United States Supreme Court decided ***Harris v. United States*** 536 U.S. 545 (2002) and ***Ring v. Arizona*** 536 U.S. 584 (2002). In *Harris*, the Court in a 5-4 decision reversed the 4th Circuit and stated in part: "not all facts affecting the defendant's punishment are elements" [which must be proven to a jury].

In *Ring*, the Court in a 7-2 decision held that juries, not judges, must determine if the death penalty shall be applied. The Court stated in part: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both."

State v. Allen, 30 Kan. App. 2d 774, 48 P.3d 678 (2002), *rev. denied*, 275 Kan. 965 (2003). Here the offender pled guilty to four counts of aggravated indecent liberties with a child and three counts of criminal sodomy. The sentencing court found the primary offense was sexually motivated and pursuant to K.S.A. 2001 Supp. 22-3717(d)(1)(D)(i) imposed a 60 months postrelease supervision period. The offender appealed.

An appeal involving the interpretation of a statute is a question of law and the Court's

standard of review is unlimited. The Court reviewed *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002) and then stated in part: "In the instant case, the trial court used the "sexually motivated" characterization of K.S.A. 2001 Supp. 22-3717(d)(2)(L), instead of the "sexually violent" characterization of K.S.A. 2001 Supp. 22-3717(d)(2)(C), as a reason to depart. Although aggravated indecent liberties is specifically listed in the statute as a "sexually violent" crime, there is no specific listing of "sexually motivated" crimes in subparagraph (L). However, we have no difficulty in finding that a "sexually violent" crime is also a "sexually motivated" crime under our statutes.

"Therefore, the trial court was within its authority to order 60 months of postrelease supervision, as the pleas of guilty to aggravated indecent liberties and criminal sodomy were obviously pleas of guilty to sexually motivated, or sexually violent, crimes. As such, there was a factual finding in the legal proceeding below which would satisfy the requirements of *Apprendi* and *Gould*."

"We do acknowledge that Anthony was convicted by a jury while Allen pled guilty. We also note *State v. Cody*, 272 Kan. 564, 35 P.3d 800 (2001). In *Cody*, the defendant had pled guilty to multiple drug charges. The trial court made an upward durational departure based generally on reasonable, but unproven, *inferences* from the evidence that Cody was a major drug dealer."

"The instant case is distinguishable. While the trial court in *Cody* had to make inferences from the pleas to reach a finding of factors supporting an upward departure, no such inference is necessary here. The plea to a charge of aggravated indecent liberties is a plea to a crime which is sexually violent and sexually motivated by definition. No inference is necessary. Once the statutory nature of the crime is determined, the provisions of K.S.A. 2001 Supp. 22-3717(d)(1)(D)(i) can be applied. There is no need for any evidentiary fact finding by the court, which is prohibited by *Apprendi* and *Gould*."

State v. Coleman, 30 Kan. App. 2d 988, 56 P.3d 290 (2002), *rev'd*, 275 Kan. 796, 69 P.3d 1037 (2003). This case is noted as an additional footnote to *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002), *cert. denied*, 537 U.S. 1104 (2003) in the **CRIMINAL HISTORY ISSUES (Juvenile Convictions Issues)** section.

State v. Spinden, 30 Kan. App. 2d 1014, 54 P.3d 514, *rev. denied* 274 Kan. 1117 (2002). See the update under **SPECIAL APPLICATIONS IN SENTENCING (Persistent Sex Offenders)** section on Appendix A page 116.

State v. Carr, 29 Kan. App. 2d 501, 28 P.3d 436 (2001), *aff'd*, 274 Kan. 442, 53 P.3d 843 (2002). In a 5 to 2 decision, the Supreme Court upheld the Court of Appeals' decision that there wasn't a violation of either *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000) or *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), when the sentencing court imposed an upward *dispositional* departure in lieu of presumptive probation. See Appendix A Page 69 for the Court of Appeals' opinion for *State v. Carr*, 29 Kan. App. 2d 501, 28 P.3d 436 (2001), *aff'd*, 274 Kan. 442, 53 P.3d 843 (2002).

The offender entered into a plea agreement for criminal possession of a firearm and although the presumptive sentence was probation, the sentencing court instead chose a 15 months prison sentence. The offender appealed but the Court of Appeals upheld the upward *dispositional* departure sentence because *Apprendi* did not apply to *dispositional* departures and

the sentencing court's reasons to depart were substantial and compelling. However, the Court of Appeals also vacated the sentence and remanded the case for resentencing because the sentencing court "did not provide adequate notice of its intention to depart on its own violation under K.S.A. 21-4718(b)."

The offender's appeal involved a question of law and thus the Supreme Courts' jurisdiction involved unlimited review. The fact that the offender's conviction resulted from a plea agreement as opposed to a jury verdict did not affect the Court's analysis. The Court also noted that neither *State v. McKay*, 271 Kan. 725, 26 P.3d 58 (2001) nor *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied* 532 U.S. 932 (2001), disposed of this issue. Instead, the Court focused upon whether or not *Apprendi* applied to *dispositional* departures.

The Court referenced *Hudson v. State*, 273 Kan. 251, 42 P.3d 150 (2002) to illustrate the distinction that an offender on probation or parole isn't serving a sentence and stated in part: "Probation and parole are dispositions alternate to the serving of a sentence, and neither probation nor parole increase or decrease the sentence required to be imposed by statute."

"The determination that probation is separate and distinct from the sentence is demonstrated by the fact that an individual can be placed on probation for more or less time than the length of his or her underlying prison sentence. See K.S.A. 2001 Supp. 21-4711. Additionally, even when an individual's probationary term has almost been satisfied and probation is revoked, the person still must serve the entire length of the underlying prison sentence and will be denied credit for time spent on probation unless it was spent in a county jail or a residential treatment center. See K.S.A. 21-4614a. It is also noteworthy that an individual may either accept probation and be subject to serving the entire sentence if his or her probation is revoked or reject probation and elect to serve a known sentence."

"We conclude that *Apprendi* applies only to upward durational departures of a sentence imposed under K.S.A. 2001 Supp. 21-4716. The distinction between probation and the imposition of a prison sentence renders the United States Supreme Court's *Apprendi* decision inapplicable to a sentencing judge's decision to impose a dispositional departure prison sentence rather than to grant probation."

The dissent pointed out that sentencing court's lost a great deal of discretion with the enactment of the Kansas Sentencing Guidelines Act (KSGA). This resulted from the imposition of the drug and nondrug grids and also with the definition of a "sentencing range" at K.S.A. 21-4703(s). A "sentencing range" only involves an appealable sentence and the only appealable sentences under the KSGA are departures. Thus, the only real discretion that a sentencing court now exercises involves the three border boxes on the nondrug grid and the seven border boxes on the drug grid.

In the view of the dissent, anything other than the border boxes involves either a presumption of probation or a presumption of imprisonment and each of these presumptions represents the statutory maximum sentence for an offender.

State v. Purcell, 30 Kan. App. 2d 1102, 54 P.3d 523 (2002), *rev. denied*, 275 Kan. 967 (2003). The offender entered a plea to one count of aggravated indecent liberties with a child and one count of contributing to a child's misconduct. The plea agreement contained a provision that the presumptive postrelease supervision period of 36 months be increased to 60 months. After failing to complete the Labette Correctional Conservation camp, the offender was ordered to

serve the underlying presumptive term of 56 months and the offender then appealed his extended postrelease supervision.

The Court reviewed *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002), *State v. Cody*, 272 Kan. 564, 35 P.3d 800 (2001) and *State v. Kneil*, 272 Kan. 567, 35 P.3d 797 (2001) and then stated in part: "We conclude from the cases cited above that the fact that defendant in this case pled guilty does not establish any facts under which the trial court may have imposed an upward departure."

"In *State v. Anthony*, the defendant argued that his postrelease supervision period was increased from 36 to 60 months and that this increase was unconstitutional. The distinguishing feature in *Anthony* is that Anthony was convicted by a jury. The Supreme Court held that the upward departure in Anthony was not unconstitutional because he had been tried to a jury, the jury had found him guilty of a sexually violent crime, and under K.S.A. 2001 Supp. 22-3717(d)(2)(C), the facts on which the upward departure was based had been determined by a jury beyond a reasonable doubt."

"The Supreme Court has made it clear that a plea of guilty does not provide the necessary facts to impose an upward durational departure nor does the fact that a defendant entered into a plea agreement agreeing to an illegal sentence make that sentence legal."

NOTE: The Petition for Review was granted on 02/04/03 and the case was remanded back to the Court of Appeals in light of the holding in ***State v. Walker***, 275 Kan. 46, 60 P.3d 937 (2003). An unpublished opinion was filed on 05/02/03 withdrawing the Court of Appeals' opinion and affirming the decision of the sentencing court. Pursuant to Supreme Court Rule 7.04 (f)(1)(i) issued on February 7, 2003, unpublished opinions are not favored for citation, however, unpublished opinions "may be cited if they have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition." A Petition for Review was filed by the offender on 05/09/03 and subsequently denied.

State v. Moore, 274 Kan. 639, 55 P.3d 903 (2002). See the update under **SPECIAL APPLICATIONS IN SENTENCING (Persistent Sex Offenders)** section on Appendix A page 117. See also ***State v. Spinden***, 30 Kan. App. 2d 1014, 54 P.3d 514, *rev. denied*, 274 Kan. 1117 (2002) on Appendix A page 116.

State v. Garcia, 274 Kan. 708, 56 P.3d 797 (2002). This decision involved an interpretation of the "gang related" presumptive imprisonment statute, K.S.A. 2001 Supp. 21-4704a(k). The Court vacated the offender's sentences for aggravated battery and incitement to riot and then remanded the case for resentencing because the sentencing court failed to make adequate findings on the record as required by K.S.A. 2001 Supp. 21-4704a(k). The Court's Syllabus states as follows: Syl. ¶ 1. "*Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), does not apply to a prison sentence imposed under K.S.A. 2001 Supp. 21-4704a(k)." and also at Syl. ¶ 2. "The language of K.S.A. 2001 Supp. 21-4704a(k) requires that specific findings be made at sentencing in order to impose a presumptive prison sentence."

On the issue of the resentencing, the Court stated in part: "The district court failed to make findings on the record consistent with those outlined in K.S.A. 2001 Supp. 21-4704a(k). Garcia's prison sentences are vacated. On remand, the district court is given the opportunity to make the proper findings and reimpose the same sentences if appropriate. See *State v. Peterson*,

25 Kan. App. 2d 354, 358, 964 P.2d 695, *rev. denied*, 266 Kan. 1114 (1998)."

NOTE: K.S.A. 2001 Supp. 21-4704a was repealed on 04/04/02 by House Bill 2623. See Chapter 10, 2002 Session Laws of Kansas, pages 45-49. K.S.A. 2001 Supp. 21-4704 was also amended by that same legislation.

State v. Beasley, 274 Kan. 718, 56 P.3d 803 (2002). This decision involved an interpretation of the "firearm used in the commission of a person felony" presumptive imprisonment statute, K.S.A. 2001 Supp. 21-4704a(h). Following a jury trial the offender was convicted of aggravated assault and aggravated battery. The sentencing court then sentenced the offender to two concurrent 12-month prison terms because a firearm was used in the commission of the crimes. The Court's Syllabus states in part: "(2) a judge-made finding that defendant used a firearm in the commission of a person felony, thus mandating a prison sentence, did not violate *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)."

The Court's opinion stated in part: "We have not considered the question of whether *Apprendi* applies to K.S.A. 2001 Supp. 21-4704a(h). However, in *State v. Garcia* (No. 87,691, this day decided), we relied on *Carr* in holding that *Apprendi* does not apply to K.S.A. 2001 Supp. 21-4704a(k) (presumptive prison term for gang-related crimes)." See *State v. Garcia*, 274 Kan. 708, 56 P.3d 797 (2002).

"The district court here, after finding that Beasley used a handgun to commit the crimes, imposed a presumptive prison term. Following the reasoning of *Garcia*, the prison term does not exceed the statutory maximum punishment for Beasley's crimes, and *Apprendi* does not apply."

"We also note that the jury found beyond a reasonable doubt that Beasley used a firearm to commit the aggravated assault… The jury convicted Beasley of aggravated assault after being instructed that it must find, among other things, that "the defendant used a deadly weapon[,] to wit: a handgun."

NOTE: K.S.A. 2001 Supp. 21-4704a was repealed on 04/04/02 by House Bill 2623. See Chapter 10, 2002 Session Laws of Kansas, pages 45-49. However, K.S.A. 2001 Supp. 21-4704 was also amended by that same legislation.

State v. Sprinkle, 31 Kan. App. 2d 45, 59 P.3d 1039 (2002), *rev. denied*, 275 Kan. 968 (2003). The offender was a police officer who had been convicted of fourteen counts of nonresidential burglary. Three of the counts took place before he had left the police department. Although the presumptive sentence was eleven to thirteen months probation, the State moved sentencing court for an upward dispositional departure based upon the argument that a police officer has a fiduciary trust with members of the public. The court sentenced the offender to twelve months imprisonment for each of the fourteen counts, with the first three counts concurrent to one another and the remaining eleven counts also concurrent to one another but consecutive to the first three counts. The offender appealed.

The Court of Appeals reviewed *State v. Ippert*, 268 Kan. 254, 995 P.2d 858 (2000), *Denison State Bank v. Madaira*, 230 Kan. 684, 640 P.2d 1235 (1982) and *State v. Gideon*, 257 Kan. 591, 894 P.2d 850 (1995) in addition to four out-of-state cases. The Court reversed and remanded the offender's sentence for resentencing, stating in part: "In *Ippert*, the defendant's status as the victimized children's father gave rise to a duty of support as well as protection. The children were dependent upon him in every way emotionally, physically, and financially.

Although trust and a duty of protection also existed between Sprinkle and the individual members of the public who eventually became his victims, those persons were not dependent upon him. There was no "peculiar confidence placed by one individual in another." *Denison State Bank*, 230 Kan. at 692. We cannot find a fiduciary relationship implied in law between Sprinkle and his victims "due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transactions." *Denison State Bank*, 230 Kan. at 691. There is no proof Sprinkle capitalized on his official relationship with the victims to maximize the success of his criminal pursuits."

"This also was not a situation in which a more general abuse of trust was demonstrated under *Gideon*. That decision indicates our Supreme Court would apply a more demanding test than that applied in at least Arizona, Louisiana, and Washington. We hold that it is not sufficient for the State to prove only that a defendant was a police officer or that he or she occupied a position of merely theoretical trust. The defendant must have had a direct, personal relationship of some duration with the victim, one that would have led the victim to place trust eventually betrayed."

"In this case, there is no evidence that Sprinkle had such a relationship with any of the victims in this case. There is no evidence that he used his position as a police officer to acquire specific, individualized information about any particular victim or the security of that victim's business. There is nothing beyond the speculative argument of the State to support an upward dispositional departure for an abuse of trust. That is insufficient."

State v. Walker, 275 Kan. 46, 60 P.3d 937 (2003). The offender pled guilty to aggravated indecent liberties with a child and was sentenced to the presumptive prison term but to an extended postrelease supervision term of 60 months. A divided Court of Appeals panel in an unpublished opinion vacated the postrelease supervision term and the State filed a Petition for Review.

The Supreme Court's opinion reviewed *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002) and noted that the increase in the postrelease supervision for a sexually violent crime was due to the provisions of a statute, namely K.S.A. 2001 Supp. 22-3717 which defines a sexually violent crime. The fact relied upon by the sentencing court to extend the postrelease supervision was already found by a jury beyond a reasonable doubt when the offender was convicted. However, here Walker pled to his offense and the issue became "whether a guilty plea prevents application of the analysis in *Anthony*."

The Court also reviewed *State v. Allen*, 30 Kan. App. 2d 774, 48 P.3d 678 (2002), *rev. denied* 275 Kan. 965 (2003), *State v. Purcell*, No. 87,694, unpublished opinion, *aff,d*, (2003), *State v. Cody*, 272 Kan. 564, 35 P.3d 800 (2001) and *State v. Kneil*, 272 Kan. 567, 35 P.3d 797 (2001). In *Allen*, *Anthony* was applied to the extended postrelease supervision period, however, in *Purcell* it wasn't. Next *Cody* and *Kneil* were distinguished because those cases involved different statutes, namely K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4717, not K.S.A. 2001 Supp. 22-3717.

The Court then stated in part: "The reasoning in *Allen* is persuasive. A plea of guilty to a statutorily defined sexually violent crime provides the basis for an extended postrelease supervision period under K.S.A. 2001 Supp. 22-3717(d)(1)(D)(i) without resort to the type of court-made fact-findings disapproved by *Apprendi* and *Gould*."

"Walker pled guilty to a statutorily defined sexually violent crime. His extended postrelease supervision period imposed under K.S.A. 2001 Supp. 22-3717(d)(1)(D)(i) does not offend *Apprendi* and *Gould*."

State v. Pruitt, 275 Kan. 52, 60 P.3d 931 (2003). The offender pled guilty to first-degree premeditated murder and aggravated robbery in order to have additional charges dropped and to avoid a Hard 40 sentence. In addition, the offender also agreed to an upward durational departure sentence of 178 months on the aggravated robbery, with the same to run concurrent to a life term. Although the offender stipulated to the substantial and compelling reasons for an upward departure, he withdrew his stipulation prior to sentencing. The prosecution asked the sentencing court to consider the evidence presented at the preliminary examination and the written stipulation, and the court then imposed the agreed upon upward durational departure sentence for the aggravated robbery. The offender appealed.

The Court noted that the offender had not stipulated to substantial and compelling reasons for an upward departure with his plea agreement, thus the only possible basis was the evidence from the preliminary hearing. The Court then stated in part: "Pruitt pled no contest to the crime of aggravated robbery but ultimately did not admit that the crime was excessively brutal or that the victim was vulnerable. The facts here are similar to *Kneil*. Pruitt's upward durational departure sentence was imposed under K.S.A. 2001 Supp. 21-4716, a scheme which had been declared unconstitutional on its face. Under *Gould*, *Cody* and *Kneil*, Pruitt's sentence for aggravated robbery cannot stand."

"The State argues that *Apprendi* and *Gould* had not been decided when Pruitt was sentenced on June 21, 1999; thus, they do not apply to his case. Pruitt filed a timely notice of appeal. For reasons not apparent in the record, appellate counsel was not appointed until August 2001. We granted Pruitt's motion to docket his appeal out of time in October 2001. Pruitt's case was not yet final when *Apprendi* was decided on June 26, 2000; thus *Apprendi* and *Gould* apply."

State v. Cullen, 275 Kan. 56, 60 P.3d 933 (2003). The offender pled guilty to attempted rape and agreed to an upward durational departure sentence and an extended postrelease supervision. An aggravated kidnapping count was dismissed. The sentencing court imposed the agreed upon upward departure/extended postrelease sentence and the offender appealed.

The Court noted *People v. Jackson*, 199 Ill. 2d 286, 769 N.E.2d 21 (2002) but held that it did not apply because the Illinois departure statute did not specify "whether a court or a jury must make the finding." However, the Kansas departure statute, namely K.S.A. 2001 Supp. 21-4716(a) specifies that the departure is a judge-made finding and is unconstitutional on its face. The Court stated in part: "The holding in *Jackson* is of little assistance here. The Kansas scheme for upward durational departure sentences has been declared unconstitutional on its face. Neither *Jackson* nor any other authority provided by the State suggests that a defendant may submit by waiver to the application of an unconstitutional sentencing scheme."

"*Gould*, *Cody*, and *Kneil* are dispositive."

The Court also applied *State v. Walker*, 275 Kan. 46, 60 P.3d 937 (2003) to the extended postrelease supervision issue and upheld the same.

State v. Santos-Garza, 276 Kan. 27, 72 P.3d 560 (2003). The offender pled guilty to aggravated battery and on August 1, 2001, received an upward durational departure sentence which was a part of the plea agreement. However, the issue of whether or not the upward durational departure portion of the sentence was illegal, was reserved for appeal.

The Court reviewed *State v. Cody*, 272 Kan. 564, 35 P.3d 800 (2001), *State v. Kneil*, 272 Kan. 567, 35 P.3d 797 (2001), *State v. Boswell*, 30 Kan. App. 2d 9, 37 P.3d 40 (2001), *State v. Johnson*, 30 Kan. App. 2d ___, 55 P.3d 927 (2002) and *State v. Cullen*, 275 Kan. 56, 60 P.3d 933 (2003) before stating in part: "As previously noted, *Cullen* agreed to the upward durational departure sentence. The defendant herein went further and stipulated that had the case gone to trial, the jury would have found, beyond a reasonable doubt, that the specific aggravating factor of defendant's having manifested excessive brutality in the offense (K.S.A. 2000 Supp. 21-4716[b][2][B]). This additional stipulation does not support a different result than that reached in *Cullen*. The defendant before us reached an upward durational departure sentence pursuant to K.S.A. 2000 Supp. 21-4716, a statutory sentencing scheme we have repeatedly held to be unconstitutional on its face."

NOTE: Effective on June 6, 2002, K.S.A. 2001 Supp. 21-4716 was amended as the result of Senate Substitute for House Bill 2154.

State v. Kessler, 276 Kan. 202, 73 P.3d 761 (2003). The offender was convicted of two counts of indecent liberties with a child. Following the determination of guilt the jury was also asked to determine whether or not both of the offenses involved a fiduciary relationship between the offender and the victim (the victim was the offender's son). The offender objected but the objection was overruled and the jury found that a fiduciary relationship existed. The sentencing court imposed an upward durational departure sentence for one of the two offenses and the offender appealed.

The Court stated in part: "At the time of the trial of this case, the court handed down its decision in *Gould*, but the legislature had not responded with another means of imposing upward durational departures. A new procedure for imposing upward durational departures was not enacted into law until June 6, 2002, over one year after the trial of this case. L. 2002, ch. 170. Thus, this court is not evaluating the constitutionality of the legislature's response to *Gould* but, rather, the propriety of the procedure employed by the trial court in imposing an upward durational departure when the procedure in place at the time was unconstitutional."

"In accordance with this court's decision in *Gould*, *Cody* and *Kneil*, we deny the State's invitation to work around a flawed sentencing scheme. A district court's authority to impose sentence is controlled by statute. Thus, where the statutory procedure for imposing upward durational departure sentences has been found unconstitutional, the district court has no authority to impose such a sentence. This case is remanded to the district court for resentencing on count one in accordance with this opinion."

State v. Neri, 32 Kan. App. 2d 1131, 95 P.3d 121, *rev. denied*, 278 Kan. 850 (2004). The offender was convicted of seven counts of forgery for stealing and forging checks from the Olathe Youth Baseball Program. The offender qualified for presumptive probation under the KSGA, however the court imposed an upward dispositional departure based on the courts finding that the children of baseball program were the victims of the offender's crime, and sentenced the offender to prison for 30 months.

The offender appealed claiming the sentencing court erroneously applied the aggravating factor at 21-4716(c)(2)(A) because there was no connection between his crime and a vulnerable victim.

In support of the departure sentence, the court found the victims of the forgeries to be the children in the baseball program and that the children, because of their ages, were particularly vulnerable to the offender's actions which constituted a substantial and compelling reason for the departure sentence.

The court, reversing the offender's sentence, stated in pertinent part: "The statutory description of vulnerability lists several human characteristics, including age, infirmity, and reduced physical or mental capacity. K.S.A. 2003 Supp. 21-4716(c)(2)(A). Where the victim is an organization, as opposed to a person, a finding of vulnerability is less applicable. The essence of the vulnerable victim aggravating sentencing factor is that the vulnerability somehow facilitates commission of the crime." The court concluded that the aggravating factor in this case was "misplaced".

DEPARTURE SENTENCING (NON-STATUTORY DEPARTURE REASONS)

State v. Trimble, 21 Kan. App. 2d 32, 894 P.2d 920 (1995). A finding that the offender has committed numerous crimes while on parole for a prior conviction may constitute a "substantial and compelling" basis for a dispositional departure sentencing the offender to prison even though an individual offender's prior criminal history may not be utilized as a basis for departure. In this case the sentencing court found that the offender's record of continually committing additional offenses while on parole from a previous conviction established that the offender was "not amenable to probation supervision," thus a dispositional departure sentencing the offender to prison was justified. The Court upheld the sentencing court's reasoning and sustained the upward dispositional departure sentence.

State v. Caldwell, 21 Kan. App. 2d 466, 901 P.2d 35, *rev. denied*, 258 Kan. 859 (1995). As a result of a drive-by shooting, the offender was convicted of two counts of aggravated assault, one count of discharging a firearm at an occupied building, and one count of criminal possession of a firearm. The Court justified an upward durational departure of sentence on the basis of the escalating nature of offender's crimes, the legislative intent to punish persons shooting at occupied houses more severely than persons shooting at unoccupied houses, the possibility the offender could have killed someone, the offender's failure to take advantage of prior lenient sentences and the finding the offender was the only aggressor.

The Court reversed the sentencing court and remanded the case back for resentencing. Citing *State v. Rhoads*, 20 Kan. App. 2d 790, Syl. ¶ 3, 892 P.2d 918 (1995), the Court held that the reasons for departure given by the sentencing court failed to articulate why the factors stated should translate into a maximum durational departure. There was no valid reason given as to why the offender's failure to take advantage of prior leniency should compel departure in this case. Moreover, some of the factors cited by the sentencing court are clearly inappropriate: the legislature's intent to punish one crime more severely than another is incorporated in the presumptive sentences through assignment of severity levels to each crime. Similarly, the possibility that the offender could have killed someone when firing at an occupied house is not unique to the circumstances of his case and does not compel a sentencing court to go beyond

what is ordinary.

State v. Cox, 258 Kan. 557, 908 P.2d 603 (1995). The offender was convicted by a jury of felony murder, aggravated robbery and of conspiracy to commit a robbery arising from a carjacking involving a shooting death. The offender was tried for the murder on an aiding and abetting theory. The sentencing court sentenced the offender to life imprisonment for felony murder and imposed upward departures of 102 months for aggravated robbery and 26 months for conspiracy to commit robbery. All of the sentences were ordered consecutively. The sentencing court relied on the State's assertion of the aggravating factor "excessively brutal killing" in imposing the upward departures. In explaining the upward departures, the sentencing court also stated that the offender and his co-defendants were "all in it together."

Appellate review of a departure sentence is a question of law. See 258 Kan. at 575. Under K.S.A. 1993 Supp. 21-4716(b)(2)(B), only the offender's own individual conduct during the commission of the current offense is to be considered for a sentence departure. The offender was an aider and abettor in the murder, but had no physical contact with the victim. Considering the offender's own individual conduct, that conduct did not amount to excessive brutality to the victim. The Court rejects the idea that aider and abettor liability alone may be used as a basis for sentence departure.

The Court found the nature of the killing could not properly be used as an aggravating factor for the crime of conspiracy to commit robbery because that crime was completed at the time the robbery occurred. Consequently, the Court held that the sentencing court's findings for an upward departure, were neither supported by the evidence in the record nor did they establish substantial and compelling reasons for an upward departure. The Court vacated the offender's sentences for aggravated robbery and conspiracy to commit robbery, and remanded the matter for resentencing with instructions to impose the appropriate sentences under the KSGA.

See also ***State v. Vincent***, 258 Kan. 694, 908 P.2d 619 (1995).

State v. Crawford, 21 Kan. App. 2d 859, 908 P.2d 638 (1995). The offender was convicted of possession of methamphetamine and possession without tax stamps affixed. Her criminal history was "G", making the presumptive sentence 51 to 57 months. The sentencing court granted a downward departure and sentenced the offender to 18 months in prison and 24 months' postrelease supervision. The State appealed from the departure sentence and the issue was whether the sentencing court's reasons for departing downward were substantial and compelling.

The Court held that there is no fault in a downward departure from the presumptive sentence based on facts that suggest that the presumptive sentence would be purely vindictive and without any rehabilitative effect. It concluded that the sentencing court's reasons for departure, that the offender was a functioning member of society with a family to raise and had made substantial rehabilitative efforts "are surely compelling reasons not to impose a long-term presumptive sentence which appears to benefit no one." See 21 Kan. App. 2d at 861-862. Moreover, the Court also held the fact that the co-defendant, who was the offender's husband, was charged with similar crimes and placed on probation is another substantial and compelling factor for a downward departure.

State v. Meyer, 25 Kan. App. 2d 195, 960 P.2d 261, *rev. denied*, 265 Kan. 888 (1998). "The fact that a defendant is found not to be amenable to probation supervision is, if supported by the

evidence, a substantial and compelling reason for upward departure, either dispositional or durational." In this opinion the Court upheld the reasoning from *State v. Trimble*, 21 Kan. App. 2d 32, 894 P.2d 920 (1995), which found that evidence showing an offender is not amenable to probation supervision may justify a dispositional departure. Evidence supporting a finding that an offender is not amenable to probation may include a showing that the offender has a history of committing crimes while on parole or probation.

The Court extended the reasoning from *Trimble* to allow for evidence that an offender is not amenable to probation supervision to justify an upward durational departure as well as an upward dispositional departure. The Court cited the offender's "incredible" record of prior convictions for nonperson felonies (12 prior convictions, including 9 burglary convictions) as support for the sentencing court's decision to depart.

The Court did, however, state in part: "We hasten to state that this opinion does not approve a departure based simply on the number of convictions a defendant may have. A departure based solely on a defendant's criminal record is doubtful, while one based on a defendant's nonamenability to probation is not."

State v. Sewell, 25 Kan. App. 2d 731, 971 P.2d 1201 (1998). Dealing with a case where both dispositional and durational departures were ordered by the sentencing court, the Court stated a number of holdings relevant to determining whether a departure sentence is warranted. Included within the syllabus were the following guidelines: "A finding of unamenability to probation supported by competent evidence may be substantial and compelling reason to impose a dispositional departure." At Syl. ¶ 1. "Mere conclusory findings are insufficient to support a sentencing departure." At Syl. ¶ 2. "Generally, issues of safety to the community and the best interests of the defendant are built into the sentencing guidelines and are not proper considerations on departure." At Syl. ¶ 3. "A sentence departure based on nonstatutory aggravating factors is subject to greater scrutiny upon appeal than a departure based on specific statutory facts." At Syl. ¶ 4. "An atypical lesser degree of harm or loss is a specific mitigating factor under K.S.A. 21-4716(b)(1)(E), but an atypical greater degree of harm or loss is not a specific aggravating factor under K.S.A. 21-4716(b)(2)." At Syl. ¶ 5.

The Court held the sentencing court erred by failing to consider placement in the Labette Correctional Conservation Camp prior to imposing an upward dispositional departure. See also ***State v. Trimble***, 21 Kan. App. 2d 32, 894 P.2d 920 (1995) and ***State v. Williams***, 24 Kan. App. 2d 447, 946 P.2d 98 (1997) (holding that when the defendant's probation was revoked for violating a condition of probation that she maintain full-time employment, the trial court's failure to consider Labette required that the defendant be granted a new hearing).

State v. Alderson, 266 Kan. 603, 972 P.2d 1112 (1999). Upon a resentencing for the offender's convictions for first degree murder and aggravated battery the sentencing court sustained the State's motion for an upward durational departure on the aggravated battery charge. The sentencing court based the upward durational departure on the "randomness" of the offender's crimes. The offender shot and killed one victim by shooting into the victim's car following a fight between the victim and several other individuals. Later that evening the offender drove by and shot another victim who was walking along the street. The second victim testified that he had never seen the offender before the night of the shooting.

In the offender's first appeal before the Court, *State v. Alderson*, 260 Kan. 445, 922 P.2d 435 (1996), the Court upheld the offender's "randomness" in committing his crimes as a

sufficient basis for the sentencing court's upward departure sentence but ordered a resentencing on other grounds. In the present appeal the Court again found the random nature of the offender's crime justified the departure and upheld the upward durational departure sentence as ordered in the resentencing hearing.

State v. French, 26 Kan. App. 2d 24, 977 P.2d 281 (1999). The offender appealed the upward dispositional departure sentence he received after pleading *nolo contendre* to three counts of indecent solicitation of a child, contending the aggravating factors relied upon by the sentencing court were not supported by the evidence, nor were they substantial and compelling. The Court noted the sentencing court's only stated reason for the departure sentence was that the court was convinced the offender had "shown a pattern of exploiting young girls." However, the only examples in the record alleging that the offender had engaged in unlawful conduct with young girls were statements made by the prosecutor concerning the crimes the offender plead to in this case. Dealing with the issue of whether the evidence of the current crimes of conviction could serve as sufficient aggravating factors to support a departure in this case, the Court cited K.S.A. 21-4716(b)(3), which reads in part: "If a factual aspect is a statutory element of the crime… that aspect of the current crime of conviction 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."

Interpreting the KSGA and "the purposes and provisions of sentencing guidelines," the Court concluded: "a pattern of exploitative conduct based exclusively upon the inherent facts of the multiple crimes of conviction is not substantial and compelling reason for a sentencing departure under K.S.A. 21-4716." However, the Court went on to note that on remand the sentencing court is not precluded from considering additional, appropriate reasons that would justify the imposition of a departure sentence. See also ***State v. Peterson***, 25 Kan. App. 2d 354, 964 P.2d 695, *rev. denied*, 266 Kan. 1114 (1998).

Finally, the Court noted that K.S.A. 21-4603d(a) requires a sentencing court to consider placement in the Labette Correctional Conservation Camp before a dispositional departure is imposed.

State v. Yardley, 267 Kan. 37, 978 P.2d 886 (1999). The State moved for an upward durational departure on a conviction for aggravated robbery. The sentencing court granted the departure reasoning that Yardley: (1) had failed rehabilitative and probationary services; (2) was on escape status at the time of the crime; (3) continued threatening behavior that made him a danger to society; and (4) committed crimes that were vicious, unprovoked and totally random. Yardley contended there was no statutory basis or case law to support the departure factors relied upon by the sentencing court.

The Supreme Court disagreed and noted *State v. Trimble*, 21 Kan. App. 2d 32, 38, 894 P.2d 920 (1995) in that: "(additional crimes committed while on parole can be a substantial and compelling reason for departure)." The Court also noted *State v. Hawes*, 22 Kan. App. 2d 837, 840, 923 P.2d 1064 (1996) in that: "Future dangerousness may constitute a factor for an upward departure." Finally, the Court noted *State v. Alderson*, 260 Kan. 445, Syl. ¶ 13, 922 P.2d 435 (1996) in that: "A defendant's random shooting of the victim may also be considered as an aggravating factor to justify a departure sentence."

State v. Smart, 26 Kan. App. 2d 808, 995 P.2d 407 (1999). Whether a sentencing court has relied upon a substantial and compelling basis for a departure is a question of law over which there is

unlimited review. Veracity, or the lack thereof, of an offender when testifying in his or her own behalf at trial is an appropriate factor to be considered in granting or denying a sentencing departure. However, when using perjury as a basis for establishing a lack of veracity in an upward sentencing departure, due process demands at a minimum a finding that all elements of perjury are satisfied.

State v. Rodriguez, 269 Kan. 633, 8 P.3d 712 (2000). The offender pled guilty to a cruelty to animals charge and was then also found guilty by a jury of arson. The State requested and the sentencing court ordered an upward dispositional departure for the arson conviction and the offender appealed arguing the reasons for the departure were not substantial or compelling, nor supported by the evidence.

The Court stated that the aggravating and mitigating factors contained in K.S.A. 21-4716 are nonexclusive and that a sentencing court may use other nonstatutory factors if they are supported by the evidence. Although there were four nonstatutory factors relied upon by the sentencing court, the Court pointed out the nonamenability to probation of the offender was sufficient by itself. The nonamenability factor was based upon the offender's disregard of previous court orders.

The Court noted although K.S.A. 21-4603d required consideration of placement at the Labette Conservation Camp as an alternative to a dispositional departure in a presumptive probation case, this was considered by the sentencing court, however, there was a shortage of bed space. The Court also noted K.S.A. 21-4728 that requires any and every other probation alternative to prison, was properly rejected as not being applicable by the sentencing court, once again due to the offender's nonamenability to probation.

State v. Murphy, 270 Kan. 804, 19 P.3d 80 (2001). The offender pled guilty to aggravated robbery and kidnapping after a felony murder count was dismissed on the offender's motion. The sentencing court sentenced the offender to serve both counts concurrently and also granted the offender's motion for a dispositional departure to the Labette Correctional Conservation Camp (Labette) based upon the evidence and contentions at the sentencing hearing. The State appealed the departure.

The Court noted that the State did not contest the supporting evidence and its appeal is limited to whether the factors considered by the sentencing court were substantial and compelling reasons for a departure. The Court further noted that the sentencing court's comments at the time of the sentencing and not the written Journal Entry, govern as the reasons for departure.

The Court acknowledged aggravating and the mitigating factors contained in K.S.A. 21-4716(b)(1) are nonexclusive and that a sentencing court may use other nonstatutory factors if they are supported by the evidence. There were eight nonstatutory factors relied upon by the sentencing court, namely: the offender had no prior criminal history; the offender was only 19 years old; the offender did not instigate the incident; the offender had nothing to gain from the incident; the offender had already been accepted into Labette which has a reputation for good results; the offender has a supportive family; the offender's employer reported the offender was a good employee and the trial court felt that community safety would be enhanced because the offender had a better chance of reformation at Labette than in prison.

The Court applied *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996) finding that when

a sentencing court does not rely upon statutory factors for departure, the departure should be viewed with "stricter scrutiny". The Court stated in part: "When considered as a whole the factors considered by the court and stated on the record are sufficient to constitute "substantial and compelling reasons for imposing a departure sentence in light of the offense of conviction, the defendant's criminal history, and the purpose of the sentencing guidelines." *State v. Grady*, 258 Kan. 72, 89, 900 P.2d 227 (1995).

State v. Benoit, 31 Kan. App. 2d 591, ___ P.3d ___ (2003). This matter was remanded from the Supreme Court as a result of an unpublished opinion filed on 06/28/02. On remand the Court of Appeals applied the Supreme Court's holding in *State v. Carr*, 274 Kan. 442, 53 P.3d 843 (2002) to the issue of whether there was any statutory authority to impose the offender's upward dispositional departure sentence and then addressed whether there was a substantial and compelling basis for the upward dispositional departure.

The offender was convicted of several offenses in two separate cases. In the first case the offender's criminal history (which included the convictions from the second case) warranted a presumptive sentence of probation but in the second case (which included the convictions from the first case) the presumptive sentence was imprisonment. The sentencing court on its own motion sentenced the offender for both cases on the same date and imposed a sentence of imprisonment in both cases, to be served consecutive to some unrelated Missouri cases.

The review of a departure sentence is a two part procedure where the Court first determines if the facts stated by the sentencing court were supported by the record to justify a departure. Next the Court must consider whether or not the reasons stated by the sentencing court were substantial and compelling enough reasons to support a departure. Here the sentencing court stated that it was impractical to impose a sentence of probation in the first case when the presumptive sentence in the second case was imprisonment. The sentencing court found that the offender was not amenable to probation.

As to the issue that the upward dispositional departure in the first case was based upon a factor that was not present in the first case, the Court reviewed *State v. Soler*, 25 Kan. App. 2d 1, 957 P.2d 516 (1998) and stated in part: "As we read *Soler*, the broad statement that the aggravating circumstances must be based on conduct that is contemporaneous with and rationally related to the underlying crime of conviction was unnecessary to the decision and was therefore dicta."

"Further this court and the Supreme Court have approved aggravating circumstances that are neither rationally related to nor contemporaneous with the crime of conviction. See, e.g., *State v. Rodriguez*, 269 Kan. at 646; *State v. Mitchell*, 262 Kan. 434, 447, 939 P.2d 879 (1997); *State v. Meyer*, 25 Kan. App. 2d 195, 960 P.2d 261, *rev. denied*, 265 Kan. 888 (1998); *State v. Billington*, 24 Kan. App. 2d 759, 953 P.2d 1059 (1998); *State v. Trimble*, 21 Kan. App. 2d 32, 38, 894 P.2d 920 (1995)."

"Having reviewed several cases, we believe a more accurate statement of the law is that *generally*, an aggravating circumstance must be based on conduct of an offender that is contemporaneous with and rationally related to the underlying crime of conviction. *However*, when facts exist, though factually unrelated to the crime of conviction, that demonstrate the defendant is not amenable to probation, such facts may justify an upward departure. And those facts may include that defendant is sentenced to imprisonment in another case on the same date."

"Our holding in the present case is in accord with *State v. Hawes*, 22 Kan. App. 2d 837, 841-42, 923 P.2d 1064 (1996), where we vacated an upward durational departure because the aggravating factor relied on was other uncharged conduct, unrelated to the conviction. But in *Hawes*, the uncharged criminal conduct shed no light on defendant's amenability to probation. Our holding in the present case also squares with *Rodriguez*, *Mitchell*, *Meyer*, *Billington*, and *Trimble*, where facts unrelated to the current crimes of conviction bore directly on the defendants' nonamenability to probation."

"We also need to clarify another rule stated in Hawes, where in Syl. ¶ 4 we stated: "A defendant's criminal history cannot be used to justify a departure sentence when the sentencing guidelines have already taken the criminal history into account in determining the presumptive sentence."

"In the present case, the two convictions Benoit was sentenced on were cross scored in his criminal history. See *State v. Roderick*, 259 Kan. 107, Syl. ¶ 4, 911 P.2d 159 (1996). In other words, Benoit's conviction in 1704 was included in his criminal history score in 1574, and vice versa. Pursuant to a literal reading of *Hawes*, Benoit's conviction in 1704 could not be used to justify a departure sentence in 1574."

"However, in "those instances where prior convictions have been used as a substantial and compelling reason for departure, the focus of the sentencing court's inquiry is not the defendant's general criminal history, but specifically what that history says about the defendant's amenability to probation.." *Hawes*, 22 Kan. App. 2d at 840. Such is the case here—the sentencing court did not depart solely because of the other conviction, but because the presumptive sentence in the other conviction rendered Benoit nonamenable to probation."

State v. Martin, 32 Kan. App. 2d 642, 87 P.3d 337, *rev'd*, 279 Kan. 623 (2005). The offender was convicted of one count of conspiracy to commit identity theft and four counts of identity theft. The trial court departed from the presumptive probation sentence and imposed a prison sentence. The trial court concluded that the offender's role as the ringleader was a substantial and compelling reason to depart and sentenced the offender to 34 months imprisonment. The offender appealed his sentence.

Prior to trial, the state filed a motion asking the court, if the defendant was convicted of the crimes, to allow the jury to make a special finding as to whether the offender was the "boss, kingpin, organizer, or supervisor" of the identity theft ring. The offender was convicted as charged and the jury found beyond a reasonable doubt that the offender was, "the organizing force who directed the criminal activities of three named accomplices".

The offender contended that the trial court erred when it granted the State's motion for an upward dispositional departure. In addition, the offender asserted that the trial court's departure findings are not supported by the evidence and the factors relied upon do not constitute substantial and compelling reasons to depart.

The Court's analysis included a review of K.S.A. 2003 Supp. 21-4716 (c) (2) which contains a nonexclusive list of aggravating factors that may provide substantial and compelling reasons for departure from the presumptive sentence range provided by the sentencing guidelines. After review, the Court stated in pertinent part: "The rationale for punishing the ringleader more severely is based on the ringleader's extensive participation in the criminal enterprise as well as the ringleader's control over the enterprise. Although K.S.A. 2003 Supp. 21-

4716(c)(2) does not include an aggravating factor relating to a defendant's role as a ringleader, K.S.A. 2003 Supp. 21-4716(c)(1) provides the following mitigating factor: (B) The offender played a minor or passive role in the crime . . . ."

The Court ultimately concluded that being a mastermind or kingpin in an identity theft ring is an aggravating factor that justifies the imposition of a departure sentence even though it is not included in the nonexclusive list in K.S.A. 2003 Supp. 21-4716(c)(2).

However, the offender's sentence was vacated and remanded for resentencing because the trial court failed to consider placement of the offender at Labette Correctional Conservation Camp (Labette). Consideration of Labette is required by K.S.A. 2003 Supp. 21-4603d(g) which states in pertinent part: "Prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid . . . the court shall consider placement of the defendant in the Labette correctional conservation camp…"

NOTE: The Supreme Court reversed the district court and Court of Appeals in ***State v. Martin***, 279 Kan. 623, ___ P.3d ___ (2005). The sole issue before the Supreme Court was whether Martin's role as "boss," "kingpin," or "ringleader" was a valid upward dispositional departure factor.

State v. Matthews, 32 Kan. App. 2d 281, 81 P.3d 1268, *rev. denied*, 277 Kan. 926 (2003). The offender was convicted of 6 counts of unlawful acts in connection with offering services of a loan broker in excess of $25,000, 6 counts of theft, 1 count each of conducting an unregistered mortgage business, operating as a real estate broker without a license, obstruction of legal process, and unregistered loan brokering. The trial court ordered an upward durational departure sentence of 92 months imprisonment because the court held that the offender owed a fiduciary duty to his clients. The offender appealed claiming the trial court erred when it imposed an upward departure sentence. The state agreed with the offender.

The Court citing *State v. Gould*, 271 Kan. 394, 23, P.3d 801 (2001), held that Matthews must be given the presumptive sentence or that the jury must determine the issue of a departure sentence. The court affirmed the offender's convictions, vacated his sentence and remanded the case to the trial court for resentencing.

State v. Haney, 34 Kan. App. 2d 232, 116 P.3d 747, *rev. denied*, 280 Kan. ___ (2005). The State appeals the imposition of a downward durational and dispositional departure sentence imposed upon the defendant for his conviction of rape. Haney had been convicted of the statutory rape of a 13-year-old girl. Prior to the rape, the victim had become severely intoxicated to the point that the four young men she was with almost took her to the hospital. The decision was made not to admit her to the hospital and the victim was instead taken to apartment of a codefendant. After carrying the victim up to the apartment, Haney took off the victim's clothes and the four young men subsequently requested to have sex with the victim. The victim stated she did not specifically agree to have sex but requested that the men use a condom if they were going to have sex with her.

Haney and another codefendant were tried as adults and Haney was convicted of statutory rape. Haney's departure motion was granted and he was sentenced to 60 months probation with an underlying sentence of 30 months. The presumptive guidelines sentence was 147 – 165 months. Departure had been granted by the district court based on (a) the relative

sentences of the codefendants in relation to each defendant's relative culpability; (b) the degree of harm or loss associated with this particular crime; (c) the willing participation of the victim in the criminal conduct; and (d) the defendant's receptiveness to rehabilitation.

The Court first addressed the issue pertaining to the relative sentences of the codefendants, two of which had been tried as juveniles while Haney had been tried as an adult. Since lack of equity in sentencing among codefendants is not a mitigating factor listed in K.S.A. 2004 Supp. 21-4716(c)(1) it is subject to greater scrutiny. *State v. Murphy*, 270 Kan. 804, 870, 19 P.3d 80 (2001).

The Court noted that while the legislature has provided the means to treat specified juvenile offenders as adults for purposes of prosecution and punishment, the legislature has not similarly chosen to provide for treatment of certain adults as juveniles. See. K.S.A. 38-1636. Therefore, the sentencing court's attempt to circumvent the legislature's policy decisions by so regarding the adult codefendants' offenses is inappropriate. See *State v. Heath*, 21 Kan. App. 2d 410, 418, 901 P.2d 29 (1995) (holding that disagreement with the classification of a crime by the legislature is not a substantial and compelling reason to depart from the presumptive sentence.)

The Court also acknowledged that the Kansas Legislature has recognized that some adult defendants do not possess a normal capacity to reason, which should be considered as mitigation in sentencing, even thought such diminished capacity is not a defense to the crime of conviction. See K.S.A. 2004 Supp. 21-4716(c)(1)(C). Consequently, to the extent that the sentencing court relied upon Haney's relative age, immaturity, or impaired judgment to justify a departure, the court's reasoning would provide a substantial and compelling reason to depart from the presumptive guidelines sentence.

The problem however is that the sentencing court improperly considered Haney's age, immaturity and impaired judgment with regard to the juvenile codefendant's sentence. The district court should have considered Haney's diminished capacity only to the extent of his relative age, immaturity, and impaired judgment as distinguished from the average *adult* offender. Therefore, the sentencing court erred when it based its sentencing determination solely upon Haney's age relative to the age of the juvenile codefendant when comparing the presumptive sentence for the defendant with the sentence imposed upon the juvenile codefendant.

The Court next looked at the degree of harm or loss involved in the crime as a mitigating factor. The district court relied upon the relative ages of the victim and Haney which implied that the harm to the victim was not as great because there was less disparity in age. To the extent sexual activity is encouraged by an underage victim, the legislature has provided for mitigation. See K.S.A. 2004 Supp. 21-4716(c)(1)(A). Likewise, the legislature and courts have considered the relative immaturity of an offender in providing for mitigation. See. K.S.A. 21-4716(c)(1)(C); *State v. Favela*, 259 Kan. 215, 237-38, 911 P.2d 792 (1996). Any other reliance upon age of a victim or defendant is improper and does not form a substantial and compelling basis to depart from presumptive sentence. The Court disagreed with the reasoning of the district court that the harm or loss occasioned by the rape in this case was less significant that a typical rape of its kind because of the relative ages of the victim and the defendant.

The Court next addressed the participation of the victim as a mitigating factor. The sentencing court relied upon the victim's role in the events leading up to the statutory rape as support for the departure. Specifically, it noted that the victim was an experienced drinker; the

alcohol had not been furnished by Haney; there were no threats, force, or weapons involved in Haney's conduct; and the victim requested Haney to wear a condom before engaging in sex with her. In *State v. Rush*, 24 Kan. App. 2d 113, 942 P.2d 55, *rev. denied* 262 Kan. 968 (1997), the Court of Appeals held that while a victim's active participation in sexual conduct was not a defense to statutory rape, aggressive conduct of a victim leading to sexual intercourse was a substantial and compelling reason to depart from a presumptive sentence for statutory rape. 24 Kan. App. 2d at 116. Since the record in this case contained evidence supporting conflicting interpretations of the victim's participation in the sexual activity for which Haney was convicted of statutory rape, and the absence of any threats or force used in commission of the offense, the Court upheld the district's reliance on this statutory factor in granting Haney's downward departure.

Finally the Court held that while a particular defendant's amenability to rehabilitation is not a substantial and compelling reason to depart from the guidelines by itself, a sentencing court may properly consider such evidence in the totality of the circumstances in determining the appropriate penalty to be imposed for a particular offense if other factors warrant departure.

The Court went on to evaluate the extent of the departure granted in light of the valid departure factors listed herein and held that no reasonable person would have departed from the presumptive sentence to such and extent when considering such factors and therefore the departure was excessive and an abuse of discretion. The sentence was vacated and the case was remanded for resentencing proportionate to the act committed.

See also ***State v. Ussery***, 34 Kan. App. 2d 250, ___ P.3d ___, (2005).

State v. Martin, 279 Kan. 623, ___ P.3d ___ (2005). Review of *State v. Martin*, 32 Kan. App. 2d 642, 87 P.3d 337 (2004) above. The single issue before the court was whether the defendant's role as "boss," "kingpin," or "ringleader" was a valid upward dispositional departure factor. The issue was one of first impression for the appellate courts. The Court of Appeals discussed *State v. Adames*, 631 So. 2d 98 (LA. App. 1994), and *Fletcher v. State*, 508 So. 2d 506 (Fla. Dist. App. 1987), as supporting Martin's sentencing departure. It also found support for the upward departure in the Kansas statutory scheme. Noting that K.S.A. 2003 Supp. 21-4716(c)(2) does not include an aggravating factor relating to a defendant's role as a ringleader but that 21-4716(c)(1)(B) identifies the defendant's playing a minor or passive role in the crime as a mitigating factor, the Court of Appeals concluded that the latter subsection could be interpreted as supporting greater punishment for the leader of a criminal enterprise.

The Supreme Court disagreed with the majority in the Court of Appeals and agreed with the reasoning of the dissenting judge. K.S.A. 2003 Supp. 21-4716(c)(1)(B) specifically lists the defendant's playing a minor or passive role in the crime as a mitigating factor, but 21-4716(c)(2) says nothing about the defendant's ringleader status being an aggravating factor. Because the legislature expressly identified a minor or passive role as a mitigating factor does not mean that it follows that the ringleader role, although unmentioned, is an aggravating factor. On the contrary, the legislature's expressing the one and failing to express the other is correctly construed as an indication that the legislature did not intend the other. Therefore, the Court reversed the decision of the district court to impose an upward dispositional departure and the decision of the Court of Appeals affirming the district court, vacated the upward dispositional departure sentence, and remanded the matter for resentencing.

DEPARTURE SENTENCING (DEPARTURE HEARING)

State v. Gideon, 257 Kan. 591, 894 P.2d 850 (1995). The offender was sentenced to an upward departure with a controlling term of 716 months for aggravated kidnapping, rape, and aggravated criminal sodomy. This was in addition to the "Hard 40" sentence imposed for his conviction of first- degree murder.

The Court found the offender did not show that he was denied notice and reasonable opportunity to be heard on departure issues where the statute in effect at the time [K.S.A. 1993 Supp. 21-4718(a)] did not expressly require the State to specify the grounds upon which departure was sought and where the offender did not object at the sentencing court that the State's notice of departure was insufficient. The Court notes the statute was amended by the 1994 legislature to require that the reasons for departure be stated in a departure motion. The Court further found while it is error to use a factor (in this case, future dangerousness) for an upward departure sentence and the offender has not received notice of it until it is presented at the sentencing hearing, the error will not be reversible unless the offender makes some proffer of the evidence that would be presented to refute the factor. In any event, the Court held, the other reasons for departure given by the sentencing court were supported by the evidence and constituted substantial and compelling reasons for an upward departure.

State v. Rodriquez, 23 Kan. App. 2d 559, 933 P.2d 164 (1997). The offender filed a motion for a dispositional and durational departure sentence. At the sentencing hearing the offender's counsel stated he could incorporate his arguments for departure with his comments regarding sentencing. The sentencing court denied the motion for departure sentence. On appeal the offender contended the sentencing court did not have authority under K.S.A. 21-4718(a)(1) to hold the departure hearing in conjunction with the sentencing. The Court held K.S.A. 1994 Supp. 21-4718(a) requires a motion for departure be heard and resolved prior to sentencing after both parties have adequate time to prepare for the departure hearing, but is silent as to whether the departure hearing can be combined with the sentencing hearing. The offender's counsel agreed to a combined hearing by stating before the sentencing she was prepared to argue the departure motion.

The offender also argued that the joint hearing resulted in prejudice to the offender because the sentencing court had knowledge of and could consider the offender's criminal history in denying offender's motion to depart. The Court found no error in the sentencing court having knowledge of the offender's criminal history when denying a departure motion. The sentencing court gave the presumptive sentence based on the offender's criminal history after concluding there was no substantial and compelling reason to depart. For the Court to find the offender is entitled to an appeal based on prejudice by the sentencing court denying the offender's motion to depart, the offender must argue the sentencing court was presented with a substantial and compelling reason to depart.

CONSECUTIVE AND CONCURRENT SENTENCES (GENERAL ISSUES)

State v. Dillard, 20 Kan. App. 2d 660, 890 P.2d 1248 (1995). A consecutive sentence is

mandated when felony probation is revoked because of a new felony conviction and sentence. See K.S.A. 1994 Supp. 22-3716(b). However, when misdemeanor probation is revoked because of a subsequent conviction and sentence for a new felony, the mandatory consecutive sentencing provisions are not applicable.

See also ***State v. Howard***, 20 Kan. App. 2d 252, 885 P.2d 1273 (1994).

State v. McCallum, 21 Kan. App. 2d 40, 895 P.2d 1258, *rev. denied*, 258 Kan. 861 (1995). The legislature has specified a limit on the length of consecutive sentences under K.S.A. 1993 Supp. 21-4720(c)(3), which prevents manifest injustice. Unless that limit is exceeded, the sentencing court's decision to impose consecutive sentences cannot result in manifest injustice.

State v. Manning, 24 Kan. App. 2d 506, 947 P.2d 452 (1997), *rev. denied*, 263 Kan. 452 (1998). Manning pled guilty to a theft that occurred while Manning had either been on parole, or had escaped from custody, for convictions in Missouri. The State claimed that whether Manning was on parole or an escapee the sentencing court was required to sentence Manning to consecutive sentences under K.S.A. 21-4608(c). The sentencing court agreed and Manning was sentenced to a term to run consecutively to the sentences Manning had received in Missouri. Manning appealed, claiming that the sentencing court had discretion on whether to sentence him concurrently or consecutively under K.S.A. 21-4608(h).

The Court held that while K.S.A. 21-4608(c) does not expressly include one who has escaped from custody, an offender on parole from a felony should not be rewarded by his own illegal act of escaping. The Court concluded that the failure to expressly include a convict on escapee status in K.S.A. 21-4608(c) and K.S.A. 21-4608(e) does not prevent the statues from operating to require the sentencing court to order consecutive sentences for an offender who commits a crime after escaping from custody.

State v. Koehn, 266 Kan. 10, 966 P.2d 63 (1998). While on felony probation for three other criminal convictions, the offender committed new crimes. His probation was revoked, and he was sentenced on the new crimes. In response to the issues brought on appeal by the offender, the Court held: (1) When probation is revoked and an offender is sentenced on a new conviction on the same date, the provisions of K.S.A. 21-4608(c) (which require the new sentences to be run consecutive to the old sentence) control rather than the language found at K.S.A. 21-4608(a); (2) The sentencing court is not required to give reasons for denying departure to an offender under K.S.A. 21-4718(a)(2); (3) Revoking probation and sentencing an offender on a new conviction on the same day is not a “multiple conviction case” under K.S.A. 21-4720(b).

State v. Long, 26 Kan. App. 2d 644, 993 P.2d 1237 (1999). The offender was sentenced to a controlling term of 1,487 months imprisonment based on his criminal history category of “A” and his convictions for five counts of rape, two counts of aggravated criminal sodomy and one count of aggravated burglary, all of which were sentenced to run consecutively. The offender argued, in part, on appeal that running his sentences consecutively in this case constituted cruel and unusual punishment under both the United States and Kansas Constitutions. On this issue the Court stated in part: “Where each of the multiple sentences imposed is within the appropriate presumptive sentence, and a claim of cruel and unusual punishment is based solely upon the running of some of the sentences consecutively, it is held an appellate court lacks jurisdiction to determine the issue.” The Court determined that it lacked jurisdiction to determine this issue in the offender’s case, but the Court added, “even if we were to determine the issue, it has no merit.”

State v. Ramos, 271 Kan. 520, 24 P.3d 95 (2001). The offender was convicted of first-degree felony murder, criminal discharge of a firearm at an occupied dwelling and criminal possession of a firearm. The offender was sentenced to serve consecutive sentences for the first two convictions and the offender appealed. The offender argued that the two crimes had merged because they were both based upon the same facts and thus the consecutive sentences violated the constitutional prohibition against double jeopardy.

The offender alleged there was a conflict between the rulings in *State v. Rayton*, 268 Kan. 711, 1 P.3d 854 (2000) and *State v. Smallwood*, 264 Kan. 69, 955 P.2d 1209 (1998). The Court pointed out that in *Smallwood* (where the offender had been convicted of felony murder and two counts of child abuse resulting from a single episode of child abuse), the act of shaking the child was also the basis for the child's death. In that case the two offenses merged and consecutive sentences for both offenses violated the constitutional prohibition against double jeopardy. However, in *Rayton*, the criminal discharge of a firearm did not merge into the felony murder charge because these two crimes are separate and distinct offenses that require proof of different elements. Since there was no merger in *Rayton*, there was no violation of double jeopardy by sentencing that offender consecutively for both of his convictions and thus the Court affirmed both the offender's convictions and his sentence.

State v. Bramlett, 273 Kan. 67, 41 P.3d 796 (2002). The offender pled guilty to seven sex crimes. The sentencing court ordered four of the seven sentences to run consecutively. The offender appealed. The Court of Appeals, in an unpublished opinion filed August 3, 2001, held that it had no jurisdiction because the sentence was within the presumptive range of the guidelines and also rejected the argument that the consecutive sentences were unconstitutional under *Apprendi*. A Petition for Review was then filed.

The Supreme Court noted that presumptive sentences are not subject to appellate review. However, the issue of the constitutionality of the consecutive sentences involved a question of law over which the Court had unlimited review.

In its opinion, the Supreme Court stated in part: "Here, unlike *Gould*, the district court imposed a presumptive sentence for each count within the applicable grid box. The highest level of felony for which Bramlett was convicted was rape, a level one felony. He received the maximum sentence in the applicable grid box (165 months). Bramlett contends that the district court erroneously increased his sentence for rape beyond 165 months by imposing consecutive sentences for his other crimes. Bramlett's argument is not persuasive.

The district court did not exceed the maximum KSGA sentence for any individual count. Therefore, it cannot be said that, as to any individual count, the court's findings resulted in the imposition of a greater punishment than was authorized by the jury's verdicts. See *Apprendi*, 530 at 494."

State v. Campbell, 273 Kan. 414, 44 P.3d 349 (2002). Refer to the Syllabus. Syl. ¶ 2. "K.S.A. 22-3424(c) provides that if the verdict or finding is guilty, judgment shall be rendered and sentence pronounced without unreasonable delay, allowing adequate time for the filing and disposition of post-trial motions and for completion of such presentence investigation as the court may require."

Syl. ¶ 4. "When a defendant is convicted on several counts, a single judgment should be pronounced declaring the full measure of punishment to be imposed for all offenses." Syl. ¶ 5. "… Where it can be shown that the defendant was fully aware of his or her right to appeal, or was fully advised of his or her right to appeal by counsel at the time of sentencing, a waiver of that right may be established. A knowing and voluntary waiver by the defendant of his statutory right to appeal is generally enforceable."

CONSECUTIVE AND CONCURRENT SENTENCES (THE "DOUBLE" AND "DOUBLE- DOUBLE" RULES)

State v. Peterson, 22 Kan. App. 2d 572, 920 P.2d 463, *rev. denied*, 260 Kan. 1000 (1996). While the Court reversed the offender's sentence due to the sentencing court's failure to state its reasons for departure, the Court construed the "double-double" rule under K.S.A. 21-4720(b)(4) and found that the sentencing court properly calculated the offender's departure sentence under that rule, which authorizes a sentencing court to impose maximum consecutive sentences up to twice the departure sentence imposed for the primary crime.

State v. McCurry, 32 Kan. App. 2d 806, 89 P.3d 928 (2004), *rev'd*, 279 Kan. 118, 105 P.3d 1247 (2005). The offender had three separate cases consolidated for trial. The offender was convicted of three counts of aggravated robbery and one count of kidnapping. The offender received a sentence of 653 months incarceration and appealed the sentence. The Court of Appeals reversed the kidnapping conviction and remanded the case for resentencing based on the incorrect use of the offender's criminal history score. *State v. McCurry*, case no. 84,856, unpublished opinion filed November 16, 2001.

On remand, the district court sentenced the offender to 64 months incarceration for each of the three aggravated robbery convictions, for a controlling term of 192 months incarceration. The offender filed a pro se motion to correct an illegal sentence, arguing that his maximum sentence could not exceed 128 months, twice the base sentence, under 21-4704 because all three cases were consolidated for trial.

After reviewing several cases interpreting K.S.A. 21-4720(b)(4) and the legislative intent behind that statute the Court concluded the double rule in K.S.A. 21-4720 (b)(4) applies to cases consolidated for trial. Therefore, the Court vacated the offender's sentence and remanded for resentencing.

NOTE: The Supreme Court reversed the Court of Appeals and district court rulings in ***State v. McCurry***, 279 Kan. 118, 105 P.3d 1247 (2005). The Court held that the plain language of the statute only affected multiple counts within "an" information. The Court also noted that, with regard to criminal history, the Legislature had expressly delineated that convictions obtained in a consolidated trial were not "prior convictions." The Court rejected the defendant's assertion that separate complaints tried together pursuant to K.S.A. 22-3202(l) merge into one complaint and held that the double rule does not apply to cases consolidate for trial.

CONSECUTIVE AND CONCURRENT SENTENCES (MULTIPLE CONVICTION CASES)

State v. Bowen, 20 Kan. App. 2d 576, 890 P.2d 374 (1995). Under K.S.A. 1993 Supp. 21-4720, base sentences and nonbase sentences must be established when imposing consecutive sentences. Base sentences will have the full criminal history score assigned, nonbase sentences will be calculated in the criminal history "I" category.

State v. Riley, 259 Kan. 774, 915 P.2d 774 (1996). The Court interprets K.S.A. 21-4720(b) to mean that in a multiple conviction case "… a trial court should determine the primary crime, a base sentence by applying the defendant's total criminal history to that primary crime, the nonbase sentences for the remaining crimes without any criminal history, whether to run the base and nonbase sentences consecutively or concurrently, and then the maximum possible consecutive sentence under the double rule limit." At Syl. ¶ 7.

State v. Reed, 23 Kan. App. 2d 661, 934 P.2d 157, *rev. denied*, 262 Kan. 968 (1997). Prior to July 1, 1993, the offender was convicted of two felony counts and three misdemeanor counts of contributing to a child's misconduct or deprivation. The offender received consecutive terms of 1 to 5 years imprisonment for each felony count and a 1 year imprisonment for each misdemeanor count. Upon the offender's motion to convert his pre-guidelines sentence, the sentencing court sentenced the offender to 11 months imprisonment for each felony and 1 year sentences for each misdemeanor. The sentencing court then ordered consecutive sentences.

The Court held the offender's sentence was illegal because the sentencing court failed to use criminal history category "I" to compute the nonbase felony sentence. Then the Court considered whether K.S.A. 21-4720(b)(4), which limits the duration of the sentence imposed in a multiple conviction case to twice the base sentence, also applies to limit the duration of consecutive misdemeanor convictions within that case. The Court held both the 1993 and 1994 versions of K.S.A. 21-4720(b)(4) precluded application of the "double" rule to limit consecutive misdemeanor convictions in the same case. An offender may be sentenced to consecutive terms for multiple misdemeanor convictions in addition to any sentence imposed pursuant to K.S.A. 21-4720(b)(4) for multiple felony convictions.

State v. Christensen, 23 Kan. App. 2d 910, 937 P.2d 1239 (1997). Christensen was sentenced on two felony and one misdemeanor drug charges. The sentencing court sentenced Christensen to two prison sentences for the felony charges, to run consecutively and then sentenced Christensen to jail for the misdemeanor charge, to run concurrently to the felony sentences. At both the plea hearing and the sentencing, the State informed the sentencing court that because Christensen was out on bond when she committed the second offense, the law required that the sentences run consecutively. The sentencing court ordered the two felony sentences to be served consecutively without stating on the record that it was exercising its discretion in doing so.

On appeal Christensen argued in part that the sentencing court erred in concluding that consecutive sentencing was mandatory because Christensen had committed one of the felony drug offenses while on bond for the other felony drug offense. Christensen also argued that the sentences were illegal because the sentencing court imposed her sentence based on an erroneous view of the law.

Citing *State v. LaGrange*, 21 Kan. App. 2d 477, 901 P.2d 44, *rev. denied*, 258 Kan. 861 (1995), the Court held that under K.S.A. 21-4608(a) the sentencing court must exercise its discretion on the record when it determines that separate crimes sentenced on the same date will run consecutively. Further, the Court in *LaGrange* held that a sentence imposed under the mistaken belief that consecutive sentences are mandatory must be vacated and remanded for sentencing. See 21 Kan. App. 2d at 484-85. Following the rulings from *LaGrange*, the Court ordered Christensen's sentences vacated and the case remanded for resentencing, with the instruction to the sentencing court that if it orders the sentences to be served consecutively, it should clearly indicate on the record it is exercising its discretion in doing so.

Next, Christensen argued that the sentencing court erred by imposing a dispositional departure without making findings of substantial and compelling reasons for the departure. The Court stated that the "crucial question" was whether K.S.A. 21-4720(b)(6) applies so that the sentence is not a dispositional departure. The Court held that K.S.A. 21-4720(b)(6) applies to sentencing in multiple conviction cases regardless of whether the crimes were charged in one document or several.

In regards to the issue of whether Christensen may be sentenced to a prison sentence for an otherwise non-prison offense without the prison sentence being considered a departure, due to the fact that the offense was committed when Christensen was on bond, the Court held that under *State v. Arculeo*, 261 Kan. 286, 933 P.2d 122 (1997), Christensen's bond status did not authorize the imposition of a prison term in a presumptive probation case without a departure.

NOTE: The Supreme Court overruled the language of this decision which conflicted with Syl. ¶ 2 of ***State v. Bolin***, 266 Kan. 18, 968 P.2d 1104 (1998).

State v. Bolin, 266 Kan. 18, 968 P.2d 1104 (1998). Resolving the conflict between the decisions in the cases of *State v. Bolin*, 24 Kan. App. 2d 882, 955 P.2d 130 (1998) and *State v. Christensen*, 23 Kan. App. 2d 910, 937 P.2d 1239 (1997) concerning the proper application of K.S.A. 21-4720(b) when sentencing "multiple conviction cases," the Court extended the holding from *State v. Roderick*, 259 Kan. 107, 911 P.2d 159 (1996) and stated in part: "A multiple conviction case is a case involving multiple crimes arising under a single charging document. The definition applies for all provisions of K.S.A. 21-4720(b). *Bolin* is affirmed. We disapprove of the conflicting language in *Christensen*..." 266 Kan. at 19.

Bolin had pled guilty to two counts of forgery in a 1994 case, and on the same date, in the same sentencing court had also pled guilty to three counts of vehicle burglary and one count of felony obstruction in another case. The sentencing court sentenced Bolin first on the 1994 case, assigning a primary crime and a criminal history score of "E," with each of the nonprimary crimes being sentenced at criminal history score "I". The court then sentenced Bolin on the separate case involving the vehicle burglary and felony obstruction charges. Again, the court assigned a primary crime and a criminal history score of "E" and sentenced the remaining nonprimary crimes at criminal history score "I". Bolin later filed a motion to correct an illegal sentence claiming that the sentencing court had erred by applying his full criminal history to his burglary/obstruction sentence.

Bolin contended that under K.S.A. 21-4720(b)(5) and the holding in *Christensen*, that his full criminal history score should have been applied only to the primary crime in his 1994 forgery case, and that the criminal history score for all his other crimes, including those in the separate burglary/obstruction case, should have been sentenced at criminal history score "I". The

Court of Appeals rejected Bolin's argument and reasoned that under the rationale of *Roderick*, K.S.A. 21-4720(b)(5) applies only to "multiple counts within *an* (the same) information, complaint, or indictment." *Bolin*, 24 Kan. App. 2d at 885. The Supreme Court concurred and approved the Court of Appeals decision in *Bolin.*

City of Wichita v. Cook, 32 Kan. App. 2d 798, 89 P.3d 934, *rev. denied*, 278 Kan. 843 (2004). The offender appealed his convictions for battery, battery of a law enforcement officer, and two counts of resisting arrest. The offender was convicted of all charges in municipal court and appealed to district court where he was convicted of all charges after a jury trial. The offender appealed criticizing the jury instructions.

After review of the facts of this case, the Court affirmed the convictions for battery, battery or a law enforcement officer and one count of resisting arrest. The Court concluded that the offender's resistance was a single, ongoing event and that the offender could only be convicted of one resisting arrest charge from that incident.

SPECIAL APPLICATIONS TO SENTENCING (CAPITAL MURDER)

State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (2001), *cert. denied*, 537 U.S. 834 (2002). In a case of first impression that addressed the constitutionality of the Kansas capital murder statute, the Court unanimously affirmed the offender's capital murder conviction, however, it vacated the offender's death sentence and remanded the matter for resentencing before a newly impaneled jury that could still reinstate the offender's death sentence.

The offender had raised 51 main issues on appeal along with numerous sub-issues. The Court's holdings as they applied to the sentencing issues of a capital murder case are as follows:

1) The wording of the second special jury verdict form was faulty in that it had the confusing effect of requiring that the death penalty apply even when the aggravating and the mitigating circumstances are found by the jury to be in equal balance. On this issue the Court was unanimous. However, the specific requirement of K.S.A. 21-4624(e) that if aggravating circumstances were found but "not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death." was decided on a 4-3 decision. This "weighing equation" portion of the statute was held to violate the Eighth Amendment prohibitions against cruel and unusual punishment and also the guarantee of due process. The Court provided substitute language for the second jury verdict form that is to be used in all death penalty cases.

2) That portion of K.S.A. 21-4624(e) that requires the application of the "weighing equation" was held to be unconstitutional. However, the statute itself is not void on its face but only in its application.

3) The death penalty statute (K.S.A. 21-4624) is not in violation of the Eighth Amendment prohibition against cruel and unusual punishment.

4) The Court also noted in its opinion that the net cumulative effect of the prosecutorial misconduct in this case might have provided another basis for reversal and the Court provided comments on prosecutorial misconduct for the benefit of future capital murder trials.

NOTE: In the Syllabus portion of its opinion (88 numbered paragraphs), the Court addressed the specific sentencing related issues that needed to be considered in this capital murder sentence case. Please refer to numbered paragraphs: 30; 31; 36; 37; 43; 44; 45; 47; 48; 50; 51; 52; 53; 54; 55; 56; 57; 58; 60; 62; 63; 64; 65; 66; 67; 68; 69; 70; 71; 74; 79; 83; 85; 86 and 88 for the specifics. The remainder of the opinion (338 pages) deals with each of these issues in detail.

A Motion for Rehearing or Modification was denied by the Court on 02/05/02. A Petition for Writ of Certiorari was filed by the offender on 05/03/02 with the United States Supreme Court but was denied on 10/07/02.

***State v. Marsh*,** 278 Kan. 520, 102 P.3d 445 (2004).
FACTS: The offender was convicted of capital murder, first-degree premeditated murder, aggravated arson and aggravated burglary. The offender was sentenced to death for the capital murder conviction, hard 40 for the first-degree premeditated murder conviction, 51 months for aggravated arson conviction and 34 months for aggravated burglary conviction. The district court ordered the last three sentences to run consecutively.

SENTENCING ISSUE: Constitutionality of K.S.A. 21-4624 (e) and the hard 40 sentence.

HELD: The Court affirmed the offender's convictions and sentences for aggravated burglary and premeditated murder and reversed and remanded for a new trial on the capital murder and aggravated arson convictions.

The Court determined that the death penalty statute, K.S.A. 21-4624, is unconstitutional because subsection (e) required the jury to impose the sentence of death if the jury found the aggravating circumstances and mitigating circumstances were equal when deciding whether to sentence an offender to death.

The hard 40 sentence in K.S.A. 2003 Supp. 21-4635(a) is constitutional. The imposition of the hard 40 sentence does not increase the statutory maximum punishment a judge may impose, which is life imprisonment. The hard 40 sentence sets the minimum punishment for parole eligibility. The imposition of the hard 40 sentence is not unconstitutional as a violation of the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

SPECIAL APPLICATIONS TO SENTENCING (K.S.A. 21-4603d SPECIAL RULE)

State v. Howard, 20 Kan. App. 2d 252, 885 P.2d 1273 (1994). Under K.S.A. 1993 Supp. 22-3716(b), where an offender commits a new felony while on assignment to community corrections for a prior offense, the sentencing court may sentence the offender to imprisonment for the new conviction even when the new crime of conviction presumes a nonprison sentence.

State v. Fischer, 22 Kan. App. 2d 568, 919 P.2d 368 (1996). Because juvenile adjudications are not criminal convictions, K.S.A. 21-4603d is inapplicable to offenders who are on probation for a juvenile adjudication when they commit a felony. Under K.S.A. 21-4603d, "probation" refers to offenders who have been convicted of a felony and who have been placed on probation for that crime.

State v. Burrows, 23 Kan. App. 2d 342, 929 P.2d 1391, *rev. denied*, 261 Kan. 1087 (1997). The offender pled guilty to three counts of burglary. The sentencing court found the offender committed these crimes while incarcerated, as an "escapee" subject to a warrant and detainer issued by the state of Oklahoma. The sentencing court ordered imprisonment rather than probation, exercising the option provided under K.S.A. 21-4603d. The offender appealed the sentencing court's decision to impose a prison sentence. He argued the prison sanction imposed was neither a presumptive sentence nor a departure sentence but an exercise of unlimited judicial discretion that is subject to appellate review. The Court held for the purposes of an appeal, the imposition of either incarceration or probation is the imposition of a presumptive sentence under K.S.A. 21-4603d, when the offender commits the felony while an "escapee" from custody supervision for a prior felony offense.

State v. Arculeo, 261 Kan. 286, 933 P.2d 122 (1997). At the time the offender committed the crime, he was under bond supervision awaiting sentencing for felony convictions in two other counties. The sentencing court used the option provided by K.S.A. 21-4603d to sentence the offender to a prison term rather than the presumptive probation sentence his crime would carry, by construing "conditional release" as used in this statute to include the offender's release on bond pending sentencing for prior felony convictions.

The offender argued on appeal that the prison sentence was a departure sentence imposed without the required finding of substantial and compelling reasons to depart. The Court of Appeals affirmed the sentencing court, concluding the legislature intended a broader meaning for "conditional release" under Chapter 21 than the narrow definition provided in K.S.A. 22-3718. In K.S.A. 22-3718, "conditional release" is defined as the release status of an inmate who has served the inmate's maximum term less good time credits earned, subject to the rules and conditions imposed by the parole board.

The Supreme Court disapproved the Court of Appeals' expanded definition of "conditional release". Focusing on the statutory scheme of K.S.A. 21-4603d, the Court noted each of the other five categories under that statute designated a status in which the offender was under sentence for a felony when the new felony was committed. Expanding "conditional release" under K.S.A. 21-4603d to include an offender not yet sentenced, was inconsistent with the statutory scheme and also contrary to the definition of the term in K.S.A. 22-3718. A sentencing court cannot impose a prison sentence for a felony where the presumptive sentence is probation when the offender commits the felony while released on bond pending sentencing for a prior felony conviction.

NOTE: This case reversed *State v. Arculeo*, 22 Kan. App. 2d 91, 911 P.2d 818 (1996).

State v. Williams, 24 Kan. App. 2d 447, 946 P.2d 98 (1997). The Court held under the mandatory provisions of K.S.A. 1996 Supp. 21-4603d(a)(10), a sentencing court is required prior to the revocation of a nonprison sanction of an offender whose offense is classified in the presumptive nonprison grid block of either sentencing grid, to consider placement of the offender in the Labette Correctional Conservation Camp on the terms set forth in the statute. A failure to do so will require the Court to reverse the revocation and remand the matter for a new hearing.

State v. Marsh, 263 Kan. 773, 952 P.2d 933 (1998). The provision of K.S.A. 1996 Supp. 21-4603d(a) allowing an offender to be sentenced to prison without a departure when the new felony is committed while the offender is incarcerated even though the new crime otherwise presumes a nonprison sentence, applies only if the offender is serving a sentence for a felony when the new felony is committed. Under the admitted facts in this case, the offender was not serving a sentence for a felony while incarcerated when a new felony was committed and the sentence for the new crime of conviction was a presumed nonprison sentence. Therefore the sentencing court may not sentence the offender to imprisonment without the proper imposition of a departure sentence.

State v. Billington, 24 Kan. App. 2d 759, 953 P.2d 1059 (1998). In cases where the sentencing court intends to depart, the court must give notice to the parties of the court's intent and the reasons and factors relied upon, even if the crime took place prior to the 1994 amendments to the KSGA. Failure to consider placing an offender at Labette will be grounds for resentencing. The Court discussed the rules relating to the notice to be given by a sentencing court to impose an upward departure sentence. The offender contended on appeal that under the 1994 amendments to K.S.A. 21-4718(b), a sentencing court's notice of intent to depart must state the type of departure intended by the court and the reasons and factors relied upon. The offender argued that the sentencing court had failed to follow the 1994 rule in this case. The offender stated that because his revocation hearing took place after the 1994 amendments became law, the sentencing court was bound to comply with the amended language of K.S.A. 21-4718(b) even though the offender's original crime had taken place prior to 1994.

The Court concluded the 1994 amendments to K.S.A. 21-4718(b) were *procedural* changes only and thus, under the holding in *State v. Sylva*, 248 Kan. 118, 119, 804 P.2d 967 (1991) the 1994 amendments to K.S.A. 21-4718(b) must be applied retroactively. On a separate issue the Court found that the offender's prior act of having absconded from a halfway house while on bond for over two (2) years constituted a substantial and compelling reason for departure.

Finally, the Court held that the sentencing court's failure to consider placing offender in the Labette Correctional Conservation Camp required that the sentence imposed on the offender be vacated and the matter remanded for resentencing. The Court ruled the 1994 amendment to K.S.A. 21-4603d concerning the consideration of placing offenders in the Labette Correctional Conservation Camp were procedural in nature and thus do apply retroactively.

See also ***State v. Williams***, 24 Kan. App. 2d 447, 946 P.2d 98 (1997).

NOTE: The requirement for a sentencing court to consider placement at Labette applies to women as well as to men.

State v. Schick, 25 Kan. App. 2d 702, 971 P.2d 346 (1998), *rev. denied*, 266 Kan. 1114 (1999). The Court held "K.S.A. 1996 Supp. 21-4603d(a) requires when the sentencing court imposes an imprisonment sentence on an offender who falls within a nondrug border box classification, it must state for the record that it has considered placement at the Labette Correctional Conservation Camp."

State v. Martin, 270 Kan. 603, 17 P.3d 344 (2001). The offender pled guilty to possession of marijuana with intent to sell and no tax stamp. These offenses were committed in March 1997. Prior to sentencing in May 1999, the offender applied for and received preliminary acceptance to

the Labette Correctional Conservation Camp (Labette). The offender's criminal history score was a category "H" with a severity level 3 on the drug sentencing grid, which placed him in a border box classification.

K.S.A. 1997 Supp. 21-4603d(e) authorized the sentencing court to consider placement at Labette if three specific conditions were met. At sentencing, the court declined to sentence the offender to Labette, citing the amount of marijuana involved (37 pounds) and instead ordered a 26 months prison term. The Kansas Department of Corrections (KDOC) placed the offender in Labette pursuant to K.S.A. 21-4603d(e) and before the offender had graduated from Labette, the KDOC advised the sentencing court that in compliance with K.S.A. 21-4703d(e) the sentencing court was to order the offender be released to community corrections.

The sentencing court set a hearing date to address the constitutionality of K.S.A. 21-4603d(e) and held that K.S.A. 1998 Supp. 21-4603d(e) was an unconstitutional violation of the separation of powers doctrine. The sentencing court refused to release the offender to community corrections and the offender then appealed. Jurisdiction for the appeal was granted pursuant to K.S.A. 22-3602.

In that the offender committed the offenses in March 1998, the Court found that the criminal statutes and penalties in effect at the time of the criminal act are controlling. Thus, K.S.A. 1997 Supp. 21-4603d applied, not K.S.A. 1998 Supp. 21-4603d, or K.S.A. 1999 Supp. 21-4603d. The change in this statute (K.S.A. 1999 Supp. 21-4603d) that the KDOC had sought to apply occurred after the date of the crimes. Whether or not the 1999 version of the statute was procedural and retroactive determined if the 1999 version was before the sentencing court. The Court stated in part: "The prescription for punishment at the time of Martin's criminal act was provided by K.S.A. 1997 Supp. 21-4603d and K.S.A. 1997 21-4705(d). Under those statutes, Martin's imprisonment was not a departure. K.S.A. 1999 Supp. 21-4603d(e) prescribes the punishment for the criminal act; therefore, it is substantive and cannot be applied retroactively to Martin. The district court did not have the power to modify Martin's sentence and the issue of the constitutionality of K.S.A. 1998 21-4603d(e) was not properly before the court. Martin was required to serve the sentence as imposed."

State v. Allen, 28 Kan. App. 2d 784, 20 P.3d 747 (2001). The offender pled guilty to two counts of vehicular battery and one count of felony theft. The presentence investigation report indicated three municipal misdemeanor battery convictions that were then combined into one person felony for criminal history purposes, moving the offender from a category "E" to a "C" on the nondrug grid. The offender was sentenced consecutive terms of 13, months, 7 months and 6 months.

This matter had been appealed once before and then remanded back to the sentencing court to determine if an ineffective assistance of counsel issue regarding the inclusion of the three misdemeanors into the offender's criminal history. In addition, the sentencing court was also supposed to determine if the offender could be sentenced pursuant to K.S.A. 1999 Supp. 21-4603d since the offender had been placed on parole by the State of California.

The Court noted the sentencing court's refusal to hear evidence or to make factual findings, which prevented the Court from having a sufficient record to review the issue of ineffective assistance of counsel. The Court reviewed the law of the right to counsel in a municipal court case and how it applied to each of the offender's misdemeanor convictions. The Court held the offender had the right to collaterally attack one of the misdemeanor convictions

because the municipal court record was unclear whether or not the offender knowingly and intelligently waived the right to counsel. The Court specifically referred to the fact the offender had served time resulting from his conviction and that the stamping of the word "Waiver" on the Journal Entry was not enough to explain what rights the offender waived.

As for the issue involving K.S.A. 1999 Supp. 21-4603d (a)(11), the Court followed the reasoning in *State v. Aleman*, 16 Kan. App. 2d 784, 830 P.2d 64, *rev. denied*, 251 Kan. 940 (1992). In *Aleman* the Court held that our statute was meant to treat all people the same "regardless of the location of the releasing authority" that granted an offender probation or parole. The matter was upheld as to the K.S.A. 1999 Supp. 21-4603d issue but was remanded to determine if the offender's sentencing counsel was deficient.

State v. Adams, 29 Kan. App. 2d 589, 30 P.3d 317, *rev. denied*, 272 Kan. 1419 (2001). The offender had been assigned to a community corrections program after he had pled guilty to two counts each for burglary and theft. While in the community corrections program, the offender left for a job search one day, failed to return and was arrested 7 days later. The offender was then convicted by a jury of aggravated escape from custody, had his community corrections assignment revoked and was then sentenced to the presumptive sentence of imprisonment for the new felony conviction.

The offender appealed raising the issue that the sentencing court had failed to consider the Labette Correctional Conservation Camp (Labette) before revoking the community corrections assignment and imposing a sentence of imprisonment. This involved an issue of first impression because the revocation of the nonprison sanction was based upon the offender's commission of the new felony. The Court reviewed K.S.A. 2000 Supp. 21-4603d(a) and also *State v. Williams*, 24 Kan. App. 2d 447, 946 P.2d 98 (1997) before holding that *Williams* was distinguishable. In *Williams* the offender failed to follow the procedural terms of her community corrections program, while here the offender had committed a new felony offense.

The Court stated in part: "… The language in K.S.A. 2000 Supp. 21-4603d(a) concerning commission of a new felony while on community corrections was not applicable in Williams. Here, K.S.A. 2000 Supp. 21-4603d(a) eliminates any presumptive probation classification for sentencing of Adams' new felony. To require the trial court to consider sending a defendant to Labette when revoking community corrections for commission of a felony where an imprisonment sentence is a presumptive sentence is not consistent."

In determining the legislative intent embodied in K.S.A. 2000 Supp. 21-4603d, the Court held when all of the provisions of this statute are considered for the intended purposes that the statute was meant to accomplish, a sentencing court is not required to consider placement in Labette before revoking probation when a new felony is committed while in a community corrections program.

NOTE: The Petition for Review filed in ***State v. Morrison*** (No. 84,823, filed 02/09/01) was withdrawn on 10/15/01. The Motion to Publish was denied on 09/25/01. ***Morrison*** remains an unpublished opinion and the reference to this case on Appendix A pages 46-47 of the 2001 Desk Reference Manual should be disregarded.

State v. Dreier, 29 Kan. App. 2d 958, 34 P.3d 480 (2001). The offender was convicted on August 8, 1997 and placed on probation. The probation was later revoked and the offender was ordered to serve his original prison sentence. The offender appealed based upon the

interpretation of two statutes for which an appellate court has unlimited review.

The Court first addressed the offender's K.S.A. 2000 Supp. 22-3716 retroactivity issue. This statute was amended as part of Senate Bill 323 that became effective on May 25, 2000. Subsection (b) requires a sentencing court to consider placement in a community corrections program first before imposing a prison sentence for an offender who violates conditions of probation. The Court stated in part: "The fundamental rule is that a statutory change operates prospectively except when (1) its language clearly indicates the legislature intended retroactive application, or (2) the statutory change does not prejudicially affect the substantive rights of the parties and is merely procedural or remedial in nature. *State v. Sutherland*, 248 Kan. 96, 106, 804 P.2d 970 (1991).

There is nothing in the language of K.S.A. 2000 Supp. 22-3716(b) which clearly indicates the legislature intended it to operate retroactively…" (Emphasis added.) The Court held that this statute did not apply because the offender committed his crime in 1997, before the 2000 amendment. However, the Court next noted that this statute would not require the sentencing court to consider placement in a community corrections program and said in part: "Even if K.S.A. 2000 Supp. 22-3716(b) did apply, the district court did not err. K.S.A. 2000 Supp. 22-3716(b) allows the district court to order the defendant to serve the original sentence imposed without a prior assignment to a community corrections services program "if the court finds and sets forth with particularity the reasons for finding that the safety of the members of the public will be jeopardized or that the welfare of the inmate will not be served by such assignment to a community correctional services program." In this case, the sentencing court made the finding that the "public safety requires defendant to be committed directly to the Department of Corrections."

Regarding the offender's argument that the sentencing court was required to consider placement at the Labette Correctional Conservation Camp (Labette) pursuant to K.S.A. 2000 Supp. 21-4603d(a), the Court noted: "The transcript of the sentencing proceeding reveals the district court did not state on the record that it had considered but rejected Labette as placement for Dreier." The Court then held the failure of the sentencing court to clearly consider the offender's placement at Labette on the record required setting aside the sentence and remanding the case back to the sentencing court for resentencing.

NOTE: The issue in ***State v. Adams***, 29 Kan. App. 2d 589, 30 P.3d 317, *rev. denied*, 272 Kan. 1419 (2001) involved the commission of a new felony following placement in a community corrections program while on probation, as opposed to a condition violation while on probation.

State v. Moody, 272 Kan. 1199, 38 P.3d 659 (2002). The offender entered a plea to the possession of cocaine with intent to sell and was sentenced to 36 months probation. This offense took place on June 10, 1995. The offender entered another plea to the possession of cocaine and a violation of the drug tax stamp statute and was sentenced to 24 months probation for each offense to be served consecutively to one another and also to the first sentence. These second two offenses took place on December 8, 1995.

On October 16, 1997 the offender tested positive for cocaine use and on April 4, 1998 the offender's probation was revoked due to her testing positive for cocaine and her admission to the use of marijuana. The Kansas Department of Corrections (KDOC) placed the offender into Labette on January 20, 2000 pursuant to K.S.A. 1999 Supp. 21-4603d(e) and the State filed a motion asking that the statute be declared unconstitutional and the offender's placement at

Labette be set aside. The KDOC intervened but the sentencing court held that the 1995 amendment to the statute wasn't in effect on June 10, 1995 and could not be applied retroactively.

The Court reviewed that history of K.S.A. 1999 Supp. 21-4603d and noted the first 1995 amendment was effective on April 20, 1995. The statute was amended a second time on May 17, 1995 but this second amendment did not affect the first amendment. However, it was the 1999 amendments to the statute were the basis for the sentencing court's determination that the statute was unconstitutional. The Court noted that the 1999 amendments prescribed a punishment for a criminal act, were substantive in nature, and could not be applied retroactively to this offender whose offenses were committed prior to the effective date of these amendments. The Court held the sentencing court did not have any jurisdiction to consider the issues that were raised and the constitutionality issue of the statute was not properly before the Court.

State v. Miller, 30 Kan. App. 2d 161, 41 P.3d 868 (2002). The offender pled to burglary of a nonresidential dwelling and was sentenced to 36 months probation, a $1,000 fine, $200 restitution and $500 costs and fees. The offender's probation was later revoked for violating his conditions of probation and although the sentencing court considered placement of the offender at Labette, decided the offender should serve his original sentence of 23 months imprisonment. The offender appealed both the imposition of the prison sentence and his $1,000 fine.

The offender relied upon the application of K.S.A. 1998 Supp. 21-4603d(a) and that the sentencing court did not consider placement in a community intermediate sanction center (CISC) before ordering the prison sentence. The Court held that the second sentence of this statute clearly states that a sentencing court must consider and state on the record the reason to reject each and every non-prison option before placing an offender in prison after revoking his/her probation. The offender's sentence was reversed and remanded for the sentencing court to determine on the record if a CISC exists and whether or not it is an appropriate placement for this offender.

The issue of whether or not the offender's fine was appropriate pursuant to K.S.A. 21-4607 was disposed of by the application of K.S.A. 22-3608. The offender did not appeal the fine within ten days of sentencing.

NOTE: In ***State v. Wiegand***, 275 Kan. 841, 69 P.3d 627 (2003), where the Supreme Court specifically stated that it disapproved of any language in this case that is contrary to its holding in ***Wiegand***. See Appendix A page 108.

State v. Tisdale, 30 Kan. App. 2d 524, 44 P.3d 835, *rev. denied*, 274 Kan. 1118 (2002). The offender was convicted of aggravated battery after waiving his right to a jury trial. Although the new offense fell within presumptive probation, the offender was on parole at the time of the offense and the sentencing court sentenced the offender to 27 months imprisonment. The offender appealed.

One of the questions presented to the Court on appeal was whether or not the offender's waiver of his right to trial by jury also waived his right to have a jury determine any aggravating factors that could apply to this dispositional departure sentence. The Court pointed out that K.S.A. 2001 Supp. 21-4603d(f) provides the basis for a sentencing court to chose imprisonment if a new offense is committed while an offender is on parole. Such a choice by the sentencing court is not a departure and the provisions of *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001)

would not apply.

State v. Beard, 274 Kan. 181, 49 P.3d 492 (2002). The offender entered into a plea agreement for two counts of possession of methamphetamine with prison terms of 23 months each to be served consecutively. The sentencing court sentenced the offender to imprisonment without complying with K.S.A. 1999 Supp. 21-4603d(a), which required the court to consider on the record, placement in a conservation camp or a community intermediate sanction center. The Department of Corrections (DOC) then placed the offender into Labette.

The State filed a motion to refile the charges that had been previously dismissed on the grounds that the offender had violated the plea agreement by making application for placement at Labette. In addition, the State also filed a motion seeking to have a portion of K.S.A. 1999 Supp. 21-4603d set aside as unconstitutional as a violation of the separation of powers doctrine. However, the motion to refile the charges was dismissed by the State because an offender who refuses placement at Labette would be subject to lose good time credits.

After the DOC notified the sentencing court that the offender was completing Labette the sentencing court then vacated the original sentence and resentenced the offender because Labette had not been considered at the original sentencing. The sentencing court also found K.S.A. 1999 Supp. 21-4603d(e) (now K.S.A. 2002 Supp. 21-4603d(l), see Chapter 19 of the 2002 Session Laws of Kansas) to be unconstitutional and the offender appealed.

The Court noted that placement in community corrections after being transferred into the custody of DOC is not probation. Placement in community corrections is distinct from probation or parole. See K.S.A. 2001 Supp. 21-4602(f) for the definition of "community corrections". The Court also stated in part: "Although K.S.A. 1999 Supp. 21-4603d(e) may lead to the result that a defendant who was affirmatively denied placement in a conservation camp by the district court might later be enrolled in one by the DOC to relieve the prison population, this is what the legislature intended in enacting the statutes. Although there is some blending of powers, the executive branch is not usurping the powers of the judicial branch. Thus, there is no violation of separation of powers that renders the statute unconstitutional."

State v. Oster, 30 Kan. App. 2d 1135, 55 P.3d 364, *rev. denied*, 275 Kan. 967 (2002). The Court's Syllabus states the opinion best, namely at Syl. ¶ 2 "If the trial court considers Labette Correctional Conservation Camp, it is not also required to consider a community intermediate sanction center." and also at Syl. ¶ 3 "It is impossible for a trial court to consider placement in a community intermediate sanction center if one does not exist."

See also ***State v. Wiegand***, 275 Kan. 841, 69 P.3d 627 (2003).

State v. Owens, 31 Kan. App. 2d 519, 67 P.3d 164 (2003). The offender pled guilty to one count each of the sale or delivery of marijuana and the sale and or delivery of cocaine. Although the offender was informed that he was qualified for the Labette Correctional Conservation Camp, the sentencing court decided against Labette. The sentencing court's decision was based upon the large amount of drugs and money involved and the court determined that the offender was not a suitable candidate for probation. The offender appealed.

The Court reviewed K.S.A. 2000 Supp. 21-4603d(a)(11) and stated in part: "This court held that the failure of a trial court to consider placement of the defendant at Labette, as required by K.S.A. 2000 Supp. 21-4603d(a), mandates that the sentence be vacated and the matter

remanded for resentencing. See *State v. Drier*, 29 Kan. 958, 960, 34 P.3d 480 (2001)."

"In this case, the trial court did consider placement at Labette. Owens insists that he was eligible for placement at Labette and the trial court did not 'adequately state reasons why he should not go to Labette except for the prejudicial and irrelevant issue of age.'"

"The trial court's duty to consider Labette in appropriate situations and to note its consideration on the record. *State v. Schick*, 25 Kan. App. 2d 702, 704, 971 P.2d 346 (1998), *rev. denied*, 266 Kan. 1114 (1999). Contrary to Owens' assertions, the trial court stated that Labette was "for persons who need structure, reorientation and responsibility," but it did not view Owens as "one of those people that would benefit from the boot camp." The trial court satisfied the requirements of K.S.A. 2000 Supp. 21-4603d(a)."

State v. Wiegand, 275 Kan. 841, 69 P.3d 627 (2003). This matter involved the review of an unpublished Court of Appeals decision filed on 10/18/02 where that Court held that the sentencing court should have considered placement of the offender at a Community Intermediate Sanction Center (CISC) before placement in the Department of Corrections. The offender had first been convicted, placed on probation, committed 23 probation violations and then placed at the Labette Correctional Conservation Camp where he was discharged for rules violations. The sentencing court then revoked the offender's probation and ordered him to serve the original prison sentences and the offender appealed.

The Court reviewed *State v. Oster*, 30 Kan. App. 2d 1135, 55 P.3d 364, *rev. denied*, 275 Kan. 967 (2002), *State v. Miller*, 30 Kan. App. 2d 161, 41 P.3d 868 (2002) and also K.S.A. 2002 Supp. 21-4603d(g) before stating in part: "Reading the two sentences of K.S.A. 2002 Supp. 21-4603d(g) together, we hold that the sentencing court is required to consider a nonprison alternative, either Labette, another conservation camp, or a CISC. If evidence is presented that space is available and the defendant meets the placement criteria of one or more alternatives, the court must consider each option. If a nonprison sanction is not imposed and information is provided that such placement is available, the trial court must state on the record the reasons for not placing the defendant in any alternative for which information has been provided."

"Hence the practical result of our holding is that prior to the revocation of a nonprison sanction of a defendant whose offense is classified in a presumptive nonprison grid block or a border box, the sentencing court shall consider placement at Labette. If, in the future, a CISC or other conservation camp is established, information must be presented to the court regarding the placement option."

"In this case, the court considered Labette and ordered a placement in that program. After Wiegand failed to complete that program, the court imposed a prison sanction. Since there was no information regarding defendant's eligibility for placement at a CISC, the trial court did not err in failing to make the findings required by K.S.A. 2002 Supp. 21-4603d(g)."

The Court also stated that it disapproved of any language in *State v. Miller*, 30 Kan. App. 2d 161, 41 P.3d 868 (2002) that is contrary to the holding in this case.

NOTE: On 05/22/03 the Secretary of the Kansas Department of Corrections published a Notice Concerning Community Intermediate Sanction Centers in the Kansas Register, at 22 Kan. Reg. 835. Said Notice stated in part: "A community intermediate sanction center was never opened pursuant to the authorization cited above and there are no community intermediate

sanction centers within the meaning of K.S.A. 2002 Supp. 21-4603d (nor any of its preceding versions) operating at this time in the State of Kansas. Therefore, there is neither space available nor placement criteria for community intermediate sanction centers for purposes of potential sentencing dispositions pursuant to K.S.A. 2002 Supp. 21-4603d." The Court noted this Notice in its opinion.

State v. Banning, 34 Kan. App. 2d 783, ___ P.3d ___ (2006). Defendant appealed the district court's decision ordering her to serve her underlying prison sentence after revoking her probation. Banning argued that the court, absent specific findings, was required to assign her to community corrections.

In November 2003, Banning pled guilty to forgery in case 03CR2134 (case #1) and was given probation. In February 2004, he probation was revoked and then reinstated with the same conditions as the first probation with the exception that Banning was also ordered to enter and successfully complete the Labette Correctional Conservation Camp (LCCC).

In March 2004, Banning pled guilty to possession of pseudoephedrine and drug paraphernalia in case 04CR78 (case #2). Banning was granted a dispositional departure and place on probation with completion of LCCC as a condition of her probation. The sentence in case #2 was to run consecutive to case #1. Banning subsequently violated the conditions of her probation by being removed from LCCC and the district court revoked her probation in both cases and ordered her to serve her underlying prison sentences.

On appeal Banning argued that before revoking probation and imposing a prison sanction, the court was required to find that she failed "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" pursuant to K.S.A. 2004 Supp. 21-4603d(n). The Court of Appeals rejected this argument since Banning was not charged with violating K.S.A. 65-4160 or 65-4162 to which K.S.A. 2004 Supp. 21-4603d(n) applies.

Banning's next argument was based on the language in K.S.A. 2004 22-3716(b) which provides that an offender for whom a violation of conditions of a nonprison sanction has been established shall not be required to serve any time for the sentence imposed or which might originally have been imposed in a state facility in the custody of the secretary of corrections, "unless such person has already at least one prior assignment to a community correctional services program related to the crime for which the original sentence was imposed." Banning originally contended that she had not been assigned to a community correctional service program. However, her counsel eventually conceded that she had been assigned to community corrections on case #1 and that the district court could impose the underlying prison sentence in that case.

The State argued that the two cases were related since case #1 had been considered when the court granted her departure in case #2 and therefore, Banning's assignment to community corrections in case #1 could also be applied to case #2. The Court of Appeals rejected this argument since the convictions did not arise from the same events and there were separate plea and sentencing hearings for both cases. See *State v. Miller*, 32 Kan. App. 2d 1099, 1103, 95 P.3d 127 (2004)(holding that K.S.A. 2004 Supp. 22-3716(b) applies only to the case before the court for sentencing, not to prior sentencing dispositions for other offenses.)

The Court of Appeals also considered a question not briefed by either party. The

question was whether ordering Banning to complete the program at LCCC constituted assignment to a community correctional service. The Court looked to the plain language of the pertinent statutes.

The Court noted that K.S.A. 2004 Supp. 75-5291(a)(1) provides the secretary of corrections with the authority to make grants to counties for the development, implementation, operation and improvement of various community correctional services with the exception that "no community corrections funds shall be expended by the secretary for the purpose of establishing or operating a conservation camp as provided by K.S.A. 75-52,127." In addition, K.S.A. 75-52,127 provides that the secretary of corrections may establish conservation camps to provide inmates with a highly structured residential work programs and that "such conservation camps shall be a state correctional institution or facility for confinement under the supervision of the secretary."

The plain language of the statutes indicates that LCCC is not a community corrections service program but a state correctional institution. Therefore, the Court concluded that assignment to LCCC as a condition of probation does not constitute assignment to a community correctional program within the meaning of K.S.A. 2004 Supp. 22-3716(b).

The State argued that Banning should still be sentenced to her underlying prison sentence pursuant to the court finding exception in K.S.A. 2004 Supp. 22-3716(b)(3) based on statement of the district court judge. The Court reviewed the statement and found it insufficient. The Court of Appeals affirmed in part, reversed in part, and remanded with directions to assign Banning to community corrections or to make the specific findings necessary under K.S.A. 2004 Supp. 22-3716(b)(3).

SPECIAL APPLICATIONS TO SENTENCING (DUI CASES)

State v. Binkley, 20 Kan. App. 2d 999, 894 P.2d 907 (1995). The Court held the penalty provisions for felony DUI under K.S.A. 1993 Supp. 8-1567(f) are more specific and control over the sentencing provisions of the KSGA. Felony DUI under the 1993 amendments to K.S.A. 8-1567(f), was classified as a severity level 9, nonperson felony, which created a conflict with the guidelines sentencing provisions. That conflict was removed in subsequent amendments by the legislature that removed the designation of felony DUI as a severity level 9 felony and made felony DUI a nongrid crime subject to the specific sentencing provisions of K.S.A. 8-1567.

See also ***State v. Webb***, 20 Kan. App. 2d 873, 893 P.2d 255 (1995).

State v. Bell, 30 Kan. App. 2d 395, 42 P.3d 749, *rev. denied*, 274 Kan. 1114 (2002). The offender entered a plea on August 21, 2000 for a DUI offense that took place on April 19, 1998. The offender was then sentenced on December 15, 2000 and had her previous convictions on July 6, 1995 and April 16, 1998 included in her criminal history. The offender appealed her third DUI conviction based upon the argument that the two previous convictions were more than five years prior to the date of her most recent conviction. The offender specifically argued that it was the date that her third conviction was entered by the court that counted, not the date of the actual offense.

The Court applied *City of Chanute v. Wilson*, 10 Kan. App. 2d 498, 704 P.2d 392, *rev. denied*, 238 Kan. 877 (1985) and pointed out once again that it is the date of the offense, not the date a conviction is entered that counts in applying 5 years decay rule in K.S.A. 1997 Supp. 8-

1567(k)(3).

State v. Anthony, 30 Kan. App. 2d 427, 42 P.3d 207, *rev'd*, 274 Kan. 998, 58 P.3d 742 (2002). The offender pled guilty to a third DUI and was sentenced to 12 months imprisonment. After serving the mandatory minimum of 90 days in jail, the offender asked the sentencing court to modify his sentence and place him on probation. The sentencing court denied the motion based upon a lack of jurisdiction and the offender appealed.

The Court reviewed K.S.A. 2000 Supp. 21-4704(i) and stated in part: "It is conceded that 21-4704(i) specifically refers to only two exempted sections, 21-4704 and 21-4707. However, applying only a portion of the KSGA provisions to nongrid felonies distorts the overall purpose and scheme of the KSGA. Nongrid felony sentences are simply different from grid sentences. Here, the sentencing judge had broad discretion on the term of incarceration and the manner of serving the sentence. Anthony was never transferred to the custody of the Secretary of Corrections. There is apparently no mechanism whereby Anthony may earn good time credits. If Anthony "flattens" the maximum 12-month term of incarceration, there would be no post-release supervision or any means to coerce payment of a fine and costs…. The rationale for divesting the district court of jurisdiction to modify a grid sentence is not applicable to a nongrid sentence."

The matter was reversed and remanded for a determination of the motion to modify the offender's sentence.

State v. Anthony, 274 Kan. 998, 58 P.3d 742 (2002). Review of the judgment of the Court of Appeals in *State v. Anthony*, 30 Kan. App. 2d 427, 42 P.3d 207 (2002). The sole issue on appeal was whether the sentencing court has jurisdiction to modify a sentence after it has been imposed pursuant to the felony DUI statute, namely K.S.A. 2001 Supp. 8-1567. The Court of Appeals held that the sentencing court did have jurisdiction to consider a motion to modify the sentence by granting probation after service of the mandatory 90 days jail sentence and the Supreme Court held that it did not.

The Supreme Court's opinion was based upon a review of both the DUI statute and the Kansas Sentencing Guidelines Act. In addition, the Court also reviewed *State v. Smith*, 26 Kan. App. 2d 272, 981 P.2d 1182, *rev. denied*, 268 Kan. 854 (1999).

The Court stated in part: "The *Smith* court expressly held, however, "[t]he plain language of K.S.A. 21-3705 does not authorize the district court to modify a sentence." 26 Kan. App. 2d at 273. Rather, the language there "merely stated a defendant must serve the mandatory jail time before he or she is eligible for probation, suspension or reduction of his sentence, or parole." 26 Kan. App. 2d at 272-73. We agree with the *Smith* court's reading; nothing in the DUI statute authorizes the district court to modify a sentence. Without the authority granted by statute, the court has no ability to modify. In short, neither the present DUI statute nor the criminal deprivation of property statute at issue in *Smith* expressly states the district court's authority to modify sentences as did the former 21-3603(d)…"

State v. Kendall, 274 Kan. 1003, 58 P.3d 660 (2002). The offender was convicted of felony DUI (i.e., a third conviction within five years), driving while license suspended and refusing a preliminary breath test. All three offenses were appealed as was the offender's sentence.

The Court upheld the convictions and the offender's sentence, specifically holding that the sentence did not violate *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct.

2348 (2000)." The Court stated in part: "In *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002), we analyzed the prior conviction exception to the *Apprendi* rule. We held that *Apprendi* did not require a jury finding of the fact of a prior conviction beyond a reasonable doubt in order for the prior conviction to be included in Ivory's criminal history score under the Kansas Sentencing Guidelines Act, K.S.A. 21-3701, et seq…"

"We took *Ivory* one step further in *State v. Graham*, 273 Kan. 844, 46 P.3d 1177 (2002), where Graham raised an *Apprendi* objection to the use of his prior drug convictions to increase the severity level of his drug crimes and his sentence under K.S.A. 2001 Supp. 65-4160(c). We compared the use of a prior conviction to increase the criminal history score to the use of a prior conviction to increase the severity level of the crime, both of which increased the overall sentence. We concluded that the net affect was the same, and the use of Graham's prior drug convictions to increase his sentence did not implicate *Apprendi*. 46 P.3d at 1184-85."

Kendall complains of the fact that his two prior convictions of DUI were used to change the classification of the instant DUI from a misdemeanor to a felony and increase his sentence. The use of prior convictions here, as in *Ivory* and *Graham*, falls squarely within the prior conviction exception of *Apprendi*. Kendall's sentence is constitutionally sound."

City of Norton v. Hurt, 275 Kan. 521, 66 P.3d 870 (2003). The offender was convicted in a municipal court of a second DUI offense following the 2001 amendment to K.S.A. 2000 Supp. 8-1567. The 2001 amendment deleted the five year decay rule for previous DUI convictions and became effective on July 1, 2001. The offender appealed his conviction.

On appeal the offender argued that sentencing him as a second DUI offender violated the prohibitions of the United States Constitution regarding ex post facto laws. The Court reviewed *Anderson v. Bruce*, 274 Kan. 37, 50 P.3d 1 (2002) and also *State v. Campbell*, 9 Kan. App. 2d 474, 681 P.2d 679 (1984) in addressing the offender's argument. In its opinion, the Court said in part: "A function of the Ex Post Facto Clause is to bar enactments which, by retroactive application, increase the punishment for a crime after its commission. *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990)."

"… Hurt's violation occurred after the effective date of the amended ordinance. For legislation to violate the ex post facto prohibition, the criminal conduct must have occurred before the law was enacted. See *Anderson*, 274 Kan. at 43."

"Enhancement statutes, like sentencing guidelines or recidivist statutes, are common in state criminal laws and do not change the penalty imposed for the earlier conviction. *Nichols v. United States*, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994). The amended Norton ordinance did not operate retroactively to increase the penalty for Hurt's prior DUI offense. Instead, the amended ordinance became effective prior to Hurt's second DUI violation and increased the penalty for the second violation only. Because the amendment does not affect Hurt's actions prior to its effective date, it is not an ex post facto law."

State v. Manbeck, 277 Kan. 224, 83 P.3d 190 (2004). The offender was convicted of involuntary manslaughter as a result of driving under the influence of alcohol *and* drugs. The offender had four prior DUI convictions. The four DUI convictions were scored as person felonies according to K.S.A. 2002 Supp. 21-4711 (c) (2) which provides: "If the current crime of conviction was committed on or after July 1, 1996, and is for involuntary manslaughter while driving under the influence of alcohol ***and*** drugs, each prior adult conviction, diversion in lieu of

criminal prosecution or juvenile adjudication for: (A) An act described in K.S.A. 8-1567 and amendments thereto; or (B) a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits the act described in K.S.A. 8-1567 and amendments thereto shall count as one person felony for criminal history purposes." This resulted in the offender having a criminal history score of "A". The court sentenced the offender to 162 months of imprisonment.

The offender objected to a criminal history score of "A" and argued that he should have been sentenced using a criminal history score of "F" because the statute required the convictions had to be for both alcohol and drugs to count prior DUI convictions as person felonies. The sentence with a criminal history score of "F" would have resulted in a presumptive sentence between 52 and 59 months.

The analysis of this issue included a review of K.S.A. 2002 Supp. 21-4711(c)(2) and whether the language provided in that statute should be read using the disjunctive "or" or the conjunctive "and". After a review of K.S.A. 2002 Supp. 21-4711 (c) (2) and the legislative intent of the statute, the Court assumed the legislature meant what it passed when it used the conjunctive "and", and that a prior conviction for both alcohol ***and*** drugs were required in order to count prior DUI convictions as person felonies when a person is charged with involuntary manslaughter as a result of driving under the influence of alcohol *o*r drugs.

The Kansas Supreme Court affirmed the decision of the Court of Appeals holding that the offender should be resentenced using a criminal history score of "F" because the wording of the statute required offenders to have been convicted of driving under the influence of both alcohol ***and*** drugs to score prior DUI's as person felonies.

State v. Kralik, 32 Kan. App. 182, 80 P.3d 1175, (2003). The State charged the offender with felony driving under the influence (DUI) on the basis that he had two prior DUI convictions. The only evidence of two prior convictions was a single journal entry from a 1991 conviction, which contained the following reference: "The court further finds that the defendant had a prior DUI in 1988." The state was unable to locate any other evidence of a DUI conviction in 1988. The district court refused to accept the 1991 journal entry as proof of two prior DUI convictions, finding that it constituted evidence of only one prior DUI- the 1991 conviction. The court ordered the pending DUI classified as a class A misdemeanor. The State appealed the district court's ruling excluding the 1991 journal entry as proof of two prior DUI convictions.

The Court examined the 1991 journal entry and determined there was enough additional information to establish the 1988 reference was to a prior DUI conviction. The 1991 journal entry stated that the offender was given a sentence of 1 year for his conviction, therefore, the Court concluded that the journal entry alone was enough proof that the 1991 DUI was his second conviction.

The Court stated in part: "We hold that where examination of applicable law in effect on the date of a journal entry, together with all information within the four corners of a certified journal entry, serves to resolve any ambiguity regarding a prior conviction, the district court should consider the journal entry as adequate proof of the prior conviction for purposes of criminal history."

State v. Chamberlain, 280 Kan. 241, ___ P.3d ___ (2005). Defendant Chamberlain appealed the Court of Appeals' decision affirming the district court in *State v. Chamberlain*, No. 91,007, unpublished opinion filed September 3, 2004. Chamberlain was convicted and sentenced for a

third DUI offense, an unclassified nonperson felony under K.S.A. 8-1567(f) and (l)(3). His first DUI diversion was from a 1986 violation and was the focus of this appeal since it occurred prior to the 2001 amendment to K.S.A. 8-1567. That amendment removed the 5 year limitation and inserted a lifetime provision which allows any DUI diversion to be counted as a conviction for the purpose of determining the sentence for a first, second, third, fourth or subsequent offender. See L. 2001, ch. 200, sec. 14. Chamberlain argued that the use of his *two* prior diversion agreements to enhance his sentence under K.S.A. 8-1567 violated the Ex Post Facto and Contract Clauses of the U.S. Constitution. The Kansas Supreme Court affirmed his conviction and sentence.

"To be considered ex post facto, two elements must be present: "1) The law must be retrospective, applying to events occurring before its enactment and 2) it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable." *Anderson v. Bruce*, 273 Kan. 37, 43, 50 P.3d 1 (2002)." 280 Kan. at 247, See also Syl. ¶ 5.

"The use of prior convictions or diversions under K.S.A. 8-1567(l)(3), now K.S.A. 2004 Supp. 8-1567(m)(3), does not attempt to establish criminal liability or punishments where there is none; rather, a showing of prior convictions goes only to the question of a defendant's classification status. The prior convictions or diversions give the defendant a classification, and the statute prescribes sequentially increased punishment on his or her present crime for repeat offenders. A repeat offender is not punished for the prior offense or offenses, but the legislature has declared that repeated violations justify an enhanced penalty." *Id*. at 253, See also Syl. ¶ 6 and *State v. Campbell*, 9 Kan. App. 2d 474, 477, 681 P.2d 679 (1984).

The Court's decision in *City of Norton v. Hurt*, 275 Kan. 521, 66 P.3d 870 (2003), is applicable to and controls the disposition in this case. K.S.A. 8-1567(l)(3), does not operate retroactively to increase the penalty for a defendant's prior DUI offense, nor does it redefine a prior diversion as a criminal conviction. Instead, the amended statute became effective prior to the defendant's 2002 DUI violation and increased the penalty applicable to the 2002 violation only. Because the amendment does not affect the defendant's actions prior to its effective date, the amended DUI statute is not an ex post facto law. *Id*. at 255, See also Syl. ¶ 7.

The Court also rejected the defendant's Contract Clause argument finding that he had not met the threshold issue of establishing that any obligation of the 986 diversion agreement had been impaired.

State v. Moody, 34 Kan. App. 2d 526, 120 P.3d 1156 (2005). Defendant appealed her sentence as a fourth-time DUI offender because the complaint recited only two or more prior DUI's. A defendant is entitled under due process to notice in the information or complaint of the severity level of the DUI offense being charged. Syl. ¶ 3. The complaint charging Moody with DUI correctly classified the charge as a nonperson felony. However, the complaint failed to expressly mention that Moody was being charged with a fourth-offense DUI. The Court cited to *State v. Masterson*, 261 Kan. 158, 929 P.2d 127 (1996) in its decision.

While the precise degree of notice necessary for due process is uncertain, *Masterson* indicates that the crime classification of nonperson felony is all that due process requires in this instance. Because the complaint properly alleged the proper crime classification, due process was met. Furthermore, Moody was provided sufficient notice at the plea hearing when the district court specifically stated that the maximum penalties for her DUI's were "one year in the county jail and a fine of $2,500," which is the exact statutory penalty for a fourth DUI. Because

Moody received both the notice of the severity level with which she was charged and the maximum penalty for a fourth offense, the Court of Appeals affirmed the defendant's sentence.

BUT SEE: ***State v. Moore***, 35 Kan. App. 2d 274, ___ P.3d ___ (2006)(reversing defendant's sentence as a sixth-time DUI offender when the defendant was only provided notice that he was being charged as a third-time DUI offender.)

State v. Jarrell, 34 Kan. App. 2d 480, ___ P.3d ___ (2005). Defendant was charged with a third DUI in September, 2002. In September, 2003, he was charged with another DUI offense. On December 8, 2003 he entered guilty pleas on both cases, in one hearing, pursuant to a plea agreement. However, the two cases were not formally consolidated even though the trial judge stated at sentencing that he considered the matters to be "a consolidate proceeding." At sentencing, the defendant was sentenced on the 2002 charge as for a third DUI conviction and on the 2003 charge as for a fourth DUI conviction.

On appeal, the defendant argued that because the two convictions were simultaneously imposed, he should have been sentenced as though each conviction was a third conviction rather than one a third and the other a fourth. The Court of Appeals did not agree and held that since the cases were not formally consolidated, the charges did not arise form a single complaint, the integrity of the separate complaints was maintained throughout the proceedings and the defendant pled guilty to the 2002 case before he pled guilty to the 2003 case, the trial court's treatment of his convictions as third and fourth was correct.

SPECIAL APPLICATIONS TO SENTENCING (SEXUALLY VIOLENT PREDATORS)

Bussell v. State, 25 Kan. App. 2d 424, 963 P.2d 1250 (1998), *rev. denied*, 266 Kan. 1107 (1998). At issue was whether a sentencing court is required to inform an offender prior to accepting the offender's guilty plea, that the offender's guilty plea might subject the offender to application of the Kansas Sexually Violent Predator's Act at some point in the future. The Court held under K.S.A. 22-3210, a sentencing court is required to inform the offender of the direct penal consequences of a guilty plea before accepting the guilty plea. The sentencing court is not required to inform an offender of the collateral consequences of a guilty plea, including the loss of certain civil rights or privileges.

The possible future application of the Kansas Sexually Violent Predator's Act to an offender charged with a violent sexual crime, is a collateral consequence of a plea of guilty that is included in K.S.A. 22-3210. A sentencing court is not required to advise an offender charged with a sexually violent crime of the possible future application of the Kansas Sexually Violent Predator's Act, before accepting the offender's plea of guilty.

See also ***Hendricks v. Kansas***, 259 Kan. 246, 912 P.2d 129 (1996), *rev'd*, 521 U.S. 246, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), ***Kansas v. Crane***, 269 Kan. 578, 7 P.3d 285 (2000), 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 850 (2002) and ***McKune v. Lile***, 24 F. Supp. 2d 1152 (1998), 224 F.3d 1175 (2000), *rev'd*, 536 U.S. 24 (2002). In addition, also see ***In re Care and Treatment of Blackmore***, 30 Kan. App. 2d 90, 39 P.3d 89 (2002) and ***In re Care and Treatment of Searcy***, 274 Kan. 130, 49 P.3d 1 (2002).

Brull v. State, 31 Kan. App. 2d 584, 69 P.3d 201 (2003). Refer to Syl. ¶ 6: "The granting of parole or conditional release by the Department of Corrections does not conflict with the judicial function of sentencing because such release is possible only after criminal prosecution and the judicial imposition of sentence. The circumstances under which the Department of Corrections may grant release are controlled by statute, and the inmate remains within the custody of the State during the duration of the conditional release or parole period."

SPECIAL APPLICATIONS TO SENTENCING (PERSISTENT SEX OFFENDERS)

State v. Spinden, 30 Kan. App. 2d 1014, 54 P.3d 514, *rev. denied* 274 Kan. 1117 (2002). The offender pled guilty to single counts of sodomy and indecent liberties with a child. The presentence investigation report indicated that the offender had previously been convicted of attempted aggravated indecent solicitation of a child and thus, the offender was sentenced under K.S.A. 2001 Supp. 21-4704(j), as a persistent sex offender. The offender's sentence was doubled for each of the offenses, 122 months for the sodomy conviction and 69 months for the indecent liberties conviction, to be served consecutively. The offender appealed based upon the issue of whether or not the persistent sex offender statute requiring imposition of double the maximum presumptive term, violates *Apprendi* and *Gould*.

In its opinion, the Court stated in part: "Here, Spinden was sentenced as a persistent sex offender in accordance with K.S.A. 2001 Supp. 21-4704(j) based on his current crimes of conviction, criminal sodomy and indecent liberties, and his prior conviction of attempted aggravated indecent solicitation. Spinden's prior conviction of attempted aggravated indecent solicitation is a sexually violent crime as referenced by the persistent sex offender statute. As such, the enhancement of Spinden's sentences based on his prior conviction was proper because it falls under the prior conviction exception set out in *Almendarez-Torres*.

"However, Spinden's sentences were enhanced not only because of his prior convictions, but also because his current crimes of conviction were sexually violent crimes. K.S.A. 2001 Supp. 21-4716(b)(3) addresses enhancement of a sentence based on the current crime of conviction… Because enhancement under the persistent sex offender statute is based in part on the current crime of conviction, K.S.A. 2001 Supp. 21-4716(b)(3) may affect the sentence issued to a persistent sex offender."

The Court next addressed the application of K.S.A. 2001 Supp. 21-4716 to the *persistent sex offender* statute by comparing the Kansas Supreme Court's ruling in *State v. McClennon*, 273 Kan. 652, 45 P.3d 848 (2002), which involved a *predatory sex offender*. The Court stated in part: "Unlike the predatory sex offender statute, the persistent sex offender statute does not use statutory elements to define the offenses that subject a defendant to the statute. Instead, the persistent sex offender statute references a list of criminal offenses that the legislature has deemed to be sexually violent crimes... Because the persistent sex offender statute does not use statutory elements or factual aspects of the current crime to enhance a sentence, K.S.A. 2001 Supp. 21-4716(b)(3) is not applicable and, as such, no factual aspect of the current crime must be found by a jury to be significantly different from the usual conduct captured by the aspect of the crime."

"The enhancement of Spinden's sentences under the persistent sex offender statute was not a product of the scheme embodied in K.S.A. 2001 Supp. 21-4716., which the *Gould* court

found to be unconstitutional on its face. Spinden's enhanced sentences as a persistent sex offender were based on his prior offense and his current crimes of conviction for sexually violent crimes. Use of his prior conviction to enhance his sentences was proper under *Almendarez-Torres*. In addition, use of the current crimes of conviction to sentence Spinden as a persistent sex offender does not violate K.S.A. 2001 Supp. 21-4716(b)(3). As a result, we find that Spinden's sentences under the persistent sex offender statute did not violate *Apprendi* and *Gould*."

NOTE: K.S.A. 2001 Supp. 21-4716 was amended effective June 6, 2002 by Senate Substitute for House Bill 2154. See Chapter 170, 2002 Session Laws of Kansas, pages 1018-1023.

State v. Moore, 274 Kan. 639, 55 P.3d 903 (2002). Two portions of the Court's Syllabus states the decision best, namely: Syl. ¶ 3. "For the purposes of sentencing under K.S.A. 1997 Supp. 21-4704(j), the district court is not required to make a factual finding beyond the existence of defendant's convictions of the instant crimes and certain prior crimes when all the crimes were defined by the legislature under K.S.A. 1997 Supp. 22-3717(d)(2) as sexually violent crimes." Syl. ¶ 4. "Under the facts of this case, the district court's decision to double defendant's sentence under K.S.A. 1997 Supp. 21-4704(j) did not violate *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)."

NOTE: K.S.A. 2001 Supp. 21-4704 was amended on 04/04/02 by House Bill 2623. See Chapter 10, 2002 Session Laws of Kansas, pages 45-49. K.S.A. 2001 Supp. 21-4704a was repealed by that same legislation.

State v. Kackley, 32 Kan. App.2d 927, 92 P.3d 1128, *rev. denied*, 278 Kan. 849 (2004). The offender was convicted of aggravated indecent liberties with a child and sentenced to 214 months imprisonment. The offender appealed claiming, among other issues, that the trial court violated his right under the Sixth Amendment to the United States Constitution by imposing an increased sentence based upon his prior criminal history. The offender claimed that his classification as a persistent sex offender should have been alleged in the complaint and proven to a jury beyond a reasonable doubt. The offender based his claim upon *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

On this issue the court stated in pertinent part: "In *State v. Moore*, 274 Kan. 639, 653-54, 55 P.3d 903 (2002), our Supreme Court noted that the defendant's prior and current convictions were defined by statute as sexually violent crimes and held the trial court's decision to double the defendant's sentence under K.S.A. 2003 Supp. 21-4704(j) did not violate *Apprendi*. The court upheld the offender's sentence.

SPECIAL APPLICATIONS TO SENTENCING (SENTENCING HEARINGS)

State v. Parks, 265 Kan. 644, 962 P.2d 486 (1998). The offender's argument on appeal was that the sentencing court improperly permitted the victim's sister-in-law to submit a victim impact statement and to make a statement at the time of sentencing. The offender contended the admission of the statements by the sister-in-law violated both Kansas' constitutional and statutory laws, and that the inflammatory nature of the statements caused him substantial prejudice because the sentencing court ordered consecutive sentences when the prosecution had

not requested these.

The Court held that the Kansas Constitution Victims' Rights Amendment guarantees the rights of victims in criminal proceedings in this state. The statutory bill of rights for victims of crime, K.S.A. 74-7333 *et seq.*, was enacted in order to ensure the fair and compassionate treatment of such victims. To this end the Victims' Rights Amendment and the Bill of Rights of the Kansas Constitution, ensure that victims will receive certain minimum rights. Neither the Victims' Rights Amendment nor the statutory bill of rights for victims of crime, restrict the ability of nonvictim and nonfamily members to testify and submit statements during the sentencing phase of a criminal proceeding in Kansas. The Court examined the record in this case and determined that the sentencing court did not abuse its discretion in admitting the statements of a nonvictim at the sentencing hearing.

State v. Gill, 26 Kan. App. 2d 127, 980 P.2d 591 (1999). The offender argued the sentencing court erred in sentencing him in his absence. The Court disagreed and held an offender may waive his right to be present at sentencing. See also ***State v. Braun***, 253 Kan. 141, 146-47, 853 P.2d 686 (1993). In the present case, the offender left the courtroom of his own volition. The Court held the sentencing court did not err in sentencing the offender in his absence.

See also ***State v. Williams***, 259 Kan. 432, 445-46, 913 P.2d 587 (1996).

State v. Baldwin, 28 Kan. App. 2d 550, 18 P.3d 977, *rev. denied*, 271 Kan. 1038 (2001). The offender entered a plea of guilty to one count of possession of cocaine but after he found out his criminal history was less serious than he had thought, he attempted to withdraw his plea. The sentencing court denied the motion.

K.S.A. 1999 Supp. 22-3210(d) allows the withdrawal of a guilty plea at any time prior to sentencing. The standard of review when a sentencing court refuses to allow the withdrawal of a plea is the abuse of discretion standard. The Court found the offender was represented by competent counsel throughout the proceeding, that the offender was not misled, coerced, mistreated or unfairly taken advantage of and that the plea was freely, fairly and understandingly made.

See also ***State v. Ford***, 23 Kan. App. 248, 930 P.2d 1089 (1996), *rev. denied*, 261 Kan. 1087 (1997) and ***State v. Jones***, 272 Kan. 674, 35 P.3d 887 (2001). *Jones* involved the denial of a motion to correct an illegal sentence and the Court once again held that in a collateral challenge of the constitutional validity of prior convictions used to enhance a sentence based upon a claim of the absence of counsel, the offender has the burden of proof to show that he/she didn't have counsel.

State v. Fulton, 28 Kan. App. 2d 815, 23 P.3d 167, *rev. denied*, 271 Kan. 1039 (2001). The offender was sentenced for multiple felony counts to 356 months for aggravated kidnapping and consecutive sentences for the remaining charges. These sentences were ordered to run consecutive to an unrelated conviction for felony murder. One of the several issues for appeal involved the offender's sentencing hearing and his right to allocution pursuant to K.S.A. 22-3424(e)(4). The offender argued the sentencing court failed to apprise him of his right to allocution.

The standard of review for allocution is harmless error. The Court found that the offender did not have any arguments or proffer any evidence that wasn't already argued to the sentencing

court by defense counsel. Thus, no substantial rights of the offender were prejudiced.

State v. Ryan, 29 Kan. App. 2d 297, 26 P.3d 707, *rev. denied*, 272 Kan. 1422 (2001). A plea agreement resulting in a plea of guilty to the possession of cocaine was involved here and prior to the sentencing, the offender sought to withdraw her guilty plea. At that time the offender had obtained new counsel because the first attorney had represented both her and her brother and the issue of the first attorney's conflict of interest was raised. The sentencing court denied the motion and the offender appealed.

The Court reviewed K.S.A. 2000 Supp. 22-3219(d) and also some case law regarding the right to counsel that also raises the related Sixth Amendment issue of the effective assistance of counsel. Several cases were specifically cited, namely *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980), *Holloway v. Arkansas*, 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct 1173 (1978) and *State v. Jenkins*, 257 Kan. 1074, 898 P.2d 1121 (1995) before the first two were distinguished and *Jenkins* was applied. In its opinion reversing the sentencing court, the Court stated in part: "… Under *Jenkins*, if Ryan had been convicted, we would be required to reverse. We find that a showing defendant's attorney had an actual conflict of interest when negotiating a plea agreement requires the district court to grant defendant leave to withdraw the guilty plea prior to sentencing."

State v. Vasquez, 272 Kan. 692, 36 P.3d 246 (2001). This matter involved the denial of a motion to withdraw a plea of guilty and should be added as a footnote to *State v. Baldwin*, 28 Kan. App. 2d 550, 18 P.3d 977, *rev. denied* 271 Kan. 1038 (2001) on Appendix A Page 118. The Supreme Court held that a sentencing court's denial of a motion to withdraw a plea of guilty can only be reversed if there is an abuse of discretion.

State v. Jones, 272 Kan. 674, 35 P.3d 887 (2001). This matter involved the denial of a motion to correct an illegal sentence and should be added as a footnote to *State v. Patterson*, 262 Kan. 481, 939 P.2d 909 (1997). The Court once again held that in a collateral challenge of the constitutional validity of prior convictions used to enhance a sentence based upon a claim of the absence of counsel, the offender has the burden of proof to show that he/she didn't have counsel.

SPECIAL APPLICATIONS TO SENTENCING (RESTITUTION)

State v. Cooper, 267 Kan. 15, 977 P.2d 960 (1999). The Court held in a criminal case where the offender is ordered to pay reparation or restitution and where the sentencing court timely orders reparation or restitution to be made, the sentencing court has the discretion to extend the time to set the amount. At sentencing the State had informed the sentencing court that it intended to request restitution but at the time of sentencing did not have the necessary documentation to request the specific amount of restitution. The State informed the sentencing court that it could obtain the necessary documentation within 30 days. The sentencing court ordered the offender to pay restitution "with that amount to be determined within 30 days."

Within the specified 30 days the State received the necessary documentation to calculate restitution and that information was later presented to the sentencing court. The sentencing court heard statements from counsel and reviewed the information, then ordered the offender to pay $2,500 as reparation or restitution. The Court held that under the facts of this case it was not an illegal sentence, or an abuse of discretion for the sentencing court to set the amount of reparation or restitution at a later date.

State v. Hymer, 27 Kan. App. 2d 1054, 11 P.3d 94 (2000), *rev'd*, 271 Kan. 716, 26 P.3d 63 (2001). Pursuant to K.S.A. 21-4610(c) a sentencing court is not limited to ordering restitution only for the order of conviction. An unpaid order is an earlier case may be imposed as a condition of probation in a subsequent case. Here the offender was ordered to pay $4,070.43 in restitution from a prior criminal case as a condition of probation for another later offense, where the offender had already served the jail sentence from the previous case. However, the offender's probation from the prior case had been revoked first before his serving the prison sentence.

The Court noted the sentencing court has substantial discretion in determining the conditions of probation. The offender directly challenged the statute, K.S.A. 1999 Supp. 21-4610(d)(1) arguing any restitution ordered in his current case must be the direct result from the current crime only, not for a previous crime. However, the Court held the offender was only ordered to comply with the previous outstanding order for restitution as a condition for his probation in the current crime.

The Court pointed out that K.S.A. 1999 Supp. 21-4610(c) also applied to the restitution issue and held that the subsections of this statute were *nonexclusive* only, of all the conditions a sentencing court could impose for probation. Although the offender had served his prior sentence after his probation had been revoked, the statutes treat restitution as a separate order, different from the other conditions of probation. In addition, restitution is enforceable by the beneficiary of the restitution order or by the sentencing court itself.

NOTE: This decision was reversed by the Supreme Court with ***State v. Hymer***, 271 Kan. 716, 26 P.3d 63 (2001).

State v. Morrison, 28 Kan. App. 2d 249, 14 P.3d 1189 (2000), *rev. denied*, 271 Kan. 1040 (2001). On April 30, 1985, the offender was convicted on two counts of arson and was ordered to pay $63,737 as a part of his sentence as restitution. On April 11, 1986, the offender was paroled and a condition of his five years probation was to pay the restitution. On February 4, 1987, a restitution order for $63,737 was entered detailing how the payments should be made.

On April 4, 1991, the sentencing court extended the offender's probation for an additional five years and in February 1996 an order for criminal indirect contempt of court was entered, with restitution payments of $100 per month ordered but the offender's probation was terminated. The offender made the $100 per month payments until February 5, 1999, at which time the offender filed a motion to release the restitution order pursuant to K.S.A. 60-2403(d). The offender argued the restitution order had become dormant on February 4, 1997, and had been dormant for two years as required by the statute. Further, since the State had not filed a revivor of the judgment, or executed upon the judgment, the offender said he was entitled to a release of judgment.

The sentencing court agreed but the State filed a motion to set aside the release on the grounds the offender's ongoing monthly payments had tolled any dormancy issues. The sentencing court then set aside the release of judgment and the offender appealed.

The Court found that K.S.A. 1999 Supp. 60-2403(d) that was added in 1995, applied to restitution orders and the 1995 amendments to the criminal restitution statutes did not. The Court stated in part: "K.S.A. 1999 Supp. 60-2403(d) provides that "any judgment of restitution" in which a renewal affidavit is not filed or execution is not issued within 10 years is considered

dormant. A restitution judgment that is dormant is not void; it may be revived and have the same force and effect as if it had not become dormant. K.S.A. 60-2404. K.S.A. 1999 Supp. 60-2403(d) makes no provision for partial payments tolling dormancy. If a restitution judgment has remained dormant for the specified period of time, 2 years, it becomes absolutely extinguished and unenforceable."

The Court also found that neither partial nor full restitution payments could toll the dormancy provisions of K.S.A. 1999 Supp. 60-2403. Only the issuance of execution or garnishment will toll the dormancy statute.

See also ***Long v. Brooks***, 6 Kan. App. 2d 963, 966, 636 P.2d 242 (1981); ***Dallas v. Dallas***, 236 Kan. 92, 93, 689 P.2d 1184 (1984); and ***First National Bank v. Harper***, 161 Kan. 536, 169 P.2d 844 (1966) for additional authority.

State v. Ferguson, 271 Kan. 613, 23 P.3d 891 (2001). In May 1998, the offender was sentenced to twenty-four months probation with an underlying six months prison sentence for a forgery conviction. One of the specific conditions of probation was the payment of $1,550 restitution. On August 11, 1999, a bench warrant was issued for the offender when a Motion to revoke probation was filed. On May 5, 2000, an Amended Motion to revoke probation was filed and a revocation hearing was held on May 26, 2000. The offender then moved to dismiss the probation revocation Motion on the ground that her probation had been automatically reduced from 24 months to 12 months the day before the hearing (May 25, 2000) as a result of the effective date of Senate Bill 323 (SB 323). The sentencing court disagreed, denied the offender's Motion and revoked her probation. The offender then appealed.

The standard for review regarding whether or not the sentencing court had the jurisdiction to revoke the offender's probation involves a question of law where the Court's scope of review is unlimited. The Court reviewed the statutory basis of K.S.A. 2000 Supp. 21-4611 in addressing the offender's revocation argument regarding SB 323. The Court noted that the offender's probation period could be reduced from 24 months to 12 months, however, the retroactive application of SB 323 in changing the offender's probation time period was not automatic. Any application of SB 323 to this case was dependent upon the sentencing court first reviewing the offender's sentence on or before September 1, 2000. This had not been done yet and thus the sentencing court still had the jurisdiction to revoke the offender's probation first instead.

Regarding the issue of restitution, the Court noted the standard for review for a probation revocation is the abuse of discretion. However, here there were several reasons to revoke the offender's probation besides the nonpayment of restitution. The offender had also failed to report for monthly drug screens for twelve months prior to the revocation hearing, had failed to report to the probation officer in June and July 1999 and had also failed to document her claimed health problems that the offender said prevented her from working on a full time basis. The decision of the sentencing court was affirmed.

State v. Hymer, 271 Kan. 716, 26 P.3d 63 (2001). This involved a review of the Court of Appeal's ruling in *State v. Hymer*, 27 Kan. App. 2d 1054, 11 P.3d 94 (2000). Here the offender had pled guilty to burglary and also to attempted theft and as a condition of probation had been sentenced to pay $4,070.43 restitution that was still unpaid from his previous conviction. The offender objected to this condition and appealed this issue but the Court of Appeals affirmed the sentencing court (in a 2 to 1 decision with a dissenting opinion) and the Supreme Court accepted

the offender's Petition for Review. The Supreme Court considered the sole issue on appeal to be: "… whether an unpaid order of restitution made in a prior case can be imposed as a condition of probation in an unrelated, subsequent case."

The Court's analysis of the restitution issue included a review of K.S.A. 2000 Supp. 21-4610 and a comparison of how subsections (c) and (d) should be applied. The Court also reviewed three appellate cases from other states and how they had handled restitution as a condition of probation. The Supreme Court reversed the Court of Appeals based upon a holding that K.S.A. 2000 Supp. 21-4610(d) as it applies to restitution, is strictly controlled by the wording of the statute itself and that the statute only applies to restitution for the offenses on which the offender was convicted and will be sentenced. In other words, the statute limits an order of restitution to only apply to those offenses for which the offender is being sentenced. However, the Court also noted that *State v. Ball*, 255 Kan. 694, 877 P.2d 9655 (1994) would still apply in those cases where an offender in a plea agreement, agreed to pay restitution for an offense that resulted from a previous sentencing.

State v. Bausch, 29 Kan. App. 2d 649, 29 P.3d 989, *rev. denied*, 272 Kan. 1420 (2001). Following a no contest plea to two counts of felony theft over $500 the sentencing court imposed the presumptive sentence of probation but with an order for restitution in the amount of $11,530.33. The restitution order included expenses for consultations with a tax attorney, photocopying, parking, the offender's use of the victim's cellular telephone and time spent auditing business accounts. The offender filed a motion to modify the amount of restitution and the sentencing court did not allow restitution for tax attorney fees, parking, and any of the cell phone use. The offender appealed and although the notice of appeal was fled untimely, the appeal was retained.

The standard of review of an order of restitution is an abuse of discretion. The Court reviewed K.S.A. 2000 Supp. 21-4610(d) and also *State v. Applegate*, 266 Kan. 1072, 976 P.2d 936 (1999), however, the Court also looked to *State v. Johnson*, 69 Wash. App. 189, 847 P.2d 960 (1993) and also *State v. Wilson*, 100 Wash. App. 44, 995 P.2d 1260 (2000) because Kansas has never addressed the issue of reimbursing a victim with restitution for the costs of an audit.

The Court noted the law enforcement officials had informed one of the victim's owners that an audit would be needed to research and document the amount of the offender's theft, which resulted in $7,761.13 as the amount of the theft. Thus, the Court reasoned had it not been for the offender's theft, the victim would not have incurred the costs of the audit. The Court also noted the time spent in performing the audit "… was not well documented", however, there was no abuse of discretion by the sentencing court.

State v. Hunziker, 30 Kan. App. 2d 279, 41 P.3d 880, *aff'd*, 274 Kan. 655, 56 P.3d 202 (2002). The offender was convicted of criminal damage to property and ordered to pay restitution of $13,965.94, with interest at the judgment rate. A portion of this amount ($11,680.65) was ordered to be paid as "jointly and severally" with a codefendant and the offender objected to the determination of the fair market value of the damaged property, the inclusion of $700 for the victim's attorney fees and the failure of the sentencing court to consider the offender's other financial obligations.

The Court applied the standard of review (abuse of discretion) as set out in *State v. Castro*, 22 Kan. App. 2d 152, 912 P.2d 772 (1996) and pointed out that the offender failed to challenge the sentencing court's authority to order restitution for the hired work ($400), the

towing expenses ($125.88) or mileage ($272.80). The touch-up paint ($21.97) was considered a repair expense and disallowed. The lost work to a business ($1,410) was compared to lost wages for an employee and allowed. No argument was offered regarding the judgment rate interest and that issue was considered abandoned.

The victim's attorney fees ($700) required a causal connection between the victim's loss and the offender's criminal conduct. The Court ruled that the victim engaged an attorney to assist him in determining and documenting his damages and the attorney's fees were allowed. As to the issue of the offender's $200 per month payment for restitution, the Court noted that the restitution order was not challenged before the sentencing court and thus was not preserved for appeal.

See also ***State v. Cox***, 30 Kan. App. 2d 407, 42 P.3d 182 (2002), the related case.

NOTE: The Supreme Court resolved conflicting Court of Appeals' decisions in ***State v. Hunziker*** and ***State v. Cox***, 30 Kan. App. 2d 407, 42 P.3d 182 (2002) with its decision in ***State v. Hunziker***, 274 Kan. 655, 56 P.3d 202 (2002). The issue of restitution in excess of fair market value and the issue of attorneys' fees were both reversed.

State v. Cox, 30 Kan. App. 2d 407, 42 P.3d 182 (2002). The offender pled guilty to criminal damage to property and ordered to pay $11,680.55 restitution jointly and severally with his codefendant. The offender only appealed the issue of the victim's $700 attorney's fees.

The Court noted the decision regarding the same issue of $700 attorney's fees in *State v. Hunziker*, 30 Kan. App. 2d 279, 41 P.3d 880, *aff'd*, 274 Kan. 655, 56 P.3d 202 (2002), however, although causation between the victim's loss and the offender's conduct was once again the key, here the Court ruled differently. The Court held that the victim's attorney's fees had nothing to do with the prosecution of this offender and had no causal connection to the crime. In addition, the Court also noted that the offender had not argued the issue of the workability of his $200 per month restitution payments before the sentencing court and this issue was not preserved for appeal.

See also ***State v. Hunziker***, 30 Kan. App. 2d 279, 41 P.3d 880, *aff'd*, 274 Kan. 655, 56 P.3d 202 (2002) the related case.

NOTE: The Supreme Court resolved conflicting Court of Appeals' decisions in ***State v. Hunziker*** and ***State v. Cox***, 30 Kan. App. 2d 407, 42 P.3d 182 (2002) with its decision in ***State v. Hunziker***, 274 Kan. 655, 56 P.3d 202 (2002). The issue of attorneys' fees was upheld.

State v. Hall, 30 Kan. App. 2d 746, 49 P.3d 19 (2002). Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish by an order dated 06/12/02. The offender pled guilty to an amended complaint charging two counts of aiding a felon. The sentencing court imposed 60 months probation with two consecutive underlying prison terms and a $106,808.50 award of restitution. The offender appealed both the 60 months probation and the restitution award.

The Court declined to decide the probation issue that arose under K.S.A. 2001 Supp. 21-4611(c)(7) because of its determination of the restitution issue. However, the Court did reverse the 60 months probation sentence and remanded it "… for the imposition of a probationary

period of up to 18 months in length, to be effective in the event Hall successfully challenges the revocation of his probation."

As for the restitution issue, the Court set the restitution award aside and stated in part: "Nevertheless, Hall's situation is factually distinguishable from both *Ball* and *Turner*, which involved multiple counts of criminal activity. Hall's plea arrangement contained no agreement for restitution, and he adamantly opposed the restitution order in the district court. The offense of conviction, aiding a felon, is sufficiently distinct both in nature and in temporal proximity from the acts actually causing the damages, the shooting, to call into question the propriety of the restitution award. A nexus must exist between the crime of conviction and the conduct for which restitution was imposed… Hall's criminal activity, while arguably part of the chain of events, occurred well after the shooting. Hall's assisting the shooters with their false alibis did not cause the victims' damages. The State chose to abandon its efforts to tie Hall to the shooting, perhaps because the evidence was insufficient to do so. Extending *Ball* to cover the facts of this case would effectively nullify the causation requirement of K.S.A. 2001 Supp. 21-4610(d)(1)."

NOTE: See also ***State v. Ball***, 255 Kan. 694, 877 P.2d 955 (1994), ***State v. Turner***, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and ***State v. Zeiner***, 31 Kan. App. 2d 606, 69 P.3d 213 (2003).

State v. Gordon, 30 Kan. App. 2d 852, 50 P.3d 100 (2002), *rev'd*, 275 Kan. 393, 66 P.3d 903 (2003). Two cases involving different offenders were consolidated for this appeal. In the first case, the offender's probation was extended a second time twenty-six days after the first extended probation had ended. His probation was later extended for a third time but without any hearing. The offender appealed the denial of his motion for discharge from probation. In the second case, the offender's probation was extended for a third time but by an ex parte hearing. The offender appealed the denial of his motion to discharge his probation. In both cases, the probation was extended for the payment of restitution and the offenders appealed.

The Court held that in the first case, the motion to revoke probation was not filed within the probation period and thus, the sentencing court lost jurisdiction to revoke and reinstate the offender's probation. The Court's then discussed K.S.A. 2001 Supp. 4611(c) and stated in part: "Subsection (c)(7), dealing with the extension of probation to accommodate the payment of restitution, existed prior to the May 2000 amendments in former subsection (c)(4). The legislature could easily have amended the provision dealing with restitution to foreclose an appeal as it did with subsection (c)(5) but it chose to leave (c)(7) untouched."

"Since (c)(7) remains unmodified by the 2000 amendment and since the legislature did not tie subsection (c)(7) to subsection (c)(5), it appears the legislature did not intend the jurisdictional limitations of subsection (c)(5) to apply when probation is extended to accommodate child support or restitution payments. The clear intent of the legislature was to provide the court with the authority to extend probation in all cases wherein restitution is ordered as a part of probation, not just those cases falling within the parameters of subsections (c)(3) and (c)(4)."

"When the district court originally sentenced the defendants in 1995, it could have properly set their probation at 5 years or it could have imposed an indefinite probation period pending the payment of restitution. At any time prior to the expiration of their probation terms and after proper notice and hearing, the probation periods could have been extended to

accommodate the payment of the restitution ordered. In each case, the restitution extension was made too late and/or without a hearing."

NOTE: The decision of the Court of Appeals was reversed at 275 Kan. 393, 66 P.3d 903 (2003). See below.

State v. Hunziker, 274 Kan. 655, 56 P.3d 202 (2002). Review of the judgment of the Court of Appeals in *State v. Hunziker*, 30 Kan. App. 2d 279, 41 P.3d 880 (2002). The Court resolved conflicting Court of Appeals' decisions in *State v. Hunziker*, 30 Kan. App. 2d 279, 41 P.3d 880 (2002) and *State v. Cox*, 30 Kan. App. 2d 407, 42 P.3d 182 (2002).

On the issue of an award of restitution in excess of fair market value the Court stated in part: "However, the *Hunziker* panel correctly found that, since the district court ordered restitution for the fair market value of the backhoe, the touch-up paint expense should not have been compensated. The district court's award of $21.97 for touch-up paint for the backhoe was in excess of the fair market value of the backhoe and, thus, exceeded the total loss incurred by Van Loenen for that piece of equipment."

As for the issue of attorney fees as restitution, the Court stated in part: "We find that Van Loenen's retention of an attorney was not the direct result of Hunziker's criminal conduct. Here, there was no need to trace embezzled funds, recreate destroyed data, or recover stolen property. Because Van Loenen's private attorney fees only arose as an indirect or consequential result of Hunziker's crime, we reverse the order allowing $700 in attorney fees as restitution."

State v. Sammons, 31 Kan. App. 2d 135, 61 P.3d 106, *aff'd*, 276 Kan. 574, 78 P.3d 470 (2003). The offender pled guilty to aggravated burglary in exchange for an agreed upon downward durational departure and the sentencing court sentenced him to 42 months imprisonment. The sentencing court held a separate hearing on the issue of restitution and ordered that the offender pay the victim $1,935 with $400 to $500 of that amount towards the cost of tools. The tools had been lost when the offender's pickup truck was sold while the victim's tools were still in it because the police department did not prepare any property report. The offender appealed.

The specific issue of the intervening negligent act of the police had never been addressed in Kansas so the Court reviewed a similar Utah case, namely *State v. McBride*, 940 P.2d 539 (Utah App. 1997). The Court stated in part: "We find the reasoning of the Utah court persuasive. Where property has been stolen, the foreseeable negligence of the police is not an intervening and superseding event that releases the defendant from liability for the stolen property. Sammons admitted that he took Taylor's tools. But for Sammon's criminal act of burglary, the tools would have remained in Taylor's business. In addition, we do not believe that the negligence of the police was so unforeseeable as to break the causal connection between Sammon's act and Taylor's loss. The trial court did not abuse its discretion by requiring Sammons to pay restitution for the partial cost of the tools."

State v. Gordon, 275 Kan. 393, 66 P.3d 903 (2003). A review of the Court of Appeals' decision at 30 Kan. App. 2d 852, 50 P.3d 100 (2002). The decision of the Court of Appeals was reversed.

Two cases involving different offenders were consolidated for this appeal. In the first case, the offender's probation was extended a second time twenty-six days after the first extended probation had ended. His probation was later extended for a third time but without any hearing. The offender appealed the denial of his motion for discharge from probation. In the

second case, the offender's probation was extended for a third time but by an ex parte hearing. The offender appealed the denial of his motion to discharge his probation. In both cases, the probation was extended for the payment of restitution and the offenders appealed.

K.S.A. 2002 Supp. 22-2216(d) was reviewed as to the issue of the 30-day window to act upon an offender's probation. In addition, the Court also reviewed *State v. Ferguson*, 271 Kan. 613, 23 P.3d 891 (2001) and *State v. Williams*, 20 Kan. App. 2d 142, 20 P.3d 99 (2001). In holding that the sentencing court could extend probation during the 30-day window following the end of the probation, the Court said in part: "Since neither *Ferguson* nor *Williams* involved an interpretation of K.S.A. 2002 Supp. 22-3716(d), our statement in *Ferguson* that "it is well established in Kansas that a trial court has jurisdiction to revoke probation as long as the proceedings are started before expiration of the probation term," *Ferguson*, 271 Kan. at 617, is dicta only. Prior to the enactment of K.S.A. 2002 Supp. 22-3716(d), in Kansas, probation revocation proceedings had to be initiated within the probation period. However, as discussed above, the plain language of K.S.A. 2002 Supp. 22-3716(d) changes Kansas law and grants the "court… 30 days following the date probation… was to end to issue a warrant for the arrest or notice to appear for the defendant to answer a charge of a violation of the conditions of probation…. "In this case, the motion for revocation was filed within the 30-day window. The subsequent revocation and extension of probation for Gordon was within the jurisdiction of the district court. Thus, the final extension of his probation until such time as the restitution was paid in full was within the jurisdiction of the district court."

K.S.A. 2002 Supp. 21-4611(c)(7) was reviewed regarding the issue whether or not any hearing is required for the extension of an offender's probation until restitution was paid. The Court also reviewed *State v. McDonald*, 272 Kan. 222, 32 P.3d 1167 (2002) and in holding that no hearing was required, stated in part: "The above reading of the provisions of K.S.A. 2002 Supp. 21-4611 provides a reasonable basis for concluding that the legislature intentionally excluded a hearing requirement in only two cases: (1) where the defendant is convicted of nonsupport of a child and the responsibility for support continues, and (2) where the defendant is ordered to pay full or partial restitution and the amount of restitution ordered has not been paid. K.S.A. 2002 Supp. 21-4611(c)(7). In such cases, the court may extend probation for as long as the responsibility for support continues and for as long as the amount of restitution ordered has not been paid. In both cases, the issues to be decided are not of sufficient magnitude as to require an adversarial procedure for resolution. The district judge adopted such a rationale in concluding that "I am not sure there were any justifiable issues presented that would require an in court determination bringing the parties in."

The Court also found that there was no constitutional due process violation regarding K.S.A. 2002 Supp. 21-4611(c)(7) based upon not having a hearing before the extension of probation, nor any equal protection violation in that statute based upon the sentencing court's failure to make findings concerning the offenders' inability to pay restitution while still extending probation. *McDonald* was once again reviewed as to the due process issue and *City of Wichita v. Lucero*, 255 Kan. 437, 874 P.2d 1144 (1994) was reviewed regarding the equal protection issue.

Puckett v. Bruce, 276 Kan. 59, 73 P.3d 736 (2003). The offender escaped from the custody of the KDOC, was captured and then pled guilty to aggravated escape from custody and the sentencing court ordered the offender to pay $5,724.40 restitution to the KDOC. The offender filed a habeas corpus proceeding seeking to stop the collection of any restitution while he was

incarcerated and the sentencing court denied the petition, subject to a restriction of the offender retaining $10 per month in his inmate account.

The Court reviewed K.S.A. 2002 Supp. 21-4603d and stated in part: "The DOC's argument against the withholding of $10 a month from collection is based upon the mandatory nature of restitution rather than upon the discretionary nature of the order issued by the court under K.S.A. 2002 Supp. 21-4603d(a)(8). If the district court is vested with discretion regarding any repayment, the court is certainly vested with discretion to determine whether a certain amount shall be withheld from collection. Thus, we conclude that the district court in this case was within its discretion to exclude $10 per month from the collection of that order."

"The DOC further argues that Puckett has not argued that the DOC abused its discretion by permitting the total seizure of Puckett's inmate account. The abuse of discretion standard referred to by the DOC is not applicable to the DOC; rather, it is the standard applied to the ruling of the district court. Application of that standard to the order of the district court poses the question of whether or all reasonable persons would disagree with the order withholding the $10 from collection; *i.e.*, whether no reasonable person would take the action adopted by the district court. See *State v. Lopez*, 271 Kan. 119, 125, 22 P.3d 1040 (2001). We conclude that the order entered in this case was within the discretion of the trial court and that the DOC has not demonstrated an abuse of that discretion."

NOTE: A Motion for Rehearing/Modification was denied on 09/23/03.

State v. Rhodes, 31 Kan. App. 2d 1040, 77 P.3d 502 (2003). The offender pled guilty to nonresidential burglary and attempted theft. The sentencing court ordered restitution in the amount of $6,145. The offender objected to the amount of restitution and requested a hearing.

At the restitution hearing the victim could not produce receipts or written estimates for all of the stolen property but testified as to the specific amounts that she had paid for some of the items or the steps that she took to determine the property's value. The sentencing court affirmed the earlier order of $6,145 and the offender appealed.

The Court reviewed both *State v. Hinckley*, 13 Kan. App. 2d 417, 777 P.2d 857 (1989) and *State v. Applegate*, 266 Kan. 1072, 976 P.2d 936 (1999) and stated in part: "Here, Gontarek testified that following the burglary, she inventoried all the property in the unoccupied house and produced a list of all the missing items. As to the value of the property, Gontarek's testimony was strictly to replacement value and not market value…."

"Gontarek's testimony purported to be based on the fair market value of the stolen items. However, the evidence clearly showed that this value was based on the replacement cost of the items. Under Kansas law, Gontarek is permitted to express her opinion as to the fair market value of the items. See *Hinckley*, 13 Kan. App. 2d 418. However, Gontarek often used replacement cost or the original purchase price of an item to determine its value. From the evidence presented, it may be that the restitution order is appropriate. However, the district court had no basis to determine the fair market value of many of the goods upon which the restitution order was based. Therefore, even though Gontarek did properly testify as to the fair market value of some of the items, the district court abused its discretion in ordering restitution in the amount of $6,145 because a portion of that amount was calculated in reliance upon replacement cost rather than fair market value."

***State v. Robards*,** 31 Kan. App. 2d 1138, 78 P.3d 825 (2003). The offender appealed the district court decision on his motion to void restitution. The district court held: "[t]he defendant is on parole and the restitution order became part of the parole plan. The Court has no jurisdiction over the matter."

In 1985, the offender plead guilty to aggravated battery. The journal entry of sentencing, dated February 13, 1985 stated with regard to restitution: "IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant shall make restitution in the amount of Eighteen Thousand Dollars ($18,000) to be paid through the Leavenworth Court Services Office, as a condition of early release or parole pursuant to the provisions of K.S.A. 22-3717(j)."

The offender argued the district court erred in finding that it did not have jurisdiction over his motion to void restitution. He argued that the State had not taken any action concerning the restitution order since its imposition in 1985. Therefore, the order was dormant and became extinguishable and unenforceable on February 13, 1997.

The court noted K.S.A. 2002 Supp. 60-2403(d), which provides that a renewal affidavit must be filed or an execution must be issued within 10 years of a restitution order, otherwise the order will become dormant. If dormant for 2 years, then the order shall be released. The offender was granted conditional release on October 21, 1994. The Court following *State v. Morrison*, 28 Kan. App. 2d 249, 14 P.3d 1189 (2000), *rev. denied*, 271 Kan. 1040 (2001), held that the 10-year period begins on the date the restitution order is entered, not the date the offender was sentenced. Therefore, the Court affirmed the district court's rejection of the motion to void the restitution order based on the offender's conditional release date.

State v. Dexter, 276 Kan. 909, 80 P.3d 1125 (2003), review of an unpublished opinion from Court of Appeals (Case No. 86,324, filed 12/19/03). Pursuant to a plea agreement, the offender plead guilty to one count of impairing a security interest; six additional counts were dismissed. As a condition of probation the district court imposed restitution on all seven counts. The offender appealed.

The offender argued that the Court should follow the plea agreement which provided for restitution to be made in the bankruptcy proceeding or, in the alternative, that restitution should be limited to the one count to which the offender pled guilty. Furthermore, the offender argued that the district court did not have authority to impose the restitution because the one count of impairing a security interest did not cause the loss which arose from the other six counts.

The Court's analysis of the restitution issue included a review of K.S.A. 2000 Supp. 21-4610(d) and its holding in *State v. Hymer*, 271 Kan. 716, 26 P.3d 63 (2001). In *Hymer*, the court held absent an agreement by the defendant, K.S.A. 2000 Supp. 21-4610 (d) limited restitution to the damage or loss caused by the offense for which the defendant is being sentenced."

The Court in its opinion stated in part: "We hold that a district court, when sentencing a defendant to probation, may only order restitution for losses or damages caused by the crime or crimes for which the defendant was convicted unless, pursuant to a plea bargain, the defendant has agreed to pay for losses not caused directly or indirectly by the defendant's crime." The Court reversed and remanded for determination of restitution owed for the count to which `the offender pled guilty.

State v. Baxter. 34 Kan. App. 2d 364, 118 P.3d 1291 (2005). Defendant appealed the amount of restitution imposed by the trial court. The defendant stole a van equipped with special scaffolding used in the owner's billboard advertising business. The van was recovered but the scaffolding was not. At issue is the amount of restitution the defendant should pay for such scaffolding. The victim testified that the scaffolding was specially constructed by a company that was no longer in business and that replacement cost for new scaffolding would be around $1,600. The trial court ordered this amount in restitution over defense counsel's objection.

The Court of Appeals remanded the case for a more accurate determination of the appropriate restitution amount since the district court used the replacement cost rather than the fair market value of the scaffolding. In calculating restitution for a loss involving personal property, the item's fair market value is the usual standard. *State v. Rhodes*, 31 Kan. App. 2d 1040, Syl. ¶ 2, 77 P.3d 502 (2003). The Court also noted that depreciation is a factor to be considered, but it does not trump the ultimate test: the fair market value of the item in an arm's length sale.

State v. Dyer, 33 Kan. App. 2d 766, 108 P.3d 1010 (2005). Defendant appealed a $107,967 restitution order imposed after her conviction on three counts of theft. Defendant pled guilty to thefts of $1,000, $852, and $1,000 and the State dismissed the remaining counts. There was no agreement as to restitution. The victim business had losses of $276,743 which was reduced by the State due to statute of limitations to $63,213, plus attorney fees, auditing fees, and loans taken for the business during the periods of theft. At sentencing the defendant agreed that she should repay the $63,213 plus auditing fees, suggesting a restitution order of $64,937. On appeal, the defendant argued that the restitution order could not exceed the $2,852 which was the amount of loss alleged in the convictions to which she pled. The Court of Appeals agreed that a defendant could not be assessed restitution related to dismissed counts and reversed the $107,967 order. However, the Court of Appeals held that the defendant acquiesced in a restitution order of $64,937 at sentencing and directed imposition of that amount of restitution on remand.

SPECIAL APPLICATIONS TO SENTENCING (HARD 40/50)

State v. Vontress, 266 Kan. 248, 970 P.2d 42 (1998). Concerning the imposition of a "Hard 40" sentence, the Court said in part: "Where a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years or be otherwise sentenced as provided by law. K.S.A. 21-4635(a). In order to make the determination, the court may consider evidence concerning any matter that the court deems relevant. The district court shall include a consideration of the aggravating circumstances enumerated in K.S.A. 21-4636 and any mitigating circumstances. K.S.A. 21-4635(b)."

The Court also stated: "The mandatory 40-year sentence is an option only where the defendant has been convicted of premeditated first-degree murder. Therefore, the sentencing judge is precluded from imposing the hard 40 sentence where the jury is unable to reach a unanimous verdict regarding the premeditation theory. Where the sentencing court cannot ascertain whether the jury unanimously convicted the defendant of both premeditated murder and felony murder, the sentencing court has no authority for sentencing the defendant for premeditated murder."

Concerning the offender's criminal history score, the offender argued under K.S.A. 21-

4710(d)(11), a prior conviction for aggravated robbery should not have been included within his criminal history score due to the fact the prior conviction was a necessary element of one of his present convictions, namely the criminal possession of a firearm. The Court disagreed with the offender's claim, citing the offender's conviction for criminal possession of a firearm was not the offender's primary crime in the present case. Thus when the offender was sentenced on the charge of criminal possession of a firearm the offender was sentenced at a criminal history category "I" and the prior conviction for aggravated robbery was not included within the offender's criminal history for sentencing on that charge. The offender's full criminal history, including the prior aggravated robbery conviction, was computed and applied to the primary conviction for aggravated robbery. On this issue the Court stated in part: "Therefore, the prior felony was used as an element of the status crime [i.e., the current aggravated robbery conviction] and not used to establish the penalty for the firearm conviction. The sentencing court properly applied the felony conviction to that [i.e., the aggravated robbery] crime."

See also ***State v. Davis***, 275 Kan. 107, 61 P.3d 701 (2003).

State v. Spry, 266 Kan. 523, 973 P.2d 783 (1999). The offender was convicted of premeditated first-degree murder, and sentenced to the "Hard 40" under K.S.A. 1993 Supp. 21-4625(6) [now K.S.A. 21-4636(f).]

The Court affirmed the offender's conviction for premeditated first-degree murder, but held the evidence was not sufficient to support a finding of beyond a reasonable doubt, that the murder was committed in an "especially heinous, atrocious, or cruel manner" and thus did not meet the requirements for a Hard 40 sentence. The Court reversed the offender's Hard 40 sentence and remanded the case for resentencing. When determining whether the Hard 40 sentence was justified in this case, the Court stated in part that Kansas case law: "has consistently held that, in order to establish the murder as especially heinous, atrocious, or cruel,' *a victim must suffer serious physical abuse or mental anguish before death*." See *Follin*, 263 Kan. at 49-51; *Cook*, 259 Kan. 370, Syl. ¶ 8; *Willis*, 254 Kan. 119, Syl. ¶ 4; and *Kingsley*, 252 Kan. at 791-92."

Though the facts of the case indicated the victim was murdered by being struck in the head numerous times with an axe while laying asleep, the Court held there was no indication the victim suffered serious physical or mental anguish from the method of killing before she died and therefore the murder did not qualify as being "especially heinous, atrocious, or cruel."

See also ***State v Cook***, 259 Kan. 370, 913 P.2d 97 (1996).

NOTE: House Bill 2440, introduced in the 1999 Kansas Legislative Session amended the language of K.S.A. 21-4636 to more closely define what types of cases might be considered "especially heinous, atrocious, or cruel."

State v. Hazelton, 267 Kan. 384, 985 P.2d 707 (1999). Hazelton was convicted of premeditated murder and sentenced to the Hard 40 on the grounds that he had "knowingly or purposely killed or created a great risk of death to more than one person." Hazelton arranged to have his two intended victims accompany him to an isolated location. Hazelton shot and killed one victim, then turned and shot the second victim, but the second victim did not die. Hazelton argued that the two shootings were separate acts, and therefore his killing of the first victim did not "create a great risk of death to more than one person."

The Court disagreed, stating: "although not contemporaneous, the two events were so closely connected as to constitute one course of conduct." Therefore the Court held Hazelton's act created a great risk of death to more than one person and the sentencing court did not err in imposing the Hard 40 sentence.

State v. Jamison, 269 Kan. 564, 7 P.3d 1204 (2000). The sentencing court's application of the same aggravating factor, namely that the offender knowingly or purposely killed more than one person, to separate convictions for first-degree murder in imposing Hard 40 sentences, is not error even though both murders occurred in the same course of conduct and the offender was separately convicted for each murder. Relying upon a particular aggravating circumstance in imposing consecutive sentences when that circumstance has already been relied upon in imposing a Hard 40 sentence even if that circumstance is the sole reason for imposing the consecutive sentences, is not inappropriate.

State v. Conley, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied*, 532 U.S. 932, 121 S. Ct. 1383, 149 L. Ed. 2d 308 (2001). This involved a premeditated first-degree murder conviction that resulted in a Hard 40 sentence where the Court addressed an *Apprendi* based appeal, see *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The Court addressed five other arguments raised by the offender, including the Kansas Constitution's Bill of Rights, Section 5, was violated by the Hard 40 sentencing scheme, before addressing the *Apprendi* issues raised by the offender. All five of the offender's non *Apprendi* arguments were rejected.

Regarding the *Apprendi* issues though, the Court first reviewed the cases that predated *Apprendi*. In *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986), a statute which provided for a mandatory minimum 5 year prison sentence for anyone convicted of certain specified felonies if the person 'visibly possessed a firearm' during the commission of the felony was involved. The Court held that 'visible possession' of a firearm was not an element of the crime. In addition, the Court also noted the application of the 5 year minimum sentence only comes into play after an offender has been convicted of the specified felony and that the 5 year sentence is neither an increased sentence nor a separate sentence. It is merely a minimum sentence and thus would now apply in this case.

In *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), the offender was sentenced to 25 years imprisonment instead of only 15 years under a statute which involved a carjacking with the use of a firearm and then also resulted in serious bodily injury to one of the victims. This sentence was increased to 25 years because of the firearm and the serious bodily injury that resulted. However, the Court held a 25 year sentence as the result of serious bodily injury was a steeply higher penalty which was conditioned on further facts which were as important as the elements listed in the statute. Thus the judicial fact-finding based upon a preponderance of the evidence to increase the sentence from 15 to 25 years was set aside.

The Court then pointed out that *Jones* does not apply to this case in that a Hard 40 sentence does not increase the offender's life sentence. Instead a Hard 40 is only a minimum term for what could be a maximum sentence of life imprisonment. *Apprendi* also did not apply to this case because the offender's sentence in the *Apprendi* case was enhanced as a result of the sentencing court trying to determine the offender's state of mind. Thus, any fact that serves to increase the offender's sentence beyond the statutory maximum, other than the offender's prior criminal history, requires submission to a jury and must be proven beyond a reasonable doubt.

In *Conley*, there could be no increase in the maximum sentence from a minimum of a Hard 40, when the maximum sentence is already potentially for life.

See also ***State v. Lopez***, 271 Kan. 119, 22 P.3d 1040 (2001), ***State v. Coleman***, 271 Kan. 733, 26 P.3d 613 (2001), ***State v. Lessley***, 271 Kan. 780, 26 P.3d 620 (2001), ***State v. Sanders***, 272 Kan. 445, 33 P.3d 596 (2001), ***State v. Bradford***, 272 Kan. 523, 34 P.3d 434 (2001), ***State v. Gholston***, 272 Kan. 601, 35 P.3d 868 (2001), ***State v. Flournoy***, 272 Kan. 784, 36 P.3d 273 (2001), ***State v. Roberson***, 272 Kan. 1143, 38 P.3d 715 (2002), ***State v. Albright***, 273 Kan. 811, 46 P.3d 1167, *cert. denied*, 537 U.S. 962 (2002), ***State v. Papen***, 274 Kan. 149, 50 P.3d 37 (2002) and ***State v. Washington***, 275 Kan. 644, 68 P.3d 134 (2003).

State v. Lopez, 271 Kan. 119, 22 P.3d 1040 (2001). The offender received a Hard 40 sentence for a conviction of one count of premeditated first-degree murder and then raised numerous issues on appeal, including two issues on the Hard 40 sentence. These issues involved the sufficiency of the evidence supporting the aggravating factor and the sentencing court's determination the mitigating factors did not outweigh the aggravating circumstance.

The Court stated in part: "a rational fact finder could have found by a preponderance of the evidence the existence of the aggravating circumstances." The Court also held the mitigating circumstances statute, namely K.S.A. 21-4637 does not require the sentencing court to identify the mitigating circumstances and absent an abuse of discretion, a sentencing court's weighing of the aggravating and mitigating circumstances will not be set aside. The Court also noted the holding in *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert denied*, 121 S. Ct. 1383 (2001), regarding the application of *Apprendi* to the offender's Hard 40 sentence. The Court referred to Syl. ¶ 3, as follows: "Imposition of the K.S.A. 21-4638 hard 40 sentence based on a fact not found by the jury does not increase a defendant's maximum sentence of imprisonment for life imposed under K.S.A. 21-4706(c). The hard 40 sentence limits the lower end of the sentence. Defendant's hard 40 sentence violates neither the Due Process Clause of the United States Constitution, nor his right to trial by jury under the 6th Amendment to the United States Constitution or § 5 of the Kansas Constitution Bill of Rights."

State v. Coleman, 271 Kan. 733, 26 P.3d 613 (2001). The offender was a 15 year old prosecuted and sentenced as an adult for premeditated first-degree murder and three counts of aggravated assault. The offender was sentenced to a Hard 40 sentence, plus a consecutive sentence of 13 months on the three aggravated assault counts.

The Court reviewed K.S.A. 2000 Supp. 21-4636 which specifically limits the aggravating factors that a sentencing court can consider in imposing a Hard 40 sentence and then held that two of the three aggravating factors should not have been considered. These two aggravating factors were not among those included in the statute. The Court affirmed the offender's convictions, vacated the Hard 40 sentence and remanded the case back to the sentencing court to reweigh the one aggravating factor against any mitigating factors.

In addition, the Court once again specifically declined to apply *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) to the Kansas Hard 40 sentencing statute. See also ***State v. Lessley***, 271 Kan. 780, 26 P.3d 620 (2001) and ***State v. Sanders***, 272 Kan. 445, 33 P.3d 596 (2001), where the Court also declined to apply *Apprendi* to vacate a Hard 40 sentence based upon the Court's holding in *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied*, 149 L. Ed. 2d 308 (2001).

State v. Verge, 272 Kan. 501, 34 P.3d 449 (2001). The offender was convicted of capital murder, aggravated burglary, aggravated robbery, and two counts of theft. Nine issues were raised on appeal including an upward departure sentence for the aggravated burglary, aggravated robbery, and two counts of theft convictions, with all of these to run consecutive following a Hard 40 sentence. The jury had declined to apply the death penalty.

The Court applied its ruling in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) to the upward departure issue and remanded the aggravated burglary, aggravated robbery and two counts of theft for resentencing after affirming these convictions.

Regarding the issue of whether or not the Kansas Hard 40 sentencing scheme is constitutional, the Court referred to *State v. Conley*, 270 Kan. 18, Syl. ¶ 3, 11 P.3d 1147 (2000) *cert. denied*, 532 U.S. 932 (2001) and *State v. Lopez*, 271 Kan. 119, 22 P.3d 1040 (2001) as the basis for upholding the same.

The issue of the sentencing court imposing the Hard 40 sentence after the jury had refused to impose the death penalty was answered in the affirmative after the Court reviewed the statutory history of the Hard 40 sentence. When it was first established in 1990, the Hard 40 required a unanimous jury verdict that a statutory aggravating circumstance(s) existed and also that the aggravating circumstance(s) were not outweighed by mitigating circumstances. In 1994 the statute was amended to only apply to the death penalty. Another statute was passed in 1994, namely K.S.A. 21-4635 and it required the sentencing court to determine whether an offender convicted of capital murder but not subjected to the death penalty, should receive a Hard 40 sentence instead. The same balancing test of aggravating and mitigating circumstances was included in K.S.A. 21-4635 as is required for the death penalty, however, in a Hard 40 sentence the sentencing court need not find the existence of aggravating circumstances beyond a reasonable doubt. In addition, K.S.A. 21-4635(c) permitted the sentencing court to make findings concerning the aggravating circumstances and to also decide the balancing of the aggravating and the mitigating circumstances once the death penalty was no longer an issue.

The Court declined to apply *State v. Stafford*, 255 Kan. 807, 878 P.2d 820 (1994), *State v. Spain*, 263 Kan. 708, 953 P.2d 1004 (1998) or *State v. Spain*, 269 Kan. 54, 4 P.2d 621 (2000). See also ***State v. Bradford***, 272 Kan. 523, 34 P.3d 434 (2001) that was a companion case to *Verge*.

NOTE: The Supreme Court also issued an unpublished opinion regarding *State v. Bradford* on 05/30/03.

State v. Gholston, 272 Kan. 601, 35 P.3d 868 (2001). The offender was convicted of premeditated first-degree murder and a Hard 40 sentence was imposed. The offender appealed the imposition of the Hard 40 sentence based in part upon the argument that there was no evidence that he had knowingly or purposefully created a great risk of death to more than one person. In addition, the offender also argued a Hard 40 sentence wasn't appropriate if the mitigating circumstances which he felt that the sentencing court should have considered, outweighed the aggravating circumstances and also that the offender's age at the time of the offense, namely that he was only 17 years old, was a mitigating factor that should outweigh the aggravating circumstance of the risk of death to more than one person.

However, in affirming the Hard 40 sentence, the Court stated in part regarding the offender's first argument: "Where the sufficiency of the evidence is challenged for establishing

the existence of an aggravating circumstance in a hard 40 sentencing proceeding, the standard of review is whether, after a review of all of the evidence, viewed in the light most favorable to the prosecution, a rational fact finder could have found the existence of the aggravating circumstance by a preponderance of the evidence. *State v. Murillo*, 269 Kan. 281, 287-88, 7 P.3d 264 (2000)."

The Court addressed the offender's second argument regarding the sentencing court's refusal to find certain mitigating factors by stating in part: "Where a trial court's refusal to find a mitigating circumstance under K.S.A. 21-4637 is challenged by the defendant, the standard of review is whether, after a review of all the evidence, viewed in a light most favorable to the defendant, a rational fact finder could have found by a preponderance of the evidence the existence of the mitigating circumstance. However, the trial court's decision regarding a circumstance not enumerated as mitigating in the statute is within the trial court's discretion and will not be disturbed on appeal absent abuse of discretion. *State v. Spain*, 263 Kan. 708, 720, 953 P.2d 1004 (1998).

In disposing of the offender's third issue regarding his age at the time of the offense, the Court referred to *State v. Said*, 269 Kan. 657, 7 P.3d 1214 (2000). The Court once again pointed out that age can be a mitigating factor but age alone is no basis not to impose a Hard 40 sentence. In addition, the Court also noted as it first ruled in *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert denied*, 532 U.S. 932, 121 S. Ct. 1383 (2001), that the Hard 40 sentence does not violate the Sixth and the Fourteenth Amendments of the U.S. Constitution, or § 5 of the Kansas Constitution Bill of Rights.

State v. Flournoy, 272 Kan. 784, 36 P.3d 273 (2001). The offender was convicted of first-degree premeditated murder of his grandmother and battery of his girlfriend. The sentencing court imposed a Hard 40 sentence after finding that the murder was committed for the purpose of receiving money or other thing of monetary value and that it was committed in an especially heinous, atrocious, or cruel manner. One mitigating circumstance, namely that there was no significant history of prior criminal activity, was found. The offender appealed.

The Court upheld the aggravating circumstance of the offender having received money, however, the murder was found not to been especially heinous, atrocious, or committed in a cruel manner. Here the victim had been shot to death and in setting aside the second aggravating circumstance, the Court stated in part: "We have said: "All murders are heinous, atrocious, and cruel. The legislature, by using the phrase 'in [an especially] heinous, atrocious, or cruel manner,' meant that the heinous, atrocious, or cruel manner must be in a special or unusual degree, to an extent greater than in other cases." *State v. Cook*, 259 Kan. 370, 403, 913 P.2d 97 (1996). Shooting deaths are generally not considered committed in an especially heinous, atrocious, or cruel manner. *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert denied*, 532 U.S. 932, 121 S. Ct. 1383 (2001)… We recognized an exception to the rule in *State v. Alford*, 257 Kan. 830, 838, 896 P.2d 1059 (1995). We found that the *Alford* facts supported a finding that the murder was heinous and cruel…"

After eliminating the "heinous and cruel" aggravating circumstance, the Court determined the one remaining aggravating circumstance must be reweighed by the sentencing court against the one mitigating circumstance, thus the Hard 40 sentence was vacated and the case was remanded. In addition, the Court once again noted *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert denied*, 532 U.S. 932, 121 S. Ct. 1383 (2001), and that the Hard 40 sentence does not violate the Sixth and the Fourteenth Amendments of the U.S. Constitution, or

§ 5 of the Kansas Constitution Bill of Rights.

State v. Brown, 272 Kan. 809, 35 P.3d 31 (2001). The offender was convicted of premeditated first-degree murder and sentenced to a Hard 40 term of imprisonment. The offender appealed the Hard 40 sentence on several grounds.

The offender claimed the sentencing court failed to make a record of its findings with regard to the Hard 40 sentence. However, the Court held that the Journal Entry of Judgment form adequately noted the sentencing court's findings of both the aggravating and the mitigating circumstances. The offender also argued that the homicide was not committed in an especially, heinous, atrocious, or cruel manner because the victim didn't suffer serious mental anguish or serious physical abuse. The issue here becomes one of what standard of proof is required to prove this and the Court stated in part: "… The standard actually applied by this court where the sufficiency of the evidence is challenged for establishing the existence of an aggravating circumstance in a hard 40 sentencing proceeding is "whether, after a review of all of the evidence, viewed in the light most favorable to the prosecution, a rational fact finder could have found the existence of the aggravating circumstances by a preponderance of the evidence." *State v. Murillo*, 269 Kan. 281, 287-88, 7 P.3d 264 (2000)."

In this case the offender had struck the victim at least eight or nine times with a claw end of a hammer breaking the victim's skull with one blow and breaking the skull and also penetrating the brain with another. The offender's conduct warranted the especially heinous, atrocious, or cruel manner aggravating circumstance.

Although the aggravating circumstance of a great risk of death to more than one person was set aside, the Court upheld the Hard 40 sentence and stated in part: "There remains one aggravating circumstance and one mitigating circumstance. The circumstance of striking the victim some eight or nine times with a claw hammer, some blows delivered while the victim was crawling around on the floor, clearly outweighs the circumstance of no substantial criminal record. The overwhelming disparity between the two circumstances makes remand to the trial court for reweighing unnecessary. We find under the facts of this case that the mitigating circumstance does not outweigh the aggravating circumstance."

State v. Livingston, 272 Kan. 853, 35 P.3d 918 (2001). The Court's two paragraph Syllabus clearly states the Court's rulings as they apply to the sentencing issues, namely: Syl. ¶ 1. "The standard of review on a challenge to the sufficiency of the evidence for establishing an aggravating circumstance under K.S.A. 2000 Supp. 21-4635 is the same whether a hard 40 or a hard 50 sentence is at issue. The standard is whether, after a review of all of the evidence, viewed in the light most favorable to the State, a rational fact finder could have found by a preponderance of the evidence the existence of the aggravating circumstances."

Syl. ¶ 2. "The district court's failure to list the aggravating circumstances it found supporting imposition of a hard 50 sentence, as required by K.S.A. 2000 Supp. 21-4635(c), may be corrected by a nunc pro tunc order incorporating into the journal entry the findings made on the record at the time of sentencing."

State v. Albright, 273 Kan. 811, 46 P.3d 1167 (2002). The Court's stated in part: "Albright also questions the constitutionality of his hard 40 sentence and the constitutionality of K.S.A. 22-3220 (defense of lack of mental state). Neither constitutional claim was raised below. The challenge to the hard 40 sentence is based on *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed.

2d 435, 120 S. Ct. 2348 (2000. Albright's trial commenced on May 15, 2000. The guilty verdict was returned on May 18, 2000. *Apprendi* was filed June 26, 2000. Albright's hard 40 claim is controlled by *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied*, 532 U.S. 932 (2001). Albright urges us to overrule *Conley*. We decline to do so."

State v. Rice, 273 Kan. 870, 46 P.3d 1155 (2002). Refer to the Syllabus. "In an appeal from the district court's denial of a defendant's motion to correct an illegal sentence, the record is examined and it is held: The sentencing phase jury's omission of the term "especially" from its verdict finding that the crime was committed in a heinous, atrocious, and cruel manner as the aggravating factor did not render the ultimate imposition of the hard 40 sentence illegal under the circumstances herein."

State v. Boldridge, 274 Kan. 795, 57 P.3d 8 (2002). The offender was convicted of first-degree premeditated murder and received a Hard 50 sentence. Among the issues the offender argued on appeal was that the State failed to present sufficient evidence to support the imposition of a Hard 50 sentence, and also that the Hard 50 sentence violates the Sixth and Fourteenth Amendments of the U.S. Constitution, as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

On the issue of the lack of sufficient evidence to support a Hard 50 sentence, the Court stated in part: "The trial court found that Lisa committed the crime for herself or another for the purpose of receiving money or any other thing of monetary value, an aggravating circumstance under K.S.A. 2001 Supp. 21-4636(c). The court also rejected Lisa's argument that the mitigating factors in K.S.A. 21-4637(d) and (h) existed and outweighed any aggravating factors found."

"There is sufficient evidence in the record to support the sentencing court's finding that Lisa's motive for the crime was financial gain. Lisa was concerned with her son's financial support… That Lisa killed Kurt to benefit her son with social security death benefits is established in trial testimony."

"The State's evidence in the present case precludes a finding that Lisa's role was minor… Lisa showed these men the way to Kurt's house. Lisa let the men into Kurt's house and found a shotgun for Wilson to use. When Wilson fired the gun, Lisa had been standing behind Wilson the entire time…"

"Our conclusion that the trial court's finding of the aggravating factor of financial gain is supported in the record and our further conclusion that the trial court's determination that the claimed mitigating circumstances did not exist demonstrates that the trial court's weighing of all of the factors and its imposition of the hard 50 sentence was not an abuse of discretion."

Regarding the *Apprendi* issue, the Court stated: "Imposition of the hard 50 sentence based on a fact not found by the trial court as fact finder in a bench trial or by a jury in a jury trial does not increase a defendant's maximum sentence of imprisonment for life. The hard 50 sentence limits the lower end of the sentence. A defendant's hard 50 sentence violates neither the Due Process Clause of the United States Constitution nor his or her right to trial by jury under the Sixth Amendment of the United States Constitution or Section 5 of the Kansas Constitution Bill of Rights."

"This same argument has been rejected by this court in *State v. Douglas*, 274 Kan. ___, 49 P.3d 446 (2002). See *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert denied*, 532

U.S. 932, 121 S. Ct. 1383 (2001); see also *State v. Boorigie*, 273 Kan. 18, 41 P.3d 764 (2002) (summarily incorporating the *Conley* analysis with respect to *Apprendi* and the imposition of the hard 40 sentence). Lisa fails to cite any additional authority for this court to alter its position."

State v. Hebert, 277 Kan. 61, 82 P.3d 470 (2004). The offender was convicted of capital murder, aggravated battery against a law enforcement officer, criminal use of a weapon, and inflicting death to a police dog. The court sentenced the offender to consecutive sentences of life in prison without the possibility of parole for 50 years for capital murder, 46 months for aggravated battery against a law enforcement officer, 7 months for criminal use of weapons, and 12 months for inflicting death to a police dog.

The offender raised numerous issues on appeal including the constitutionality of the hard 50 statute, K.S.A. 21-4635. After the offender was found guilty, he waived his right to contest a sentence below the statutory maximum and stipulated to the aggravating factors for the purposes of a hard 50 sentence. The jury did not reach a unanimous decision during the sentencing phase of the trial. The trial court found that the defendant "knowingly created a great risk of death to more than one person" and that the defendant "committed the crime in order to avoid or prevent a lawful arrest." Based on those aggravating factors, the trial court sentenced the defendant to life in prison without the possibility of parole for 50 years on the capital murder charge.

The offender claimed that K.S.A. 21-4635 (hard 50 statute) is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed.2d 435, 120 S. Ct. 2348 (2000). The defendant argued that the aggravating factors that increased his sentence from life without the possibility of parole for 25 years to life without the possibility of parole for 50 years are facts that should have been found by a jury beyond a reasonable doubt.

The Court noted that it had addressed and upheld the constitutionality of the hard 50 sentence in *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert denied*, 532 U.S. 932, 121 S. Ct. 1383 (2001), *State v. Douglas*, 274 Kan. 96, 111 (2002), *cert. denied*, 537 U.S. 1198 (2003) and *State v. Boldridge*, 274 Kan. 795, 57 P.3d 8, *cert. denied*, 538 U.S. ___, 155 L. Ed. 2d 1494 (2003). Therefore, the Court concluded that the offender's claim was without merit and affirmed his sentence.

State v. Washington, 280 Kan. 565, 123 P.3d 1265 (2005). Defendant appealed the imposition of a hard 50 sentence for first degree premeditated murder. Defendant shot the victim in the foot. The victim hopped across the street, knocked on a neighbor's door, and pleaded for help before the defendant shot her 10 more times. The trial court imposed a hard 50 because it concluded that the crime had been committed in an especially heinous, atrocious, or cruel manner under K.S.A. 21-4636(f). On review, the Court noted that shooting deaths generally do not fall under this aggravating factor. However, the Court concluded that the victim suffered mental anguish related to her knowledge of her ultimate fate and affirmed the trial court's sentence.

See also: ***State v. Engelhardt***, 280 Kan. 113, 119 P.3d 1148 (2005) (victim stabbed approximately 55 times over 20 minutes), ***State v. Robertson***, 279 Kan. 291, 109 P.3d 1174 (2005) (victim held down and stabbed repeatedly, pulled back when attempting to escape and then victim's face and neck was stomped on to silence her gurgling noises).

NOTE: The Kansas Hard 50 sentencing scheme is not unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), or *Jones v.*

United States, 526 U.S. 227, 243, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). See ***State v. Robertson***, 279 Kan. 291, 109 P.3d 1174 (2005), ***State v. James***, 279 Kan. 354, ___ P.3d ___ (2005), ***State v. Buehler-May***, 279 Kan. 371, ___ P.3d ___ (2005).

SPECIAL APPLICATIONS TO SENTENCING (PROBATION REVOCATION)

State v. Lumley, 25 Kan. App. 2d 366, 963 P.2d 1238 (1998), *aff'd*, 267 Kan. 4, 977 P.2d 914 (1999). The offender was granted a downward dispositional departure, allowing him to participate in a Community Corrections supervised treatment program based on the offender's agreement to a number of probation conditions, including the condition the offender submit to periodic polygraph examinations. After the offender failed a polygraph examination, a motion was filed to revoke the offender's probation.

At the probation revocation hearing the offender argued that evidence concerning the polygraph examination could not be introduced at the hearing. The offender's argument for excluding the polygraph evidence was that the offender had agreed to undergo the polygraph examinations only as part of his therapy and not as a basis for additional evidence to be used against him in a probation revocation hearing. The Court held the offender's unwillingness to allow the evidence constituted an unwillingness to abide by the terms of the original probation plan and therefore the offender's earlier agreement to abide by the terms of the court's probation plan constituted a fraud on the sentencing court. The sentencing court had stated since the offender was not willing to abide by the terms of the dispositional departure probation plan, the court would "go back to ground zero" and "start over with sentencing again." The sentencing court then imposed the guidelines sentence for the offender's crimes (102 months in prison).

The Court held that even though the sentencing court had referred to its action as "resentencing," what actually occurred was a probation revocation. The sentencing court simply imposed the underlying guidelines sentence for the offender's crime, exactly as would have been done if the offender's probation had been revoked. Even though this case involved a dispositional departure from the sentencing guidelines, once the offender was placed on probation, any action to revoke that probation should properly be dealt with as any other probation revocation would be. The Court found this probation revocation to be proper based in part on *Swope v. Musser*, 223 Kan. 133, 136, 573 P.2d 587 (1977) where the Supreme Court said: "[W]hen misrepresentations have been made to the court by or on behalf of a defendant at the time of granting probation which misrepresentations were a basis for granting probation in the first place, the prior misrepresentations may be grounds for revocation... It has also been held that probation may be revoked for fraudulent concealment of facts and circumstances existing at the time of the hearing at which probation is granted."

The Court upheld the rule that whether an order of probation should be revoked is a matter within the sentencing court's discretion. See ***State v. Duke***, 10 Kan. App. 2d 392, 394, 659 P.2d 576 (1985). The Court stated such judicial discretion is only abused "when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court." See ***State v. Baker***, 255 Kan. 680, 877 P.2d 946 (1994). The Court found no abuse of discretion and sustained the sentencing court's order revoking probation.

State v. Thomas, 26 Kan. App. 2d 171, 981 P.2d 1178 (1999). Thomas was originally sentenced for possession of cocaine, possession of a controlled substance without a tax stamp and criminal use of a weapon. His classification of 4-I put him in the presumptive probation portion of the sentencing grid for drug offenses. Thomas received probation for his crimes, but was subsequently brought back before the sentencing court for probation violation hearings on January 9, 1997, and again on October 3, 1997. At the January 9, 1997, probation violation hearing the sentencing court revoked Thomas' probation, but reinstated probation under the intensive supervision of community corrections. On October 3, 1997, at Thomas' second probation violation hearing, the sentencing court revoked Thomas' probation, reinstated probation and ordered Thomas to be placed in the community corrections residential program. In light of the fact that there were no beds available at the community corrections residential program at that time, the sentencing court ordered Thomas to be held in jail until a bed became available. Thomas objected to the unspecified length of confinement in jail and subsequently filed an appeal.

In his appeal, Thomas argued Kansas statutes do not give the sentencing court the authority to set an unspecified length of confinement in jail as a condition of probation. Thomas contended that K.S.A. 21-4603d, the authorized dispositions statute, only authorizes a 30-day jail time as a condition of probation, and the sentencing court lacked the authority to impose a seemingly indeterminate jail sentence pending his placement in the community corrections residential program. The Court agreed with Thomas.

The Court acknowledged that Kansas courts have consistently recognized that probation is a privilege granted by the sentencing court and the court has broad power and authority when imposing conditions of probation so long as such conditions do not violate statutory law or constitute an abuse of discretion by the court. Citing *State v. Walbridge*, 248 Kan. 65, 805 P.2d 15 (1991) and *State v. Starbuck*, 239 Kan. 132, 715 P.2d 1291 (1986). However, the Court found when an offender has been found guilty of a crime, K.S.A. 21-4603d controls as to the authorized dispositions permitted a sentencing court. Under K.S.A. 1998 Supp. 21-4603d(a)(3) which states: ".. In felony cases except for violations of K.S.A. 8-1567 and amendments thereto, the court may include confinement in a county jail not to exceed 30 days, which need not be served consecutively, as a condition of probation or community corrections placement."

The Court further held that the Kansas Legislature also delineated a list of conditions sentencing courts may use when establishing a defendant's probation in K.S.A. 21-4610(c)(14) which states that in setting probation, the sentencing court may order the defendant, "in felony cases, except for violations of K.S.A. 8-1567 and amendments thereto, be confined in county jail not to exceed 30 days, which need not be served consecutively."

While the Court of Appeals recognized the sentencing court's good intentions in this case, the Court held that there was no authority for the sentencing court to incarcerate Thomas in county jail beyond 30 days.

State v. Wonders, 27 Kan. App. 2d 588, 8 P.3d 8, *rev. denied*, 269 Kan. 940 (2000). Under K.S.A. 22-3716(a) the sentencing court may issue a warrant *sua sponte* for a violation of a offender's probation at any time before the expiration of the probation term. The sentencing court is not deprived of the jurisdiction to revoke probation when a revocation proceeding is initiated by a court services officer.

State v. Hymer, 27 Kan. App. 2d 1054, 11 P.3d 94 (2000), *rev'd*, 271 Kan. 716, 26 P.3d 63 (2001). The offender was sentenced to residential community corrections but was held in the county jail until a bed became available. At the end of thirty days when no bed space became available, the sentencing court revoked probation and sentenced the offender to prison. The appellate court held that since the offender's presumptive sentence was probation not imprisonment and although the sentencing court could revoke probation even if there was no fault on the part of the offender, the sentencing court still must first make findings on the record of substantial and compelling reasons for a departure, pursuant to K.S.A. 21-4716(a).

It was not the offender's fault he could not attain an unattainable condition for probation and any departure from presumptive probation required a departure hearing.

State v. Street, 28 Kan. App. 2d 291, 16 P.3d 333 (2000), *rev. denied*, 271 Kan. 1041 (2001). While on probation the offender committed numerous probation violations and five motions to revoke her probation were filed. The sentencing court revoked probation the first four times, ordered 30 days in jail or community corrections and then reinstated probation each time. The fifth time the sentencing court ordered the offender to serve her underlying sentence.

The offender argued an abuse of discretion on appeal claiming it wasn't enough that she failed to pay her probation costs and fees but that the sentencing court was required to find that there was a conscious refusal on her part to pay before her probation could be revoked. The offender relied upon *Bearden v. Georgia*, 461 U.S. 660, 672, 76 L. Ed. 221, 103 S. Ct. 2064 (1983).

The Court noted if the offender's probation had only been revoked for the failure to pay her probation costs and fees, the revocation would be remanded based upon an application of *Bearden*. However, the Court found that the offender had not only failed to make her payments but in addition had also failed to keep eleven court services officer appointments and that verification of the offender's explanations for nine of these were questionable. As a result of both the failure of the offender to make the required payments and her inability to provide sufficient mitigating factors to explain nine of the eleven missed appointments, the Court found no abuse of discretion.

State v. McGill, 271 Kan. 150, 22 P.3d 597 (2001). The offender pled guilty to indecent solicitation of a child. The sentencing court sentenced the offender to an upward durational departure of 26 months but placed the offender on probation for 24 months. By voluntary agreement the offender's probation was extended for an additional 90 days or upon payment of the balance of a $279.35 probationary obligation. The offender's probation was revoked based upon an aggravated indecent liberties violation with a 15 year old girl and the trial court then imposed a lower sentence of 12 months imprisonment. The State appealed the modified sentence (which would have been the presumptive sentence for the original conviction).

The State relied upon *State v. Miller*, 260 Kan. 892, 926 P.2d 652 (1996) and also *State v. Smith*, 26 Kan. App. 2d 272, 981 P.2d 1182 *rev. denied*, 268 Kan. 854 (1999) as the basis a sentencing court could not modify a sentence after its imposition. The offender relied upon K.S.A. 22-3716.

The standard of review was the interpretation of a statute. The Court noted that both *Miller* and *Smith* involved the modification of sentences after the sentencing had been concluded

and the offenders had been committed to the custody of the Secretary of Corrections. As to K.S.A. 2000 Supp. 22-3716(b), the Court held the specific language of the statute allowed the trial court to impose a lesser sentence and the State's appeal was denied.

State v. Powers, 29 Kan. App. 2d 166, 25 P.3d 147 (2001). The offender was convicted of a class A misdemeanor with a six month sentence. After serving sixty days the offender was placed upon probation for twelve months. The offender's probation began on July 17, 1998 and two days before the expiration of the probation, the offender signed a voluntary extension of her probation for an additional twelve months. The voluntary extension wasn't filed until July 19, 1998.

The State later moved to revoke the offender's probation and the offender argued that the sentencing court had lost jurisdiction over her because the extension order was filed two days after her original probation period had ended. The sentencing court held that it had jurisdiction because the last day of the original probation (July 17, 1999) fell on a Saturday and ordered the offender to serve the balance of her original sentence. The offender appealed.

The issue of jurisdiction is a question of law over which an appellate court has unlimited review. The Court found K.S.A. 2000 Supp. 21-4611(c)(8) applied and noted the twelve months extension of the original probation period did not exceed the statutory maximum period of probation. The Court then addressed the computation of time issue for the filing of the voluntary extension order. K.S.A. 2000 Supp. 60-206(a) was applied to criminal procedure in *State v. White*, 234 Kan. 340, 673 P.2d 1106 (1983), *State v. Wilson*, 15 Kan. App. 2d 308, 808 P.2d 434 (1991) and also in *State v. Ji*, 255 Kan. 101, 872 P.2d 748 (1994). This statute provides that when the last day of the time being computed falls on a Saturday or a Sunday, or a legal holiday, the time continues to run until the end of the next day which is not a Saturday, Sunday or a legal holiday. The Court held that the reasoning in *White* applied and that the sentencing court had the jurisdiction to revoke the offender's probation.

State v. Ferguson, 271 Kan. 613, 23 P.3d 891 (2001). In May 1998, the offender was sentenced to twenty-four months probation with an underlying six months prison sentence for a forgery conviction. One of the specific conditions of probation was the payment of $1,550 restitution. On August 11, 1999, a bench warrant was issued for the offender when a Motion to revoke probation was filed. On May 5, 2000, an Amended Motion to revoke probation was filed and a revocation hearing was held on May 26, 2000. The offender then moved to dismiss the probation revocation Motion on the ground that her probation had been automatically reduced from 24 months to 12 months the day before the hearing (May 25, 2000) as a result of the effective date of Senate Bill 323 (SB 323). The sentencing court disagreed, denied the offender's Motion and revoked her probation. The offender then appealed.

The standard for review regarding whether or not the sentencing court had the jurisdiction to revoke the offender's probation involves a question of law where the Court's scope of review is unlimited. The Court reviewed the statutory basis of K.S.A. 2000 Supp. 21-4611 in addressing the offender's revocation argument regarding SB 323. The Court noted that the offender's probation period could be reduced from 24 months to 12 months, however, the retroactive application of SB 323 in changing the offender's probation time period was not automatic. Any application of SB 323 to this case was dependent upon the sentencing court first reviewing the offender's sentence on or before September 1, 2000. This had not been done yet and thus the sentencing court still had the jurisdiction to revoke the offender's probation first instead.

Regarding the issue of restitution, the Court noted the standard for review for a probation revocation is the abuse of discretion. However, here there were several reasons to revoke the offender's probation besides the nonpayment of restitution. The offender had also failed to report for monthly drug screens for twelve months prior to the revocation hearing, had failed to report to the probation officer in June and July 1999 and had also failed to document her claimed health problems that the offender said prevented her from working on a full time basis. The decision of the sentencing court was affirmed.

State v. McDonald, 272 Kan. 222, 32 P.3d 1167 (2001). The offender pled guilty to burglary and theft, and was sentenced to 24 months probation, with an underlying prison term of 27 months. In addition, the offender was ordered to pay restitution of $4,087.24 and $554.50 court costs. The offender's probation was twice extended for an additional year at a time in order for the offender to pay the restitution and costs in full. In both extensions the offender appeared at the extension hearings but without the benefit of counsel and both times the offender consented to the extensions. The offender's probation was revoked during the second extension and the offender was ordered to serve the 27 months prison sentence. The offender appealed.

The Court reviewed K.S.A. 2000 Supp. 21-4611 and K.S.A. 22-3716, then held under the latter statute that there is no right to court appointed counsel at a probation extension hearing. Counsel need only be appointed for an offender in a probation revocation hearing. See ***Brown v. Kansas Parole Board***, 262 Kan. 903, 943 P.2d 1240 (1997).

In *McDonald* the Court stated in part: "Our Kansas procedures clearly pass constitutional muster. We have previously set forth the provisions of K.S.A. 21-4611(c)(5), now K.S.A. 2000 Supp. 21-4611(c)(8), that the extension of the offender's period of supervision is based on a "modification hearing and a judicial finding of necessity."… While the legislature could have required counsel at proceedings where the term of supervision of probation is extended, it is not required. Adequate constitutional protection is afforded and McDonald's contentions herein must fail."

The Court also noted that the basis for the federal requirement of the right to court appointed counsel in a probation extension hearing is statutory in nature and not based upon case law.

State v. Haines, 30 Kan. App. 2d 110, 39 P.3d 95, *rev. denied*, 273 Kan. 1038 (2002). The offender entered a plea to attempted rape in November 1982 and was placed on probation for two years with out-of-state supervision contemplated upon his securing suitable employment. The offender then obtained employment in Ohio. In October 1983 a warrant was issued for the offender for the failure to pay a $1,000 fine and also for failure to report. In 1999 the offender discovered that the warrant was outstanding and returned voluntarily to Kansas to address it. The sentencing court revoked the offender's probation, ordered service of the prison sentence and the offender appealed.

The offender argued the delay in the time between the issuance of the warrant and the time of the revocation hearing violated his due process rights. The Court applied the holding in *State v. Williams*, 20 Kan. App. 2d 142, 884 P.2d 743 (1994) in deciding that there was an unreasonable delay in the prosecution of the probation violation in this matter. In addition, the Court also noted that the State's failure to conduct a reasonable investigation to determine the offender's whereabouts constituted a waiver of the probation violation and since the State had

waived this violation, the offender need not show that he was prejudiced by the delay.

State v. Billings, 30 Kan. App. 2d 236, 39 P.3d 682 (2002). The offender had entered pleas of guilty on two separate occasions to sale and possession of drugs. On both occasions the offender was placed on probation, violated his probation and the probation was revoked. The offender appealed.

The offender argued that the sentencing court had failed to inform him of all of his constitutional rights during his revocation hearing. The Court reviewed K.S.A. 22-3716 and noted that a revocation of probation is not part of a criminal prosecution and it does not require the full panoply of rights due to an offender in a criminal case in a probation revocation. The Court also noted that there are no cases on this point of law and stated in part: "We conclude there is no requirement that a trial judge advise a defendant that he or she has the right to present evidence and cross-examine witnesses prior to allowing the violator to stipulate to the alleged violations. There is adequate protection of the due process rights of a defendant by providing him or her with an attorney, who should advise as to the due process rights that apply."

State v. Jones, 30 Kan. App. 2d 210, 41 P.3d 293 (unpublished opinion filed on 11/16/01 and ordered published on 02/08/02). The offender was placed on probation for 24 months in December 1998. On May 25, 2000, K.S.A. 2000 Supp. 21-4611 became effective and a motion to revoke the probation was filed in June 2000. In August 2000, the offender's probation revocation hearing was continued at the offender's request, however, the offender failed to appear at the next hearing in September 2000 due to his incarceration for new charges. The offender's attorney appeared at the hearing and it was continued until October 2000 and then once again until December 2000. At the hearing the offender's probation was revoked and the offender appealed.

The offender argued that the probation revocation motion was not filed until after K.S.A. 2000 Supp. 21-4711 became effective on May 25, 2000 and that the sentencing court did not have jurisdiction. In essence the offender argued that his 24 months probation was reduced on May 25, 2000 by 12 months and it should have ended in December 1999. The Court applied *State v. Ferguson*, 271 Kan. 613, 23 P.3d 891 (2001) and held that the sentencing court had the jurisdiction to revoke the offender's probation.

The Court then reviewed K.S.A. 2000 Supp. 21-4711(c)(5) and held that the sentencing court did not comply with the statutory requirement that it find "*with particularity* the reasons for finding the safety of the public will be jeopardized or the welfare of the inmate will not be served by the shorter period of probation." Without any specific finding as required by this statute, the sentencing court's extension of probation was an abuse of discretion and the matter was reversed and remanded for the sentencing court to make the specific statutory findings.

State v. Hall, 30 Kan. App. 2d 669, 46 P.3d 561 (2002). The offender appealed the revocation of probation and also service of the underlying 30 months sentence. The Court reviewed K.S.A. 2001 Supp. 22-3716(b) and noted the holding in *State v. McGill*, 271 Kan. 150, 22 P.3d 597 (2001). The Court applied *McGill* and the case was remanded back to the sentencing court for further reconsideration regarding any reduction of the offender's sentence.

State v. Rocha, 30 Kan. App. 2d 817, 48 P.3d 683 (2002). In 1996, the offender was sentenced to 36 months probation for one count of possession of marijuana with intent to distribute. In

April 1998, while the offender was still on probation, an affidavit for probation revocation was filed alleging the failure to make payments on outstanding fines and costs. However, the offender could not be located until he was arrested in 1999 in another county for possession of a substantial amount of marijuana, which resulted in the offender being sentenced to the custody of the KDOC.

In December 1999, a second affidavit for probation revocation was signed but not filed until February 2001 and a hearing was held in May 2001 which resulted in probation revocation and the offender being ordered to serve his 15 months underlying sentence. The offender appealed.

The standard of review applied here involved a question of law instead of an abuse of discretion because the sentencing court's jurisdiction to hear the affidavit for the probation revocation was at issue. The Court found that the sentencing court did not have jurisdiction to revoke the offender's probation and stated in part: "We believe that the facts of this case compare favorably to the facts in *Williams*… In the instant case, the State obviously knew that Rocha has been arrested as early as December 1999. Rocha was still serving his term of probation at that time. However, the affidavit in support of revocation was not submitted to the trial court for over a year. We believe that such a duty was unduly prejudicial."

"Regardless of where the breakdown in communication occurred, the State's failure to conduct a reasonable investigation to ascertain Rocha's whereabouts constituted a waiver of the probation violation. See *State v. Haines*, 30 Kan. App. 2d 110, 39 P.3d 95, *rev. denied*, 273 Kan. 1038 (2002)… It is the State's responsibility to bring a probation revocation to the trial court in a timely manner."

See also ***State v. Williams***, 20 Kan. App. 2d 142, 884 P.2d 743 (1994).

State v. Briggs, 30 Kan. App. 2d 807, 48 P.3d 686, *rev. denied* 274 Kan. 1114 (2002). The Syllabus states the import of this decision: "A defendant whose probation is revoked in his or her presence after a probation revocation hearing and is informed by the judge that he or she is in custody and is to remain until a law enforcement office can take him or her to jail is in lawful custody for the purpose of K.S.A. 2001 Supp. 21-3810(a)(1), aggravated escape from custody."

See also ***State v. Hinkle***, 31 Kan. App. 2d 416, 65 P.3d 1058 (2003).

Hearst v. State, 30 Kan. App. 2d 1052, 54 P.3d 518 (2002). The offender was paroled from an indeterminate sentence and then his parole was revoked for changing his residence to an unknown location without his parole officer's permission. He was returned to the Kansas Department of Corrections and filed a K.S.A. 2001 Supp. 60-1501 habeas corpus petition, which the district court summarily denied. The offender then appealed.

The sentencing issue involved the addition of new charges against the offender during his probable cause hearing. The new charges were not contained in the written statement of charges that had been served upon the offender.

The Court discussed the sentencing issue in part: "Hearst acknowledges the KDOC's internal management policies and procedures (IMPP) require the hearing officer's report or summary to state any additional violations that were established during the proceedings. A statement of additional violations in the report is not the same as the addition of new charges at

the hearing. Also, the IMPP is not a regulation. The KDOC's regulations for a preliminary hearing do not have provisions for adding new charges, unlike the KPB's regulations. Further, the KPB's regulations allow new charges to be added only after continuing the hearing and giving written notice and a statement of such evidence against the offender so that the parolee has an opportunity to defend. The hearing officer violated Hearst's due process rights by adding a new charge without authorization, notice, and continuing the hearing."

Although there was a due process violation by the hearing officer at the probable cause hearing, the violation was corrected at the revocation hearing before the Kansas Parole Board (KPB). The KPB conducted a de novo hearing and based its decision on the parole officer's report and the offender testimony. The Court stated in part: "The decision leads to the conclusion that the KPB made an independent evaluation of the evidence and merits rather than adopting the decision of the hearing officer, thus curing the due process defect." The decision of the district court was upheld.

State v. Garcia, 31 Kan. App. 2d 338, 64 P.3d 465 (2003). The offender was placed upon 24 months probation and then later on violated his probation. The sentencing court revoked probation and then reinstated the probation but rejected placement in community corrections so the offender was sent to the Labette Correctional Conservation Camp as an additional condition of probation. The Journal Entry of Probation Revocation specifically stated: "If defendant does not successfully complete Labette, probation should be revoked and defendant should serve original sentence."

The offender graduated from Labette, however, the sentencing court found that the offender had not successfully completed Labette and once again revoked his probation and directed that the offender serve the underlying felony sentence of imprisonment. The offender appealed.

The Court of Appeals rejected the offender's abuse of discretion argument and instead focused upon the fact that the sentencing court does not have any discretion to abuse until a probation condition violation is established. The Court stated in part: "The question presented here is not whether the district court abused its discretion in sentencing a probation violator, but rather whether the evidence was sufficient to support the district court's finding that Garcia violated a probation condition."

"K.S.A. 2000 Supp. 21-4603d(a)(5) provided the district court with the authority to assign Garcia to Labette as a condition of probation. That same authorizing statutory sub-section provides that the conservation camp assignment shall be "followed by a six-month period of follow-up through adult intensive supervision by a community correctional services program, if the offender *successfully completes* the conservation camp program." (Emphasis added.) The district court's probation condition specifically used the phrase "successfully complete." Labette graduated Garcia and returned him to the district court with a recommendation that he be intensely supervised, preferably in the Sedgwick County Residential Center. Having followed the statutory procedure for an offender who successfully completes the Labette program, it is obvious the Labette officials equated graduation from its program with successful completion of the program."

"… We can find no authority, in the separation of powers doctrine or elsewhere, for a district court to substitute its assessment of what constitutes "successful completion" of Labette

for that of the Secretary. In short, a probationer complies with a probation condition requiring him or her to enter and successfully complete Labette by graduating from that program."

Davis v. Simmons, 31 Kan. App. 2d 556, 68 P.3d 160, *rev. denied*, 276 Kan. 967 (2003). The offender was convicted of an indeterminate offense and was sentenced to 13 years to life. The offense did not qualify for conversion pursuant to K.S.A. 21-4724. The offender was paroled but was later convicted of another offense and sentenced to 12 months' in prison to be served consecutive to the first sentence. The offender was later released by the Kansas Parole Board on parole/postrelease, however, this was revoked (not for a new crime) with the offender's postrelease revoked and the offender was ordered to serve 6 months' imprisonment pursuant to K.S.A. 2002 Supp. 22-3717(f).

The Kansas Department of Corrections caught the mistake and notified the offender that a mistake had been made and that the offender's indeterminate sentence did not qualify for the 6 months' imprisonment under K.S.A. 2002 Supp. 22-2717(f). The Kansas Parole Board revoked the offender's parole and the offender filed a habeas corpus petition pursuant to K.S.A. 2002 Supp. 60-1501 which the district court rejected and the offender appealed.

The Court reviewed K.S.A. 2002 Supp. 22-3717(f) and 75-75-5217(b), *McGann v. McKune*, 21 Kan. App. 2d 798, 911 P.2d 811 (1995) and also *Fanning v. State*, 25 Kan. App. 2d 469, 967 P.2d 1083, *rev. denied*, 266 Kan. 1108 (1998) and then affirmed the district court's decision by saying in part: "We hold that under K.S.A. 2002 Supp. 22-3717(f), petitioner's period of postrelease supervision shall not be based on his new sentence if his preguidelines sentence was an indeterminate sentence with a maximum term of life imprisonment. The statute clearly and specifically states as we did in *Fanning*. In this case, petitioner was on postrelease supervision for life rather than for a specific period, and the 6-month limitation provision of K.S.A. 2002 Supp. 75-5217(b) is not applicable to him. In addition, we conclude that 75-5217(b) does not apply retroactively to petitioner because his original sentence was not subject to conversion under the Kansas Sentencing Guidelines Act."

State v. Purdy, 31 Kan. App. 2d 1087, 77 P.3d 514 (2003), *aff'd*, 277 Kan. 730, 89 P.3d 591 (2004). In April 1999, the offender pled guilty to the possession of methamphetamine with the intention to sell and was sentenced to 36 months probation to be served following his release from the Kansas Department of Corrections (KDOC) in a separate case. The offender was released in December 2000 and began serving his probation. In January 2001, his probation was reduced to 18 months pursuant to Senate Bill 323.

In April 2002, a Motion to Revoke was filed and at the revocation hearing in July 2002, the offender's probation was extended for an additional 18 months. In December 2002 another Motion to Revoke was filed and in April 2003 the offender was revoked and ordered to serve his underlying sentence in KDOC. The offender appealed.

The Court in its opinion stated in part: "Here the district court shortened the defendant's original term of probation from 36 to 18 months in order to comply with K.S.A. 2002 Supp. 21-4611(c)(4). Only after this 18-month term of probation was revoked did the court extend the defendant's probation term an additional 18 months. Following a probation violation, a district court has authority to continue or revoke the probation and may require the defendant to serve the sentence imposed, any lesser sentence, or any sentence which might have originally been imposed. K.S.A. 2002 Supp. 22-3716(b). A district court is only required to make findings of

particularity if the defendant is being sentenced to serve time "in a state facility in the custody of the secretary of corrections without a prior assignment to a community correctional services program." K.S.A. 2002 Supp. 22-3716(b).

"Because the defendant was not sentenced to serve time in a state facility, the district court was not required to make findings of particularity in extending the defendant's probation term. K.S.A. 2002 Supp. 21-4611(c)(5) applies only when a district court sets the initial term of a defendant's probation, and not when this probation is later revoked."

State v. Kirby, 32 Kan. App. 2d 811, 89 P.3d 931, *rev. denied*, 278 Kan. 849 (2004). The offender appealed his sentence for burglary, complaining that the district court applied the presumptive prison provision of K.S.A. 2003 Supp. 21-4704(l) (sentencing guidelines nondrug grid).

The offender had two burglary cases. The first burglary case 02CR35 prosecuted acts committed between April 6 and May 9, 2002. The second burglary case 02CR60 prosecuted acts committed August 8, 2002. The offender pled guilty in the first burglary case on August 2, 2002. The offender was convicted of the second burglary on September 18, 2002 but had not been sentenced for the first burglary.

The Court sentenced the offender to prison for the burglary in the first case 02CR35 and applied the enhancement provision of K.S.A. 2003 Supp. 21-4704(l) which states: "The sentence for a violation of subsection (a) of K.S.A. 21-3715 (burglary) and amendments thereto when such person being sentenced has a prior conviction for a violation of subsection (a) or (b) of K.S.A. 21-3715 or 21-3716 (aggravated burglary) and amendments thereto shall be presumed imprisonment." The offender contended that "prior conviction" in 21-4704(j) did not include case 02CR60 which was committed after his conviction for the first burglary.

The Court's analysis included a plain language interpretation of K.S.A. 2003 Supp. 21-4704(l). After review the Court stated in pertinent part: "Plainly, the inquiry into whether the burglar has a prior burglary conviction is made at the time the person is being sentence, i.e. at the sentencing hearing. Here at the sentencing hearing in case 02CR35, Kirby had another conviction in case 02CR60. Therefore, the district court correctly applied the enhancement provision of K.S.A. 2003 Supp. 21-4704(l)."

State v. Pemberton, 32 Kan. App. 2d 456, 84 P.3d 623 (2004). The offender was convicted of forgery and sentenced to 18 months probation with an underlying prison sentence of 9 months. The trial court determined that the offender would be supervised by Adult Court Services for standard supervision. After sentencing the offender to supervision by court services, the trial court became aware that the offender had not cooperated with the presentencing risk needs assessment. Due to the offender's lack of cooperation, the trial court placed her with community corrections for intensive supervision.

The offender appealed claiming that the trial court's order of court services supervision was a final order and that her placement with community corrections was illegal. In addition, the offender contended that the trial court's decision to score her as high risk and subsequently place her with community corrections for probation constituted an impermissible burden on her for exercising her right against self-incrimination and that her Fifth Amendment privilege against self-incrimination extends through the preparation of a presentence investigation.

The Court's analysis of probation included a review of K.S.A. 2003 Supp. 21-4602 (c) which provides: "Probation means a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court after imposition of a sentence, without imprisonment except as provided in felony cases, subject to conditions imposed by the court and subject to the supervision of the probation service of the court or community corrections."

In addition, the Court cited *State v. Dubish* 236 Kan. 848, 696 P.2d 969 (1985). In that case the Court stated in pertinent part: "Probation is an action of the trial court where a defendant, after being found guilty of a crime, is sentenced to a term of incarceration and is then released to serve a period of supervision without serving the period of incarceration. Probation is not the sentence and does not affect the sentence".

The Court, affirming the trial court's decision noted that any subsequent adjustment to the terms of the offender's probation did not affect her sentence and that the risk assessment questionnaire that was used did not ask about the underlying facts of the crime of which the offender had been convicted. Therefore, the Court concluded that the risk assessment questionnaire would not in any way incriminate an individual and that the Fifth Amendment privilege against self-incrimination did not apply.

State v. Legero, 278 Kan. 109, 91 P.3d 1216 (2004). The offender pled guilty in separate cases to disorderly conduct and attempted criminal damage to property. The offender was sentenced by a district magistrate judge to 30 days in jail for each count, to run concurrently and was granted 12 months probation.

On May 9, 2002, the offender was before the magistrate for a probation revocation hearing. The offender stipulated to the allegation that he had been arrested and charged with driving under the influence of alcohol. The magistrate revoked the offender's probation and ordered him to serve his jail sentence.

The offender filed a notice of appeal to the district court pursuant to K.S.A. 2003 Supp. 22-3609a. The notice appealed the magistrate's revocation of probation and imposition of sentence. The district court dismissed the appeal, finding that it lacked subject matter jurisdiction to review a magistrate's order revoking probation.

The offender appealed the district court's dismissal to the Court of Appeals. The Court of Appeals reversed the district court, concluding K.S.A. 2003 Supp. 22-3609a confers appellate jurisdiction in the district court. *State v. Legero*, 31 Kan. App. 2d 897, 75 P.3d 273 (2003). The Kansas Supreme Court granted the States petition for review.

After review, the court stated in pertinent part: "We hold that K.S.A. 2003 Supp. 22-3609a does not authorize an appeal to the district court by a defendant from an order of a district magistrate judge revoking the defendant's probation. To hold otherwise would be wholly inconsistent with the mandatory trial de novo procedure on the original complaint. The judgment of the Court of Appeals is reversed. The judgment of the district court is affirmed."

State v. Freeman, 32 Kan. App. 2d 1027, 93 P.3d 1223, *rev. denied*, 278 Kan. 849 (2004). Pursuant to a plea agreement, the offender was convicted of one count of possession of cocaine. In return for the offender's plea another charge was dismissed and the State agreed not to oppose a downward dispositional departure to probation. The offender was sentenced to an underlying term of 28 months and placed on probation for 12 months.

In 2001, the offender signed an order extending his probation another year. In 2002 the State filed a motion to revoke the offender's probation. The offender filed a motion to dismiss for lack of jurisdiction, contending the probation had not been properly extended because he was not afforded a hearing. The trial court denied the offender's motion, finding that the offender had waived his right to a hearing when he signed the order extending his probation. The court revoked the offender's probation and ordered him to serve his underlying sentence.

The court's analysis included a review of K.S.A. 2003 Supp. 21-4611(c)(8) which requires the extension of probation to occur pursuant to a modification hearing and a judicial finding of necessity. The court determined that the order the offender signed extending his probation made no reference to the statutory language requiring a hearing and a judicial finding of necessity. Therefore, the court found that the offender did not knowingly and voluntarily waive his right to a hearing. The court reversed the trial court's decision and remanded with instructions to release the offender from custody.

State v. Miller, 32 Kan. App. 2d 1099, 95 P.3d 127 (2004). The offender's probation for residential burglary was revoked and he was ordered to serve his underlying prison term. The offender appealed claiming the court failed to state its reasoning with particularity for refusing to assign him to community corrections pursuant to K.S.A. 2003 Supp. 22-3716(b).

At the time the offender pled guilty to two counts of residential burglary, he was on parole and had been previously convicted of residential burglary. The offender's presumptive sentence for the burglary convictions was prison, however pursuant to a plea agreement, the offender was assigned to community corrections. The offender received a 27 month imprisonment term but was granted a downward dispositional departure to probation for 24 months to court services.

The court's analysis included a review of K.S.A. 22-3716(b) and stated in pertinent part: "the provisions of 22-3716(b) apply even if the original sentence was a departure". The offender's sentence was reversed and remanded for a hearing for the district court to either make the particularized findings required by K.S.A. 2003 Supp. 22-3716(b) or to assign the offender to community corrections.

State v. Gary, 34 Kan. App. 2d 599, ___ P.3d ___ (2005). Defendant appeals the trail court's revocation of his probation. The court based the revocation on another crime committed days before Gary was placed on probation but which did not come to light until after probation was granted. Gary was charged with and pled to two counts of forgery. On May 25, 2004, the trial court sentenced him to an underlying sentence of 11 months and granted probation of 18 months pursuant to the plea agreement. Several weeks after sentencing, the court issued an arrest warrant based upon the fact that on June 15, 2004, Gary was charged with attempted robbery that allegedly occurred on May 22, 2004.

At the hearing Gary admitted he committed the attempted robbery but argued that he did not violate any of the terms of his probation and should not be revoked for acts committed prior to the grant of probation. The trial court disagreed and revoked his probation.

K.S.A. 2004 Supp. 22-3716(a) provides the statutory justification for probation revocation and authorizes the court to issue a warrant for the arrest of a defendant for violation of any of the conditions of release or assignment, a notice to appear to answer to a charge of violation or a violation of the nonprison sanction, at any time during probation. Implicit in the

statutory provisions for probation is the understanding that the probationer is entitled to retain his or her liberty as long as he or she abides by the conditions of such probation. Probation may not be revoked unless the probationer has failed to comply with the terms and conditions of the probation. *State v. Garcia*, 31 Kan. App. 2d 338, 342, 64 P.3d 465 (2003).

In this case, Gary admitted that in all likelihood the State could prove that he committed the attempted robbery which would be a violation of the terms of his probation had it occurred during the probation period. The question was whether his probation could be revoked for an act which occurred prior to commencement of the probation period.

The Court of Appeals found no Kansas cases on point but referenced a Pennsylvania Superior Court that ruled that "revoking probation for conduct committed prior to being sentenced to probation fails to serve its rehabilitative purpose." That court elaborated that a sentence of probation allows an individual time to change their ways, while being warned that future bad conduct will result in revocation. Since "probation is intended to serve as deterrent to future antisocial conduct, and an individual's conduct is viewed prospectively," it does not serve any purpose to give weight to conduct which occurred prior to sentencing. *Com. V. Infante*, 850 A.2d 696, 700 (Pa. Super. 2004).

Considering the foregoing policy along with the statutory language of K.S.A. 2004 Supp. 22-3716(a), the Court of Appeals came to the same result. The Court pointed out that although the language of the statute clearly indicates that warrants may be issued "at any time during" probation, there is nothing in the statutory scheme which allows a warrant to be issued for conduct prior to probation. Furthermore, it was clear from the statute that revocation can only occur if there is a violation of terms of probation. In this case, there were no terms in place when Gary allegedly committed the attempted robbery therefore, the decision of the trial court to revoke Gary's probation was reversed.

SPECIAL APPLICATIONS TO SENTENCING (JAIL TIME AS A CONDITION OF PROBATION)

State v. Thomas, 26 Kan. App. 2d 171, 981 P.2d 1178 (1999). Thomas was originally sentenced for possession of cocaine, possession of a controlled substance without a tax stamp and criminal use of a weapon. His classification of 4-I put him in the presumptive probation portion of the sentencing grid for drug offenses. Thomas received probation for his crimes, but was subsequently brought back before the sentencing court for probation violation hearings on January 9, 1997, and again on October 3, 1997. At the January 9, 1997, probation violation hearing the sentencing court revoked Thomas' probation, but reinstated probation under the intensive supervision of community corrections. On October 3, 1997, at Thomas' second probation violation hearing, the sentencing court revoked Thomas' probation, reinstated probation and ordered Thomas to be placed in the community corrections residential program. In light of the fact that there were no beds available at the community corrections residential program at that time, the sentencing court ordered Thomas to be held in jail until a bed became available. Thomas objected to the unspecified length of confinement in jail and subsequently filed an appeal.

In his appeal, Thomas argued Kansas statutes do not give the sentencing court the authority to set an unspecified length of confinement in jail as a condition of probation. Thomas contended that K.S.A. 21-4603d, the authorized dispositions statute, only authorizes a 30-day jail

time as a condition of probation, and the sentencing court lacked the authority to impose a seemingly indeterminate jail sentence pending his placement in the community corrections residential program. The Court agreed with Thomas.

The Court acknowledged Kansas courts have consistently recognized probation is a privilege granted by the sentencing court and the court has broad power and authority when imposing conditions of probation so long as such conditions do not violate statutory law or constitute an abuse of discretion by the court. Citing *State v. Walbridge*, 248 Kan. 65, 805 P.2d 15 (1991) and *State v. Starbuck*, 239 Kan. 132, 715 P.2d 1291 (1986). However, the Court held when an offender has been found guilty of a crime, K.S.A. 21-4603d controls as to the authorized dispositions permitted a sentencing court. Under K.S.A. 1998 Supp. 21-4603d(a)(3) which states: ".. In felony cases except for violations of K.S.A. 8-1567 and amendments thereto, the court may include confinement in a county jail not to exceed 30 days, which need not be served consecutively, as a condition of probation or community corrections placement."

The Court specifically stated in part: "The Kansas Legislature has also delineated a list of conditions the sentencing court may use when establishing a defendant's probation. K.S.A. 1998 Supp. 21-4610(c)(14) states that in setting probation, the sentencing court may order the defendant, "in felony cases, except for violations of K.S.A. 8-1567 and amendments thereto, be confined in county jail not to exceed 30 days, which need not be served consecutively." While the Court recognized the sentencing court's good intentions in this case, the Court found there was no authority for the sentencing court to incarcerate Thomas in the county jail beyond 30 days.

State v. Petz, 27 Kan. App. 2d 805, 7 P.3d 1277 (2000). The Court restated the rule that an offender is entitled to credit for time spent in jail solely on account of the crime or crimes for which an offender is sentenced. Under K.S.A. 1999 Supp. 21-4603d(a)(3), the jail time credit an offender earns applies to confinement in the county jail ordered as a condition of probation. The Court also held under K.S.A. 21-4602(c), K.S.A. 1999 Supp. 21-4603d(3) and K.S.A. 1999 Supp. 21-4610(c)(14), a sentencing court has no authority to confine an offender in the county jail for more than 30 days.

The Court found a sentencing court many not increase the period of time of confinement in the county jail as a condition of probation beyond 30 days by granting multiple probations on a multicount complaint and then require an offender to serve consecutive 30-day jail terms on each count. The Court interpreted the phrase "need not be served consecutively" as used in K.S.A. 21-4602(c), K.S.A. 1999 Supp. 21-4603d(3) and K.S.A. 1999 Supp. 21-4610(c)(14) to mean that an offender need not be confined for 30 consecutive days as a condition of probation but that the 30 day sentence may be satisfied on weekends, nights, etc.

NOTE: These provisions allowing for jail time to be ordered as a condition of felony probation were changed from 30 days to 60 days during the 2000 Kansas Legislative Session and became effective May 25, 2000. See Senate Bill 323.

SPECIAL APPLICATIONS TO SENTENCING (AMENDING OR CHANGING A SENTENCE)

State v. Cernech, 22 Kan. App. 2d 900, 924 P.2d 648, *rev. denied*, 261 Kan. 1087 (1996). After pronouncing a sentence of 32 months for an offender's involuntary manslaughter conviction, a border box offense in this case, the sentencing court ordered the offender to serve thirty days in the county jail plus five days for a DUI conviction, after which he would be reviewed for probation. At a subsequent hearing, the sentencing court, referring to the original sentencing hearing, stated that it had lapsed into "obiter dictum" in terms of reviewing the matter for probation and denied the offender's request for probation.

On appeal the offender claimed error in that the sentencing court initially pronounced a sentence of probation and was without legal authority when it subsequently modified the sentence to a prison term. The Court found that the sentencing court did not follow proper procedure, since the applicable statutes require the sentencing court to exercise its discretion to impose either a presumptive prison or a nonprison sentence up front. If probation is ordered, a 30-day jail term can be imposed as a condition of that probation. The Court found the sentencing court had not granted probation and the 30-day sentence was therefore not possible under the statutes. While acknowledging a sentence that does not conform to the applicable statutes is illegal, the Court held the offender was not prejudiced by the sentencing court's action and affirmed.

State v. Vanwey, 262 Kan. 524, 941 P.2d 365 (1997). More than 120 days after Vanwey had been sentenced to a statutorily directed consecutive sentence, Vanwey's attorney sought and obtained a *nunc pro tunc* order from the sentencing court changing the consecutive sentence to a concurrent sentence without any basis or justification. The State had originally agreed to this action but after a member of the victim's family contacted the Disciplinary Administrator's office, an Attorney General's opinion on the legality of the *nunc pro tunc* order was obtained and the State appealed the *nunc pro tunc* order as illegal.

The Court applied K.S.A. 22-3504(2) and found that a *nunc pro tunc* order may only be used to correct actual clerical errors or errors arising from oversight or omission. The Court further held even if the parties agreed to a *nunc pro tunc* order, they cannot invest the sentencing court with the power to change a sentence if the court otherwise lacks the jurisdiction to do so. The Court went on to note that the sentencing of a criminal offender is strictly controlled by statute in Kansas and that the time limits of the statutes are jurisdictional. For crimes committed prior to July 1, 1993, a sentencing court does not have any jurisdiction to modify a sentence pursuant to a motion filed 120 days after the sentence is imposed, or if an appeal is taken and determined adversely to the offender, 120 days after the receipt by the sentencing court of the mandate from the Supreme Court or the Court of Appeals.

Finding that the sentencing court had been without the authority to enter the *nunc pro tunc* order in question, the Court held that it has the authority to reinstate an original sentence when a subsequent modification is illegal and it did so in this case.

State v. Baldwin, 24 Kan. App. 2d 12, 941 P.2d 422 (1997). In keeping with a plea agreement, Baldwin pleaded no contest to four counts of aggravated assault on a law enforcement officer in exchange for the dismissal of three counts of aggravated assault. Also in accordance with the plea agreement, which the sentencing court approved, Baldwin was originally sentenced to a

controlling sentence of 60 months, which was accomplished by imposing a sentence of 20 months for each count, three of which were to run consecutively and one count to run concurrent with the other three. The parties and the sentencing court all later agreed Baldwin's original sentence was illegal in violation of K.S.A. 21-4720(b)(4) (i.e., the total controlling sentence cannot exceed twice the base sentence). Baldwin filed a motion to correct illegal sentence and the sentencing court resentenced Baldwin as follows: the base sentence was increased to 38 months and the sentences on the remaining three counts were reduced to 19 months with the first and second counts to run consecutively and the remaining two counts to run concurrent with the first two.

On appeal Baldwin contended the sentencing court erred in increasing his base sentence. Baldwin's argument was based upon the only illegal portion of his original sentence was the total of the consecutive sentences exceeded twice the base sentence, therefore the sentencing court was without the authority to correct anything else in the original sentence and thus could not alter the separate sentences imposed for each count.

Citing *State v. Woodbury*, 132 Kan. 22, 294 Pac. 928 (1931), the Court found if the sentencing court entered an improper sentence based upon some but not all of the counts of an information, then upon resentencing the court should pronounce a single judgment declaring the full measure of punishment to be imposed for all such offenses. Based on the *Woodbury* analysis the Court concluded the sentencing court did not err in resentencing Baldwin.

State v. Reedy, 25 Kan. App. 2d 536, 967 P.2d 342, *rev. denied*, 266 Kan. 1114 (1998). When the offender was originally sentenced for the crime of criminal possession of a firearm he was placed on probation and pursuant to the provisions of the Kansas Sentencing Guidelines Act (KSGA), the offender was assigned an underlying prison sentence to be served in the event his probation was revoked. The offender subsequently violated the terms of his probation and a revocation hearing was held. During the course of the probation revocation hearing the State notified the sentencing court that an error had been made at the offender's original sentencing (i.e., the number of months of the offender's underlying sentence had been incorrectly stated at the offender's original sentencing). The offender's sentence within block 8-H of the non-drug grid was originally entered as a 6 to 8 month sentence when that grid block actually calls for a sentence of 9 to 11 months.

The sentencing court acknowledged it had utilized an incorrect sentencing range when imposing the original sentence for the offender and when the State moved to correct the illegal sentence, the offender objected. The sentencing court decided to "correct" the journal entry on the original sentence to reflect an underlying sentence of 9 to 11 months and then sent the offender to the custody of the Kansas Department of Corrections (KDOC) for 9 months.

The Court stated in part: "If the district court determines the correct severity level and criminal history score of a defendant but imposes an incorrect guidelines sentence, the court may modify the sentence to reflect the correct term after appropriate notice to the defendant." At Syl. ¶ 1.

State v. Simpson, 25 Kan. App. 2d 639, 969 P.2d 905 (1998). At the offender's original sentencing the sentencing court pronounced a postrelease supervision period of 24 months. Subsequent to that sentencing proceeding the Kansas Department of Corrections (KDOC) notified the sentencing court the proper postrelease supervision period for the offender's crime of conviction was 36 months. The sentencing court then entered an order *nunc pro tunc*

increasing the offender's postrelease supervision period to 36 months. The offender appealed claiming his right to be present at his sentencing had been violated.

The Court stated in part: "K.S.A. 22-3405 provides that a defendant shall be present at sentencing. The imposition of postrelease supervision is a part of the sentence, and the defendant is entitled to be present at its imposition." The Court reversed the sentencing court and remanded the matter for resentencing with the offender to be present.

State v. Smith, 26 Kan. App. 2d 272, 981 P.2d 1182 (1999). When a lawful sentence has been imposed under the Kansas Sentencing Guidelines Act (KSGA), the sentencing court has no jurisdiction to modify that sentence except to correct "arithmetic or clerical errors" pursuant to K.S.A. 21-4721(i). The plain language of K.S.A. 21-3705 does not authorize the sentencing court to modify a sentence but merely states an offender who is convicted of criminal deprivation of a motor vehicle must serve the mandatory jail time before he/she is eligible for probation, suspension or reduction of his/her sentence, or parole.

See also ***State v. Miller***, 260 Kan. 892, 897, 926 P.2d 652 (1996.)

McKinney v. State, 27 Kan. App. 2d 803, 9 P.3d 600 (2000). The Court held that calculation of release dates is the responsibility of the Kansas Department of Corrections (KDOC). Any petition challenging the KDOC calculation of release dates must be filed pursuant to K.S.A. 1999 Supp. 60-1501(a) in the county of incarceration rather than with the sentencing court. The offender in this case had improperly filed his challenge of the release date assigned to him by the KDOC as a K.S.A. 60-1507 motion with the sentencing court.

State v. McDonald, 29 Kan App. 2d 6, 26 P.3d 69 (2001). The offender pled guilty to a drug paraphernalia charge in exchange for the dismissal of a possession of methamphetamine with the intent to sell charge. In addition, the plea agreement also contained the prosecutor's recommendation that the presumptive imprisonment be suspended in favor of 24 month's probation, to run consecutive to the offender's sentence for parole violation.

At sentencing however, a different attorney represented the offender and although the prosecutor did not oppose the offender's motion for a dispositional departure, the prosecutor stated "… But I believe the Court still has the duty and obligation to find substantial and compelling reasons to depart. And I would like to know more about what the alternatives to his -- his dispositional departure would be. If there is -- if he has a proposed rehabilitative program. I'm not seeing there is one." The sentencing court found no such reasons to depart and sentenced the offender to 28 months imprisonment. The offender attempted to withdraw his plea but the sentencing court denied the motion. The offender appealed.

The Court relied upon K.S.A. 2000 Supp. 22-3210 (d) as the basis for review. The Court applied *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), in holding that the same judge did not preside at both the guilty plea and the sentencing hearings and thus the knowledge of the sentencing court regarding the plea agreement appeared to be uncertain. The Court also found that the State had not kept its obligation under the plea agreement.

Although the Court did not set aside the guilty plea because the offender had plead guilty only to avoid imprisonment, it did remand the case back for a new sentence before a different judge. The Court noted this was no reflection upon the sentencing court but was only in being consistent with the holding in *Santobello*.

State v. Stough, 273 Kan. 113, 41 P.3d 281 (2002). The offender had entered pleas to 2 counts of drug offenses in 1995, was sentenced in 1996 to 36 months' probation which was completed and the offender was duly discharged in 1998. However, in 2001 the offender filed a motion to set aside his pleas and a dismissal of the charges with prejudice because "[a]fter completing probation, the defendant discovered there was a strong potential that former Sheriff's Department deputies tampered with the evidence in this matter".

The State responded with the argument that the sentencing court lacked jurisdiction to enter any orders in a matter where the offender had already completed his sentence and had been discharged from his probation. However, the sentencing court granted the offender's motion and the State appealed.

The Court noted that although the sentencing court had failed to specifically rule on the State's claim that there was a lack of jurisdiction, the Court stated in part: "the ruling made must be considered to be a denial of the State's response and a finding that jurisdiction existed." In addition, the Court pointed out that K.S.A. 2000 Supp. 22-3210(d) has no time limitations for an offender to seek setting aside his/her sentence *after* sentencing.

As to the State's argument that the offender waived his right to later withdraw his plea when he first entered his plea unless he was claiming to be not guilty, the Court pointed to *State v. Vasquez*, 272 Kan. 692, 36 P.3d 246 (2001). Although *Vasquez* involved a request to withdraw a plea prior to sentencing, the same rationale applied in this matter. The Court also noted that: "The effect of the trial court's order as to Stough's criminal history in a subsequent sentencing hearing and whether expungement is available is not a question that has any bearing on our decision in this case and will not be considered."

State v. Spicer, 30 Kan. App. 2d 317, 42 P.3d 742, *rev. denied*, 274 Kan. 1117 (2002). The offender was convicted of aggravated battery and driving while suspended and received an upward durational departure sentence which the offender appealed.

The Court applied *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) in setting aside the sentence, however, in doing so the Court pointed out that the sentencing court did not have jurisdiction to amend the sentence on its own initiative. The Court noted *State v. Williams*, 235 Kan. 485, 681 P.2d 660 (1984) in holding when an offender is sentenced a sentencing court loses the jurisdiction to hear any motions to modify a sentence once an appeal is filed. The sentencing court must await the mandate from an appellate court before addressing any resentencing to correct an illegal sentence.

State v. Oliver, 30 Kan. App. 2d 665, 46 P.3d 36 (2002). The issue on the offender's appeal was one involving an illegal sentence. The Court reviewed K.S.A. 22-3504 and also *Neal v. State*, 25 Kan. App. 2d 705, 971 P.2d 748 (1998), *rev. denied*, 266 Kan. 1109 (1999) before determining to vacate the offender's sentence and remand the case with directions.

Syl. ¶ 3 and Syl. ¶ 4 state the Court's reasoning best. In Syl. ¶ 3 the Court stated: "A sentence under the Kansas Sentencing Guidelines Act within the wrong sentencing grid block is not an illegal sentence when the criminal history category was stipulated to by the parties. The justification behind this rule is that one who invites error by his or her own acts cannot then complain or take advantage of it on appeal." In Syl. ¶ 4 the Court added: "Kansas Court of Appeals' decisions do not become the law of this state until a petition for review, if filed, has

been denied and a mandate has been issued."

State v. Dickson, 30 Kan. App. 2d 682, 46 P.3d 1216 (2002), *aff'd in part, rev'd in part*, 275 Kan. 683, 69 P.3d 549 (2003). The offender had been convicted on three counts of rape, one count of aggravated sodomy and one count of criminal sodomy, and then raised four issues on appeal. The offender's fourth issue involved an illegal sentence for one of his rape convictions.

The State had charged Count IV (one of the three counts of rape) as a severity level 1 person felony offense, however, at the time of that offense (November 20, 1995) rape was only a severity level 2 person felony. In light of the offender's "H" criminal history category, the presumptive sentencing range should have been 77-82-86 months instead of the 184-194-206 months that the sentencing court utilized. The resulting sentence for that count of rape was an illegal sentence and the Court affirmed the conviction, vacated the sentence and remanded the case for resentencing on that one rape count.

State v. Dickson, 275 Kan. 683, 69 P.3d 549 (2003). The decision of the Kansas Court of Appeals was reviewed and the offender's conviction of criminal sodomy in violation of K.S.A. 21-3505(a)(3) was reversed and the sentence vacated. The Court stated in part: "Here, Dickson was charged with criminal sodomy under K.S.A. 21-3505(a)(3), whereas the evidence established a violation of K.S.A. 21-3505(a)(2). Thus we must reverse the conviction of criminal sodomy and vacate the sentence for that conviction. In so doing, Dickson's controlling sentence of 232 months is not affected."

The offender's convictions for rape and aggravated criminal sodomy were affirmed.

State v. Campbell, 31 Kan. App. 2d 1123, 78 P.3d 1178 (2003), *rev. granted*, 277 Kan. 925 (2004). The offender's cases, 00CR779 and 01CR147 were not consolidated, but were heard at one bench trial on stipulated facts and the testimony and record of the suppression and preliminary hearings. The offender was convicted in Case No. 00CR779 of possession of methamphetamine. In Case No. 01CR147, he was convicted of manufacture of methamphetamine, possession of ephedrine or pseudoephedrine with the intent to manufacture methamphetamine, possession of methamphetamine with intent to sell, possession of drug paraphernalia with intent to manufacture methamphetamine, and felony possession of marijuana. All sentences were to run concurrently. On appeal, the offender raised the issue of an illegal sentence under K.S.A. 65-7006(a).

The offender claimed he was illegally sentenced to a drug severity level 1 felony in Case No. 01CR147 for his conviction of possession of ephedrine under K.S.A. 65-7006(a). That argument was based on *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied*, 274 Kan.1115 (2002), which held that a statute prohibiting possession of drug paraphernalia, K.S.A. 2001 Supp, 65-4152(a)(3), a drug severity level 4 felony, had identical elements to the crime of possession of ephedrine under K.S.A. 2001 Supp. 65-7006(a), a defendant convicted of either crime may be sentenced only under the lesser penalty provision.

The Court's analysis included a review of the legislative history and language of K.S.A. 65-4152 and 65-7006. After review of those statutes, the court noted K.S.A. 65-4152(a)(3) and K.S.A.1999 Supp. 65-7006(a) are not identical offences and that the statutes use different language to describe the respective offenses. K.S.A. 1999 Supp. 65-7006(a) prohibits possession of drugs used to make methamphetamine. K.S.A. 65-4152(a)(3) prohibits possession of drug paraphernalia.

The court in its opinion stated in part: "We understand the valid argument of *Frazier* that the generic language of "products and materials" of K.S.A. 65-4152 may include the named substances set forth in K.S.A. 65-7006, but it is also equally logical to look to one statute as generally relating to tools or equipment necessary for manufacturing controlled substances and the other to more specifically cover the precursors to methamphetamine, and thus, find the elements do in fact differ." The Court held that the clear legislative intent in K.S.A. 65-7006 was to criminalize the specific items found in Campbell's possession and that he was correctly sentenced. The Court declined to follow *Frazier* and respectfully suggested it was wrongfully decided.

NOTE: The original Supreme Court opinion upon review of this case was withdrawn and superseded by ***State v. Campbell***, 279 Kan. 1, 106 P.3d 1129 (2005), which held that the crimes of possession of ephedrine under K.S.A. 65-7006, a drug severity level 1 felony, and possession of drug paraphernalia under K.S.A. 65-4152(a)(3), a drug severity level 4 felony, were identical offenses, thus a defendant must be sentenced to the lesser penalty.

State v. Cherry, 279 Kan. 535, 112 P.3d 224 (2005). Defendant was convicted of manufacturing or attempting to manufacture methamphetamine (meth), illegal possession of pseudoephedrine or ephedrine, possession of drug paraphernalia and possession of meth and was sentenced to a controlling term of 96 months. In *State v. Cherry*, No. 88,462, unpublished opinion filed May 23, 2003, the Court of Appeals affirmed the convictions but remanded for resentencing pursuant to *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied*, 274 Kan.1115 (2002). The State petitioned for review with regard to the defendant's sentence. The defendant petitioned for review with regard to the admission of footprint evidence and the jury instruction on the manufacturing or attempting to manufacture meth.

Defendant was originally sentenced with a downward departure for a severity level 1 felony on the conviction of possession of pseudoephedrine or ephedrine. The State argued that the Court of Appeals erred when it vacated this sentence and remanded for sentencing as a severity level 4 felony under the reasoning of *Frazier*. The State argued that *Frazier* was incorrectly decided, however, the Supreme Court rejected the State's arguments and upheld *Frazier* in *State v. Campbell*, 279 Kan. 1, 106 P.3d 1129 (2005). However, in *Campbell*, unlike *Frazier*, the Court held that the two statutes in question were overlapping rather than identical and that the defendant could only be sentenced under the lesser penalty. The Court stated that while the Court of Appeals reliance upon *Frazier* was misplaced in light of *Campbell*, it properly reversed and remanded for resentencing of the possession of pseudoephedrine or ephedrine conviction as a severity level 4 felony.

On the issue of jury instructions, the district court failed to instruct the jury on the elements of attempting to manufacture meth and the defendant was convicted of manufacture *or* attempted manufacture of meth. The Court of Appeals found that while attempt to manufacture and manufacture were two separate offenses, the failure to give an attempt instruction was not clearly erroneous in this case. The panel, reasoned that the jury's verdict would not have been different if the attempt instructions had been given because no substantial evidence was presented to support an attempt conviction.

On appeal the Defendant argued that the instructions given misstated the law and the Court of Appeals' conclusion was erroneous because it failed to view the evidence in the light most favorable to the defendant and the district court failed to give a proper instruction of either

offense under *State v. Foster*, No. 87,154, unpublished opinion filed September 6, 2002. *State v. Martens*, 274 Kan. 459, 54 P.3d 960 (2002), *State v. Peterson*, 273 Kan. 217, 223, 42 P.3d 137 (2002), and *State v. Capps*, 33 Kan. App. 2d 37, 40, 99 P.3d 138 (2004) were cited by the Court in support of the defendant's arguments. However, in order to be clearly erroneous, a real possibility that the jury would have returned a different verdict must exist. In this case, while the journal entry characterizes the conviction as manufacture of meth and erroneously cites subsection (b)(1) of K.S.A. 65-4159, which was omitted from the 2000 Supplement applicable to this case, the jury found the defendant guilty of unlawfully manufacturing or attempting to manufacture a controlled substance on the verdict form. If the proper instructions had been given, the verdict would have been different because the defendant could only have been convicted of one crime or the other. Therefore, the instructions given were clearly erroneous and the defendant's conviction for unlawfully manufacturing or attempting to manufacture meth was reversed and remanded for a new trial.

Love v. State, 280 Kan. 553, 124 P.3d 32 (2005). Defendant appealed the trail court's denial of his appeal to correct an illegal sentence. The trial court approved an order *nunc pro tunc* which had been filed to clarify that the defendant's sentenced in a 1997 case were to run consecutive to a prior felony sentence for which he was on parole at the time of the 1997 offense. The prior record had been silent on the issue of consecutive or concurrent sentencing. The defendant argued that the trial court had improperly increased his sentence with the *nunc pro tunc*.

The Supreme Court noted that K.S.A. 21-4608(c) required consecutive sentencing for offenses that occurred while on parole. Under the sentencing guidelines, K.S.A. 21-4720(a) applied the mandatory consecutive requirement unless such would result in a manifest injustice. The Court agreed with the Court of Appeals that under this mandatory provision, an order *nunc pro tunc* is appropriate where the journal entry is silent or in error regarding a mandatory consecutive sentence.

APPEALS

State v. Starks, 20 Kan. App. 2d 179, 885 P.2d 387 (1994). When an offender is sentenced to a presumptive sentence under the KSGA and there is no claim of error in regard to crime severity level or criminal history, such a sentence standing alone cannot be the result of partiality, prejudice, oppression or corrupt motive, and there is a strong legislative presumption that such sentence is not the result of partiality prejudice, oppression or corrupt motive. See K.S.A. 21-4721(e).

State v. Myers, 20 Kan. App. 2d 401, 888 P.2d 866 (1995). The offender appealed from the sentencing court's denial of his motion for a dispositional departure. The Court held where the imposed sentence is within the presumptive sentence for the crime, which it was in this case, appellate courts are without jurisdiction to consider an appeal from the sentence. The filing and denial of a motion requesting departure by either the offender or the State has no effect on the rule that a sentence within the presumptive sentencing grid box is not subject to review on appeal.

State v. Peal, 20 Kan. App. 2d 816, 893 P.2d 258, *rev. denied*, 257 Kan. 1095 (1995). The offender contended on appeal that the sentencing court abused its discretion in ordering two sentences, which were within the presumptive range for the crimes, run consecutively to each other. The Court dismissed the appeal because the Court reasoned that a consecutive sentence is

not inconsistent with the presumptive sentence for a crime and is not a departure, therefore the Court was without jurisdiction to consider the appeal. Appellate court jurisdiction of an appeal challenging a sentence imposed pursuant to the Kansas Sentencing Guidelines Act (KSGA) is limited to those grounds specified in K.S.A. 21-4721 and illegal sentences.

State v. Porting, 20 Kan. App. 2d 869, 892 P.2d 915, *rev. denied*, 257 Kan. 1095 (1995). The offender received a Kansas Department of Corrections (KDOC) KSGA conversion report showing he had no prior convictions and determining that he was eligible for conversion of his sentence under the KSGA. The State filed a timely objection to the report but a hearing was not held until more than 60 days had passed after the State filed its objection. The hearing had been previously continued because the offender's counsel failed to appear.

The State introduced a journal entry from a prior case showing the offender had convictions on three counts of aggravated assault and the sentencing court ruled that he was not eligible for conversion. The offender argued on appeal the hearing had been held more than 60 days after the State filed its objection and as required by K.S.A. 1994 Supp. 21-4724(d)(3), the sentencing court lacked the jurisdiction to consider the State's objection to his criminal history as determined by the KDOC. Thus the offender's sentence should therefore have been converted.

The Court rejected the offender's argument, finding that even though K.S.A. 1994 Supp. 21-4724(d)(3) states that the court "shall" hold a hearing within 60 days after it is requested, "Kansas courts have read "shall" to mean "may" where the context requires." 20 Kan. App.2d at 871 (citation omitted). Accordingly, the Court held that the provisions of the statute are directory and not mandatory, and that strict compliance with the statute is not essential to preserve an offender's substantial rights or the validity of the proceedings.

State v. Mejia, 20 Kan. App. 2d 890, 894 P.2d 202 (1995). The offender received a "Notification of Findings" from the Kansas Department of Corrections (KDOC) that stated he was not eligible for retroactive application of the KSGA. The offender filed a motion for conversion in the sentencing court but it concluded that it had no jurisdiction to hear the motion because the KSGA did not give the offender the right to attack a notification of findings. On appeal, the Court held that an offender may challenge his or her conviction severity level classification as set forth in a notification of findings, by filing a motion pursuant to K.S.A. 60-1507. Although the offender's pleadings were not styled as a K.S.A. 60-1507 petition, a sentencing court should look past the form of an action to its substance in situations where circumstances show K.S.A. 60-1507 would provide an appropriate remedy. The sentencing court should have construed the offender's motion to convert as a K.S.A. 60-1507 motion and thus erred in concluding that it had no jurisdiction.

State v. Randall, 257 Kan. 482, 894 P.2d 196 (1995). The offender's pro se motion for conversion of sentence was construed as a properly filed K.S.A. 60-1507 motion on an appeal from the sentencing court's dismissal of the motion for lack of jurisdiction.

State v. Bost, 21 Kan. App. 2d 560, 903 P.2d 160 (1995). The offender pled no contest to an amended charge of robbery and was sentenced under criminal history category "H" to 36 months' imprisonment. After the sentencing hearing the offender filed a motion for modification of sentence and/or downward departure. The sentencing court denied the motion and the offender appealed.

At issue on appeal were several jurisdictional issues. First, the Court addressed the issue

of timeliness of a notice of appeal under the guidelines. Under K.S.A. 1994 Supp. 22-3608(c), an offender "shall have 10 days after the judgment of the district court to appeal." The offender argued that his notice of appeal was timely because the sentencing court did not render final judgment until it ruled on his motion to modify. Citing well-settled law, the Court stated the time for filing a notice of appeal commences from the date the sentence is orally pronounced from the bench, not the date of filing the journal entry. Because the offender's notice of appeal was not filed within ten days of his sentence being pronounced from the bench there is no appellate jurisdiction over the offender's case.

The Court noted this case could constitute an exception to the timeliness requirement under the authority of *State v. Ortiz*, 230 Kan. 733, 735-736, 640 P.2d 1255 (1982), regarding the ineffective assistance of counsel for not filing a timely notice of appeal but the offender made no claim of ineffective assistance and in any event, his appeal fails on other jurisdictional grounds. The Court held there is no statutory right to sentence modification for crimes committed on or after July 1, 1993, and in such cases the legislature has revoked the ability to have one's sentence modified after sentencing. The only method for "modifying" a sentence under the guidelines is through a motion for departure, the disposition of which must be resolved prior to or at the sentencing hearing. There is no authority for a sentencing court to entertain a motion for departure after the sentence is imposed.

Finally, the Court found that an appellate court is without jurisdiction to consider a sentence entered for a felony committed on or after July 1, 1993, where the sentence imposed is within the range of the appropriate border box classification. Such a sentence of either prison or probation is the presumptive sentence for purposes of an appeal and it is not subject to appellate review.

State v. Thomas, 21 Kan. App. 2d 504, 900 P.2d 874 (1995). Holding that the *Ortiz* exception to the timely filing of a notice of appeal under the KSGA does not apply when an appeal would clearly raise no issues that an appellate court could address. In this case the offender's trial counsel was in apparent agreement the offender was ineligible for retroactive application of the sentencing guidelines and any claim of error would be invited by the offender's counsel. Therefore, even if the offender were allowed to appeal out of time no relief would be available.

State v. Hunt, 21 Kan. App. 2d 674, 906 P.2d 183 (1995), *rev. denied*, 259 Kan. 929 (1996). The issue in this appeal was whether the State's objection to the Kansas Department of Corrections (KDOC) sentencing conversion report was timely filed. The KDOC report which found the offender was eligible for retroactivity, was issued on May 20, 1994, and the State did not file its objection to the report until June 22, 1994, 33 days after the report's issuance. K.S.A. 1994 Supp. 21-4724(d)(1) states the prosecution can object to a KDOC sentencing conversion report within 30 days of the issuance of the report.

Under K.S.A. 60-206(c), whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or some other document on the party and the notice has been served on the party by mail, three days shall be added to the prescribed period. Noting it appears KDOC sentencing conversion reports are mailed in every instance, the Court held the 3-day mailing rule set forth in K.S.A. 60-206(c) applies to the statutory duty to timely object to a guidelines report. Therefore, the State's objection was timely filed.

State v. Clark, 21 Kan. App. 2d 697, 907 P.2d 898 (1995), *rev. denied*, 259 Kan. 928 (1996). A sentence of imprisonment in a sentencing guidelines border box case is a presumptive sentence for purposes of appeal. Therefore, an offender challenging a sentence of imprisonment in a border box case has the burden of proving that the sentence was the result of partiality, prejudice, oppression or corrupt motive.

State v. Parker, 23 Kan. App. 2d 655, 934 P.2d 987, *rev. denied*, 262 Kan. 967 (1997). The offender sought an appeal from a presumptive sentence by claiming he was denied his right to allocution. The Court held an appellate court has no jurisdiction over an appeal of a sentence which falls within the presumptive sentencing guidelines range and the exceptions provided in *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982) do not supply such jurisdiction.

State v. Duke, 263 Kan. 193, 946 P.2d 1375 (1997). The Court held K.S.A. 22-3504(1) does not eliminate a sentencing court's duty to preliminarily examine a motion to correct an allegedly illegal sentence to determine if substantial issues of law or fact are raised. If no such issues are found, the motion may then be summarily dismissed.

State v. Lee, 266 Kan. 1044, 975 P.2d 1278 (1999). Lee brought his appeal after the sentencing court denied his post-appeal motion to modify his sentence. The Court held when a sentence is within the statutory limits, it will not be disturbed on appeal unless it is shown that the sentencing court abused its discretion or the sentence was the result of partiality, prejudice, oppression, or corrupt motive. The Court stated in part: "In an appeal from a denial of a post-appeal motion to modify sentence, the record is examined and it is held the trial court did not abuse its discretion in denying the defendant's motion to modify his sentence without considering the factors and policies set out in K.S.A. 21-4601 and K.S.A. 21-4606." At Syl. ¶ 2.

State v. Lewis, 27 Kan. App. 2d 134, 998 P.2d 1141, *rev. denied* 269 Kan. 938 (2000). Where an offender's claim that a presumptive guidelines sentence imposed was cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and also Section 9 of the Bill of Rights of the Kansas Constitution is statutorily barred from being considered on direct appeal, it can be challenged by collateral attack under K.S.A. 60-1507.

See also ***State v. Blackshire***, 29 Kan. App. 2d 493, 28 P.3d 440 (2001), *rev. denied*, 272 Kan. 1420 (2001).

State v. Flores, 268 Kan. 657, 999 P.2d 919 (2000). Regarding the appeal of a departure sentence under the KSGA, the Court stated in part: "Under the provisions of K.S.A. 21-4721 an appellate court's jurisdiction to consider a challenge to a sentence is limited to the grounds authorized by the statute or a claim that the sentence is otherwise illegal." At Syl. ¶ 1. The Court further held a consecutive sentence under the KSGA is not a departure sentence and also stated in part: "As to crimes committed on or after July 1, 1995, claims of partiality, prejudice, oppression, or corrupt motive do not raise jurisdictional grounds sufficient to allow an appeal of a presumptive sentence." At Syl. ¶ 3.

Maggard v. State, 27 Kan. App. 2d 1060, 11 P.3d 89, *rev. denied*, 270 Kan. 899 (2000). This involved a habeas corpus issue pursuant to K.S.A. 60-1507 where the offender filed a pro se motion and the sentencing court declined to either appoint an attorney to represent the offender, or to hold a hearing on the motion. Instead, the sentencing court dismissed the motion based upon the points being raised were already addressed on appeal, or found to be without any merit.

The Court discussed the "prematurity doctrine" and held it did not apply to K.S.A. 60-1507. Although the offender was incarcerated in Missouri subject to a Kansas detainer, he could still attempt to seek relief from the Kansas detainer under K.S.A. 60-1507. The Court also pointed out the "prematurity doctrine" would not apply under K.S.A. 60-1501 because the latter statute requires an offender's physical presence in Kansas before the statute may be applicable.

The offender's appeal as to his claim of ineffective assistance of trial counsel was denied based upon the failure to raise "exceptional circumstances" pursuant to Supreme Court Rule 183 (i). The offender's claim regarding the ineffective assistance of counsel on appeal was also denied because he failed to meet either of the two prongs required for this under *Baker v. State*, 243 Kan. 1, 755 P.2d 493 (1988).

The issue regarding the failure of the sentencing court to appoint counsel for the offender's K.S.A. 60-1507 motion was denied pursuant to Supreme Court Rule 183 (i) because the court had the discretion to find the motion failed to either present substantial issues of law, or triable issues of fact.

Lujan v. State, 270 Kan. 163, 14 P.3d 424 (2000). The offender filed a pro se K.S.A. 60-1507 motion that included an allegation of ineffective assistance of counsel, both at trial and on appeal. The sentencing court appointed counsel and set the motion for a hearing but denied the offender's specific request to be present for the hearing. However, the sentencing court allowed the offender to file an affidavit setting forth the evidence he wished to present. At the hearing the offender's trial court attorney testified regarding his actions in preparing and conducting the trial. At the conclusion of the hearing, the sentencing court denied the K.S.A. 60-1507 motion. The offender's appeal was based upon the sentencing court's denial of his right to be present for the hearing on his motion.

The Court relied upon both K.S.A. 60-1507 and Supreme Court Rule 183 (h) in addressing this appeal. In addition, the Court also focused upon the offender's due process rights under both the United States Constitution and the Kansas Constitution. The standard for review was the Court's interpretation of K.S.A. 60-1507.

The Court applied *Brown v. State***,** 196 Kan. 236, 409 P.2d 772 (1966), *Ray v. State*, 202 Kan. 144, 446 P.2d 762 (1968) and *Floyd v. State*, 208 Kan. 874, 495 P.2d 92 (1972) in addressing the due process issue. The Court noted all three of these cases still remain the law in Kansas. After reviewing these cases, the statute and the Supreme Court Rule, the Court stated in part: "If the issue or issues are substantial, involving events in which the petitioner participated, the court must proceed with a hearing involving the presence of the petitioner…. However, this denial was not based on the district court's conclusion that no substantial factual issues had been raised regarding events in which Lujan had participated. Rather, the district court decided that Lujan's presence was unnecessary because an affidavit regarding his testimony would suffice. Under the circumstances of this case, the presence of the petitioner was not a question subject to the court's discretion. The petitioner was entitled to be present under the law of this state."

NOTE: This decision involved a review of the judgment of the Court of Appeals of an unpublished decision filed on 03/03/00.

State v. Downey, 29 Kan. App. 2d 467, 27 P.3d 939, *rev. denied*, 272 Kan. 1421 (2001). This matter involved the sentencing court's handling of the Court's mandate resulting from *State v. Downey*, 27 Kan. App. 2d 350, 2 P.3d 191, *rev. denied*, 269 Kan. 936 (2000). The latter opinion

is hereafter referred to as *Downey I*.

Following the decision in *Downey I*, the Court's mandate directed the sentencing court to resentence the offender. Before resentencing, the offender filed a motion to set aside his conviction and a motion for a departure sentence, and then later still a second motion to set aside his conviction. The sentencing court held a hearing on the offender's motions and eventually sustained a motion arresting judgment pursuant to K.S.A. 22-3502 and granted the offender a new trial. The State filed an interlocutory appeal on the grounds the sentencing court did not comply with the appellate court's mandate.

Several additional motions were then filed which need not be repeated here and the Court addressed the issues of whether or not it had the jurisdiction to enforce compliance with its mandate, and also if the sentencing court had any jurisdiction to grant a new trial "… in derogation of the mandate". The State's interlocutory appeal was then assigned to an expedited special docket.

The Court reviewed K.S.A. 22-3502 and held there was no arrest of judgment because that would only apply if the complaint didn't charge a crime or if the trial court was without the jurisdiction to hear the crime charged. Such a motion must also be filed within 10 days after the finding of guilty unless the trial court sets an additional time period within the statutorily required 10 day time period. Regarding the issue of a new trial for the offender, the Court found that K.S.A. 22-3501 didn't apply based upon the express language within the statute. The Court stated in part: "Downey does not allege newly discovered evidence, and the "any other grounds" proviso requires a motion within 10 days after the finding of guilty."

The Court held the State was correct in filing an interlocutory appeal pursuant to K.S.A. 2000 Supp. 22-3601(b)(1) and then stated: "Alternatively, for the reasons that follow, we believe the Court of Appeals has the inherent authority to assert continuing jurisdiction to enforce its mandate. See K.S.A. 60-2106(c). We will not be diverted from this responsibility by an amorphous argument that the unauthorized action of the trial court may circumvent may circumvent the mandate that has been issued. Such a result would lay waste to the law of the case doctrine as hereafter explained.

The trial court's jurisdiction upon remand is limited to compliance with the mandate from the Court of Appeals in *Downey*. The trial court must proceed in accordance with the mandate and the law of the case as established on appeal. *State v. Collier*, 263 Kan. 629, Syl. ¶ 4, 952 P.2d 1326 (1998). The mandate compelled the trial court to resentence Downey; nothing more; nothing less."

The Court noted that the offender could still seek a K.S.A. 60-1507 remedy.

State v. Whitesell, 29 Kan. App. 2d 905, 34 P.3d 865 (2001) and referred to here as *Whitesell II*. In the first *Whitesell* case, *State v. Whitesell*, 270 Kan. 259, 13 P.3d 887 (2000) and referred to here as *Whitesell I*, the Supreme Court upheld the constitutionality of the Kansas stalking statute, namely K.S.A. 21-3438 and affirmed the offender's conviction for a 1997 offense. However, the Court vacated the 60 months' sentence of probation that had resulted from the State's motion for a departure pursuant to K.S.A. 21-4716(a) and remanded the matter back to the sentencing court. The Court found the sentencing court had failed to state the substantial and compelling reasons for departing on the record.

Before the Court's ruling in *Whitesell I* was decided though, two important events

transpired. First, in May 2000 the Kansas Legislature passed Senate Bill 323 (SB 323) which included an amendment to K.S.A. 1999 Supp. 21-4611. Second, in August 2000 the State filed a motion "For Continuation or Extension of Nonprison Sanction" which the sentencing court granted, extending the offender's probation until December 23, 2003. This order extending the sentence of probation became the basis for the offender's appeal in *Whitesell II*.

In *Whitesell II* the Court of Appeals addressed four issues raised by the offender. First, whether the sentencing court had the jurisdiction to modify the original sentence while the offender's appeal was pending before the Supreme Court. The Court determined the specific statute regarding the appeal of a sentencing guideline sentence, namely K.S.A. 21-4721 did not apply. Instead as the result of one of the statutory changes contained in SB 323, K.S.A. 2000 Supp. 21-4611(c)(5) provided the specific basis for a sentencing court to extend an offender's probation for "public safety purposes" and was retroactive in its application [see K.S.A. 2000 Supp. 21-4611(d)].

The Court stated in part: "The new legislation specifically made this new sentencing scheme retroactive and directed the sentencing court to review the sentences of all persons serving a nonprison sentence for a severity level 10 felony and bring them into conformity with K.S.A. 2000 Supp. 21-4611(c) on or before September 1, 2001. K.S.A. 2000 Supp. 21-4611(d). The district court relied on these legislative changes in holding it had jurisdiction to modify Whitesell's sentence…"

The Court interpreted the retroactive amendment to this statute to be read as an indication that the legislature had acted with the knowledge of the relevant judicial decisions and stated: "The fundamental rule of statutory construction is that the intent of the legislature governs when it can be ascertained… When a conflict exists, the most recent enactment controls." The new subsections to K.S.A. 2000 Supp. 21-4611, namely (c)(5) and (d) thus provided the jurisdictional basis for the sentencing court to modify the offender's sentence.

Second, as for the offender's ex post facto argument, the Court held it had no jurisdiction to consider the appeal of a presumptive guidelines sentence. Instead the Court relied upon the specific language of K.S.A. 2000 Supp. 21-4611(c)(5) which states in part: "… Such an increase shall not be considered a departure and *shall not be subject to appeal*." (Emphasis added.)

Third, the offender argued the Court should consider the merits of his appeal, however, the Court held that *State v. Schick*, 25 Kan. App. 2d 702, 971 P.2d 346 (1998), *rev. denied* 266 Kan. 1114 (1999) did not apply and stated in part: "… However, the legislature did specifically intend, as evidenced by the language of K.S.A. 2000 Supp. 21-4611(c)(5), *to foreclose our review of an increase of the probation term pursuant to that statute*." (Emphasis added.)

The offender's last argument involved the Court's power to review a constitutional claim without a contemporaneous objection having been timely made, when the consideration of that issue would be necessary to serve the ends of justice or prevent the denial of fundamental rights. The Court once again pointed out that it simply had no jurisdiction to address a constitutional argument on direct appeal.

State v. McGrew, 29 Kan. App. 2d 1051, 36 P.3d 334 (2001), *aff'd*, No. 84, 351, unpublished opinion filed July 12, 2002, *cert. denied*, 537 U.S. 1058 (2002). This matter involved an appeal of a presumptive sentence and the Court held that it had no jurisdiction to consider an appeal of a presumptive sentence pursuant to K.S.A. 21-4721(c)(1).

NOTE: A Petition for Review was filed by the offender and a per curiam unpublished opinion affirmed the original opinion on 07/12/02.

State v. Clemons, 273 Kan. 328, 45 P.3d 384 (2002). Please refer to the **CRIMINAL HISTORY ISSUES (Juvenile Convictions Issues)** section on Appendix A pages 51-56.

Easterwood v. State, 273 Kan. 361, 44 P.3d 1209, *cert. denied*, 537 U.S. 951 (2002). Refer to the Syllabus. "Under the facts of this case, we hold: (1) The record established a sufficient factual basis for the defendant's pleas of guilty to felony murder, aggravated robbery, and one count of kidnapping; (2) the defendant was sufficiently informed by the court and his counsel of the possible penalties he faced before entering his pleas; (3) the defendant, who had the opportunity to challenge his felony-murder charge but knowingly and willingly waived that right and opportunity in order to take advantage of a favorable plea agreement involving the dismissal of five charges and two separate offenses, is bound by his plea agreement; and (4) the defendant is not entitled to have his pleas set aside in a collateral attack of his convictions to benefit from a favorable, nonretroactive ruling in a later separate appeal by a different party on the precise legal issue which the defendant willingly waived."

State v. Campbell, 273 Kan. 414, 44 P.3d 349 (2002). See the **CONSECUTIVE AND CONCURRENT SENTENCES (General Issues)** section on Appendix A page 95.

State v. McIntyre, 30 Kan. App. 2d 705, 46 P.3d 1212 (2002). The offender's twelve months probation was revoked and the State then moved for an extension to twenty-four months probation. The sentencing court granted the State's motion based upon "both a safety factor and judicial necessity" based upon a report from the Community Corrections Department. In extending the probation period the sentencing court had noted: "…McIntyre had a high probability of having substance dependence disorder and would need extensive treatment. Additionally, McIntyre would be required to return to the Community Corrections Residential Center following his completion of an in-patient treatment program, provided he was accepted into such a program…" The offender appealed.

The Court reviewed K.S.A. 2001 Supp. 21-4611(c)(5) and (c)(6), and then focused upon whether or not (c)(5) allowed the sentencing court to extend the period of probation. In affirming the sentencing court, the Court stated in part: "Clearly, the trial court's ruling was based on its conclusion that McIntyre's welfare would not be adequately served by the 12-month term because his serious drug problem warranted more extensive treatment. The court's reasons are sufficient to satisfy the particularity requirement of K.S.A. 2001 Supp. 21-4611(c)(5)…"

State v. Limon 32 Kan. App. 2d 369, 83 P.3d 229 (2004), *rev'd and remanded*, 280 Kan. 275, 122 P.3d 22 (2005). The offender was convicted of criminal sodomy and received a 206 month sentence based on two prior adjudications for aggravated criminal sodomy. The offender appealed and the Kansas Court of Appeals affirmed the offender's conviction for a violation of K.S.A. 21-3505 (a) (2), criminal sodomy in *State v. Limon*, Case No. 85,898, unpublished opinion filed February 1, 2002, *rev. denied*, 274 Kan. 1116 (2002) (Limon I).

On appeal, the offender argued that K.S.A. 2002 Supp. 21-3522 (a) (2) was unconstitutional because it impermissibly discriminated between heterosexual and homosexual sodomy. The offender maintained that the classification limiting the applicability of K.S.A 2002 Supp. 21-3522 to members of the opposite sex violated his right to equal protection because it

criminalized heterosexual sodomy less severely than homosexual sodomy.

K.S.A. 21-3505 (a) (2) provides: "Criminal sodomy is sodomy with a child who is 14 years of age but less than 16 years of age". This subsection does not differentiate between genders. A violation of this subsection is a severity level 3 person felony.

K.S.A. 21-3522 (a) (2) provides: "Unlawful voluntary sexual relations is engaging in voluntary sodomy with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex." Violation of this subsection is a severity level 9 person felony.

The Kansas Supreme Court denied the offender's petition for review and the offender filed a petition for writ of certiorari with the United States Supreme Court. The Court deferred its ruling until the decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003). The day after issuing the opinion in *Lawrence*, the Court granted the offender's petition for writ of certiorari, vacated the judgment, and "remanded to the Court of Appeals of Kansas for further consideration in light of *Lawrence*." *Limon v. Kansas*, 539 U.S. 955, 156 L. Ed. 2d 652, 123 S. Ct. 2638 (2003).

The Kansas Court of Appeals affirming their original decision distinguished *Lawrence* from the facts in the present case. In *Lawrence* the Court stated in pertinent part: "The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention from the government." 156 L. Ed 2d at 525-26. Furthermore, the Court noted the language underlying *Lawrence* is that "all adults may legally engage in private consensual sexual practices common to a homosexual lifestyle" and that the language in that opinion did not reference children. Therefore, the Court concluded that children are excluded from the class that "may legally engage in private consensual sexual practices common to a homosexual lifestyle."

In summary, the Court noted that a rational basis exists for placing adult heterosexual sex acts with children in a class by themselves and that these acts may be dealt with differently than adult homosexual sex acts with children.

NOTE: Following the ruling from the Ct. of Appeals, Limon file a petition for review in the Kansas Supreme Court which was granted. In *State v. Limon*, 280 Kan. 275, (filed October 21, 2005) the KS. Supreme Court reversed the Ct. of Appeals ruling, reversed the District court ruling, and remanded with directions.

State v. Beauclair, 281 Kan. 230, 130 P.3d 40 (2006). Defendant appealed denial of his motion to withdraw his no contest plea to rape and aggravated criminal sodomy. Defendant was informed by his attorney that the sentencing range according to the 1998 sentencing grid and using no criminal history was 184-206 months for rape and 136-154 months for aggravated criminal sodomy. However, the trial court, during the plea colloquy, advised the defendant of the months based on the 1999 sentencing grid in which the range for rape was 147-653 months for rape and 109-493 months for aggravated criminal sodomy. At sentencing, the trial court concluded that the 1998 grid should be used and both attorneys agreed. Defendant was

subsequently sentenced to 184 months for rape and 136 months for aggravated criminal sodomy.

The defendant file a motion to withdraw his plea, twenty months after sentencing, and argued that he had been misinformed regarding the minimum and maximum sentences. The trial court acknowledged that the plea proceeding had not gone exactly according to K.S.A. 22-3210 but denied the motion. The Court of Appeals reversed and the Supreme Court granted review of the issue.

The Court concluded that the record showed that the defendant was made aware on several occasions that he had been under-informed by the trial court at his plea hearing, but he proceeded to plead no contest. The defense council's affidavit had indicated that she advised the defendant of both the 1998 and 1999 sentencing guidelines and the defendant decided to plead no contest. Furthermore, at sentencing the defendant had been present when the trial court ordered the parties to brief the issue as to which year's guidelines applied. In addition, neither the defendant nor his counsel objected to application of the more severe guidelines sentencing range. The Court held that the requirements of K.S.A. 22-3210 were substantially fulfilled and affirmed the trial courts holding on that issue.

NOTE: The case was remanded to the Court of Appeals for resolution of other issues.

KSGA & RETROACTIVITY

Chiles v. State, 254 Kan. 888, 869 P.2d 707 (1994). The Court denied a writ filed by an offender contending that the limited retroactivity provision of the sentencing guidelines (K.S.A. 21-4724) violated equal protection and due process. The Court held the retroactivity provision was constitutional and stated in part: "… It is reasonable to assume that the interest of the public safety of the community underlay the legislative decision to limit the scope of the retroactivity provision to less serious offenders."

State v. Gonzales, 255 Kan. 243, 874 P.2d 612 (1994). By providing that certain offenders were entitled to retroactive application of the KSGA, the legislature implicitly authorized an appeal of a sentencing court's decision to deny conversion of the sentence. Conversion is mandatory for eligible offenders but the sentencing court may consider any information available as of the date of the original sentencing and may impose a departure sentence in accordance with the provisions of the KSGA.

See also ***State v. Staven***, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).

Phillpot v. Shelton, 19 Kan. App. 2d 654, 875 P.2d 289, *rev. denied*, 255 Kan. 1003 (1994). Even where an offender has served longer than the prison portion of a guidelines sentence upon conversion from an indeterminate to a determinate sentence under the retroactivity provisions of the KSGA, the offender must still serve the entire term of postrelease supervision as provided under the KSGA.

State v. Williams, 19 Kan. App. 2d 903, 878 P.2d 854 (1994). The sentencing court had no authority to determine the offender's criminal history for a crime committed prior to July 1, 1993, because the offender was not actually sentenced at the hearing at which the sentencing court made the determination. Instead, the sentencing court suspended imposition of sentence. On its face, K.S.A. 1993 Supp. 21-4724(f) applies only to a person sentenced after July 1, 1993,

for a crime committed before that date. Consequently, the sentencing court's determination of criminal history is without effect and cannot be considered in any subsequent action against the offender.

State v. Jones, 19 Kan. App. 2d 913, 878 P.2d 845, *rev. denied* 255 Kan. 1005 (1994). Relying on *Chiles v. State*, the Court held in the case of an offender serving a sentence for possession of cocaine with intent to sell who appealed from the denial of his motion for conversion, that the limited retroactivity provision of the KSGA distinguishes not only between more versus less serious offenses, but also between persons with more versus less serious criminal histories.

Safarik v. Bruce, 20 Kan. App. 2d 90, 61, 883 P.2d 1211 (1994). The retroactivity provisions of the KSGA require the sentencing court to determine a criminal history classification whenever an offender properly objects to the criminal history determination, regardless of whether the court has received the presentence investigation report. If an offender seeks to challenge his/her criminal history for purposes of conversion eligibility, the proper forum for that argument is in the sentencing court.

State v. Houdyshell, 20 Kan. App. 2d 90, 884 P.2d 437 (1994). In calculating what the severity level a pre-July 1, 1993, conviction of aggravated battery would be under the KSGA as if the crime had been committed on or after July 1, 1993, it is error to relieve the State of the burden of alleging and proving the additional element of intent to cause great bodily harm before determining the crime is a severity level 4 aggravated battery. A severity level 4 aggravated battery under K.S.A. 1993 Supp. 21-3414, requires proof of an additional element not required under the previous version of the crime. Accordingly, the language of the pre-July 1, 1993, version of aggravated battery corresponds to a severity level 7 or 8 aggravated battery.

NOTE: In ***State v. Whitaker***, 260 Kan. 85, 92, 917 P.2d 859 (1996), the Court cited ***State v. Fierro***, 257 Kan. 639, 648-650, 895 P.2d 186 (1995), in which the procedure to assign a severity level as set out in ***Houdyshell*** was specifically disapproved.

State v. Colston, 20 Kan. App. 2d 107, 883 P.2d 1231 (1994). The offender was convicted of two counts of aggravated incest in 1992 after pleading nolo contendere to the charges. The Kansas Department of Corrections (KDOC) conversion report indicated the offender's crimes were, for conversion eligibility purposes, severity level 5 offenses. The State objected to the report in claiming the offender's crimes should be classified as severity level 2 crimes, because under the 1993 amendments to the criminal statutes the offender's convictions would constitute aggravated criminal sodomy. The sentencing court ruled that classifying the offender's crimes as severity level 2 convictions would be an impermissible enhancement of the sentence.

The State appealed, arguing that the KDOC should have determined the severity level of the offender's crime as if the crime were committed on or after July 1, 1993. The offender argued that reclassifying his crime as aggravated criminal sodomy would violate the prohibition against ex post facto laws, in that the effect of the State's request would be to impose a more severe punishment on him by denying him retroactive application of the KSGA.

The Court agreed with the State and held the legislative intent of K.S.A. 1993 Supp. 21-4724(c)(1) is to look to the criminal acts committed prior to July 1, 1993, and for which defendant was convicted, then determine what crime those acts would constitute after July 1, 1993, and then determine the appropriate severity level. Application of the KSGA solely for the purpose of determining an offender's eligibility for retroactivity does not disadvantage the

offender. Conversion cannot under any circumstances lengthen an offender's sentence but is merely used to determine if the offender is eligible for conversion from an indeterminate sentence to a determinate sentence. In determining eligibility in a case where an individual pleads nolo contendere, the sentencing court may look to the well-pleaded facts in the charging document and to the journal entries to determine what crime the individual would be guilty of had the act occurred on or after July 1, 1993.

See also ***State v. Fierro***, 257 Kan. 639, 895 P.2d 186 (1995), following *Colston*; ***Baker v. State***, 20 Kan. App. 2d 807, 894 P.2d 221, *rev. denied*, 257 Kan. 1091 (1995) and ***State v. Ward***, 20 Kan. App. 2d 238, 886 P.2d 890 (1994), *rev. denied*, 257 Kan. 1096 (1995).

State v. Duff, 20 Kan. App. 2d 393, 888 P.2d 861 (1995). Eligibility for retroactivity is based only upon the classification of the offense in the grid boxes and not on the actual disposition made at the time of sentencing or other possible dispositions permitted by the KSGA. However, with respect to the question of how converted sentences for multiple convictions are aggregated, the legislature did not intend that an incarcerated person could "bank" time to be applied to a sentence imposed for a crime not yet committed. In this case, the offender had argued his combined converted sentences for a 1988 crime and for a 1993 crime, should be measured from the date of the imposition of his 1988 sentence. The Court found this would lead to an "absurd" result (i.e., the offender would begin serving his 1993 sentence before he committed his 1993 crime and thus would have served his 1993 sentence completely before the sentence was even pronounced).

State v. Sidders, 20 Kan. App. 2d 405, 888 P.2d 409, *rev. denied*, 257 Kan. 1096 (1995). The special rule under the KSGA specifying a presumptive sentence of imprisonment for any crime in which a firearm was used, does not render the offender ineligible for retroactive conversion of his/her sentence under the provisions of K.S.A. 21-4724.

State v. Geis, 20 Kan. App. 2d 778, 894 P.2d 213, *rev. denied*, 257 Kan. 1094 (1995). Multi-county challenges by an offender to a conversion report that lists convictions from numerous counties should be filed in each appropriate sentencing court, with each challenge accompanied by notice of any challenges raised in the other counties. In addition, any challenge to a specific conviction within a criminal history listing should be filed in the sentencing court of that conviction. A general challenge to a conversion report should be filed in the sentencing court that imposed the sentence on the conviction event that comprises the current controlling offense. For offenders with a controlling sentence that includes sentences from separate convictions imposed over a period of time, the offender's most recent conviction event serves as the controlling offense for conversion purposes.

State v. George, 20 Kan. App. 2d 648, 891 P.2d 1118, *rev. denied*, 257 Kan. 1094 (1995). The offender in this case appealed from the sentencing court's denial of his motion for a sentence conversion under the KSGA. The Kansas Department of Corrections (KDOC) conversion report concluded that although the offender's severity level 7 "I" classification for his aggravated battery conviction would otherwise be eligible for conversion, the offender was not eligible because he had used a firearm in the commission of the crime. At the hearing on the offender's objection to the KDOC report, the sentencing court found that a firearm was not used in the crime but concluded that the severity level of the offender's crime under the KSGA should be a severity level 4 and denied the offender's request for conversion.

The Court noted under *State v. Houdyshell*, 20 Kan. App. 2d 90, 884 P.2d 437 (1994), the

offender's crime of aggravated battery would only translate to a severity level 7 crime and thus the offender was eligible for sentence conversion. The State argued the offender should still be ineligible for conversion on the basis that he used a firearm and the sentencing court erred in finding that a firearm was not used. However, following *State v. Sidders*, 20 Kan. App. 2d 405, 888 P.2d 409, *rev. denied*, 257 Kan. 1096 (1995), the Court ruled the issue of whether or not a firearm was used, does not preclude the offender's eligibility for retroactive application of the KSGA. The Court noted although it did not affect the outcome of this case, the concept of the "use" of a firearm within the context of K.S.A. 1993 Supp. 21-4714(h) should be broadly construed and the offender did in fact use a firearm in the commission of his offense.

NOTE: In ***State v. Whitaker***, 260 Kan. 85, 92, 917 P.2d 859 (1996), the Court cited ***State v. Fierro***, 257 Kan. 639, 648-650, 895 P.2d 186 (1995), in which the procedure to assign a severity level as set out in ***Houdyshell*** was specifically disapproved.

State v. Lunsford, 257 Kan. 508, 894 P.2d 200 (1995). If an offender is ineligible for conversion on any crime for which he or she is serving an indeterminate sentence, then he or she is ineligible for retroactive application of the KSGA pursuant to K.S.A. 1994 Supp. 21-4724.

State v. Hackler, 21 Kan. App. 2d 289, 898 P.2d 1175, *rev. denied*, 258 Kan. 860 (1995). An offender whose crime is classified in boxes "3-H" or "3-I" of the drug grid is not eligible for sentence conversion unless the provisions of K.S.A. 1994 Supp. 21-4705(c), the "small sale of marijuana exception," are met. If the legislature had intended that all sentences within boxes "3-H" and "3-I" of the drug grid be eligible for conversion, then there would be no reason for it to include the additional language about the "small sale of marijuana exception" in K.S.A. 1994 Supp. 21-4724(c)(1).

NOTE: The passage of K.S.A. 1996 Supp. 21-4705(c) effectively eliminated the "small sale" exception.

State v. Corber, 21 Kan. App. 2d 325, 900 P.2d 241 (1995). When an offender is sentenced on or after July 1, 1993, for a crime committed prior to that date, the sentencing court must compute the sentence an offender would have received had the offender been sentenced pursuant to the KSGA. Failure to compute this sentence is error and requires a remand for computation of the KSGA sentence. Although the sentencing court must compute the KSGA sentence, it has no authority to impose such sentence.

Farris v. McKune, 259 Kan. 181, 911 P.2d 177 (1996). In converting an indeterminate sentence, the legislature intended that the Kansas Department of Corrections (KDOC) use records available to determine what an offender did when the crime was committed and then convert that crime to an analogous crime existing after July 1, 1993. In determining eligibility for retroactive conversion, KDOC's job is simply to collect uncontested information in order to determine what the "actual conduct" of the offender was. If the information relied upon by the KDOC turns out to be contested and the offender disagrees with the KDOC's determination, the offender has the right to challenge the determination before the true trier of fact, the sentencing court.

Faulkner v. State, 22 Kan. App. 2d 80, 911 P.2d 203, *rev. denied*, 259 Kan. 927 (1996). The time an offender spends on parole under what was an original indeterminate sentence cannot be used to satisfy the postrelease supervision period of a converted KSGA sentence.

State v. Sammons, 22 Kan. App. 2d 311, 915 P.2d 788 (1996). A substantial part of an

offender's criminal history as stated in his Kansas Department of Corrections (KDOC) sentencing guidelines report did not exist when the offender committed his most serious offense for which he was serving time. The Court found to determine the eligibility for indeterminate sentence conversions under K.S.A. 21-4724, the KDOC should determine the most serious severity level under each sentencing event for which the offender is incarcerated and then determine the offender's criminal history existing at the time of each sentencing event.

Blomeyer v. State, 22 Kan. App. 2d 382, 915 P.2d 790, *rev. denied*, 260 Kan. 991 (1996). For purposes of considering a conversion under the KSGA, an offender who is serving consecutive sentences cannot be considered as still serving a one to five year sentence for conspiracy to deliver cocaine when that crime is the offender's earliest conviction and the offender has already served longer than the five year maximum term. Whether Blomeyer would be eligible for sentence conversion under the KSGA was a central argument in this case. The Court held that Blomeyer's original indeterminate sentence could no longer be used to deny Blomeyer sentence conversion once the five years maximum of that sentence had been served.

See also ***Doolin v. State***, 24 Kan. App. 2d 500, 947 P.2d 454 (1997).

State v. Whitaker, 260 Kan. 85, 917 P.2d 859 (1996). When a crime is committed prior to July 1, 1993, and sentencing occurs after that date, the sentencing court is required to compute a KSGA sentence by looking at the actual conduct and by applying the actual acts committed to the comparable crime in effect after July 1, 1993. Any uncontested information may be considered to determine what the actual conduct of the offender was. Stating the offender's reliance on *State v. Houdyshell*, 20 Kan. App. 2d 90, 884 P.2d 437 (1994) is misplaced insofar as the procedure to assign a severity level set out in *Houdyshell*, was specifically disapproved by the Court in *State v. Fierro*, 257 Kan. 639, 895 P.2d 186 (1993).

Bookless v. State, 23 Kan. App. 2d 730, 935 P.2d 231, *rev. denied*, 262 Kan. 959 (1997). The Court first reaffirmed the holding in *Chiles v. State*, 254 Kan. 888, 903, 869 P.2d 707, *cert. denied*, 130 L. Ed. 2d 88 (1994), that the limited retroactivity provisions of the KSGA are constitutional. The Court then rejected the offender's three additional arguments that: the Kansas Parole Board is partial and biased in its own favor; the refusal to convert his sentence violated K.S.A. 1992 Supp. 22-3717(n) and K.A.R. 44-6-107; and his constitutional rights had been violated by the Kansas Sentencing Commission's alleged failure to adhere to its statutory mandate to maintain prison populations.

The Court held all of the offender's claims must be rejected and stated in part: "An action under K.S.A. 60-1507 was inappropriate to raise challenges to the action or inaction of the Kansas Parole Board or the Kansas Sentencing Commission. *Cf. Lamb v. Kansas Parole Board*, 15 Kan. App. 2d 606, 608, 812 P.2d 761 (1991)…" 15 Kan. App. 2d at 731. The Court then went on to state: "… neither the Kansas Parole Board nor the Kansas Sentencing Commission has any final say in determining the standards for which inmates are eligible for sentence conversion under the KSGA."

See also ***State v. Fierro***, 257 Kan. 639, 895 P.2d 186 (1995).

The Court held the offender's reliance on K.S.A. 1992 Supp. 22-3717(n) and K.A.R. 44-6-107 was misplaced due to the fact those provisions dealt with matters relating to parole eligibility. Such provisions may not be used to override the clear legislative intent of K.S.A. 21-4724(b) that sets forth only limited retroactivity of the KSGA.

State v. Harlin, 23 Kan. App. 2d 800, 936 P.2d 292 (1997). The offender appealed the Kansas Department of Correction's (KDOC) conversion report to the sentencing court that he was ineligible for conversion of his indeterminate sentence. The sentencing court denied the motion due to the fact it was filed long after the 30 days deadline imposed by K.S.A. 21-4724(d)(1) for the filing of such a motion. K.S.A. 21-4724(d)(1) states that an inmate "shall" have the right to file an appeal "within 30 days" of the issuance of a conversion report by the KDOC.

The Court considered this case as one of whether the provisions of K.S.A. 21-4724(d)(1) are mandatory and whether the sentencing court was correct in holding it did not have any jurisdiction over the offender's motion. Citing the decision in the case of *State v. Porting*, 20 Kan. App. 2d 869, 892 P.2d 915, *rev. denied*, 257 Kan. 1095 (1995) where the Court had held that the word "shall" as used in K.S.A. 21-4724(d)(3) was only directory and not mandatory in the time requirements that it placed on the sentencing court. The Court stated in part: "… We also believe it unseemly to conclude that an inmate's motion for access to the district court should be denied because "shall" means "shall," but the same verb means only "should" when applied to the court." 23 Kan. Apps. 2d at 802. The Court concluded the sentencing court incorrectly dismissed the offender's case for lack of jurisdiction and ruled the offender's motion must be construed as one under K.S.A. 60-1507 (i.e., attacking the sentence as imposed as illegal).

Comer v. State, 24 Kan. App. 2d 131, 942 P.2d 658, *rev. denied*, 262 Kan. 960 (1997). A fundamental rule of sentencing is that an offender convicted of a crime is given the sentence in effect when the crime was committed. Eligibility for an indeterminate sentence conversion under the KSGA is governed by the statutes in effect as of July 1, 1993, the effective date of partial retroactive application of the KSGA. Generally, subsequent amendments to the KSGA are not to be applied retroactively unless so designated by the legislature. The offender sought to have the 1996 amendments to the KSGA applied retroactively, making him eligible for conversion. The sentencing court denied the offender's petition and the Court affirmed the decision.

See also ***State v. Fierro***, 257 Kan. 639, 895 P.2d 186 (1995) and ***State v. Ford***, 262 Kan. 206, 936 P.2d 255 (1997).

State v. Bissell, 24 Kan. App. 2d 169, 943 P.2d 76 (1997). The constitutionality of the KSGA must be reviewed under a rational basis standard. Under that standard the statutory provisions of the KSGA will be upheld as long as the statutory classification bears some relevance to the purpose for which the classification is made. The limited retroactivity provision of the KSGA at K.S.A. 21-4724(b) does not violate an offender's rights to equal protection of the law even though certain offenders not eligible for indeterminate sentence conversion under K.S.A. 21-4724(b) could and did obtain converted sentences under K.S.A. 1993 Supp. 22-3717(f). The Court rejected the offender's equal protection challenge to the KSGA and held there appears to be a rational relationship between the purposes of the KSGA and the legislature's initial decision to allow otherwise ineligible offender's to have their preguidelines sentences converted if they had been released on parole.

See also ***Payton v. State***, 22 Kan. App. 2d 843, 923 P.2d 1059 (1996).

NOTE: K.S.A. 1993 Supp. 22-3717(f) applied to offenders who were sentenced for a felony committed after July 1, 1993, while they on parole or conditional release for a felony committed prior to July 1, 1993, and an indeterminate sentence would still be converted into a

determinate sentence. Effective March 24, 1994, K.S.A. 1993 Supp. 22-3717(f) was amended so that preguidelines sentences would not be converted.

State v. Standifer, 24 Kan. App. 2d 441, 946 P.2d 637, *rev. denied*, 263 Kan. 890 (1997). The offender sought to challenge his pre-guidelines sentence by claiming that he was being subjected to an illegal sentence because the prospective imposition of the 1996 amendments to the KSGA violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Section 1 of the Kansas Constitution's Bill of Rights.

The sentencing court had originally dismissed the offender's claims on the grounds the offender had not filed an appeal within 30 days after the issuance of a sentencing guidelines report by the KDOC. Citing *State v. Harlin*, 23 Kan. App. 2d 800, 936 P.2d 292 (1997), the Court held a *pro se* motion for conversion of sentence filed out of time under K.S.A. 21-4724(d)(1) should be considered by the sentencing court as a motion filed under K.S.A. 60-1507. The Court then applied *State v. Bell*, 258 Kan. 123, 899 P.2d 1000 (1995) and the Court considered the offender's "equal protection" based appeal, even though the question was being raised for the first time on appeal. This was due to the nature of the question being purely legal and considering the question would serve the ends of justice and prevent the denial of fundamental rights.

The Court then referred to *State v. Ford*, 262 Kan. 206, 936 P.2d 255 (1997), and found the 1996 amendments to the KSGA were intended to only apply prospectively. See also ***Comer v. State***, 24 Kan. App. 2d 131, 942 P.2d 658, *rev. denied*, 262 Kan. 960 (1997). However, the Court found that while both *Bell* and *Comer* dealt with statutory interpretation or construction, neither case addressed the equal protection argument that was raised by the offender.

Relying on the decisions in *Chiles v. State*, 254 Kan. 888, 869 P.2d 707, *cert. denied* 513 U.S. 850 (1994), *State v. Patterson*, 257 Kan. 824, 896 P.2d 1056 (1995), *People v. Montoya*, 647 P.2d 1203 (Colo. 1982), *Meeks v. Jago*, 548 F.2d 134 (6th Cir. 1976), *cert. denied* 434 U.S. 844 (1977) and *McQueary v. Blodgett*, 924 F.2d 829 (9th Cir. 1991), the Court stated in part in upholding the constitutionality of the 1996 amendments to the KSGA: "The State has an interest in maintaining stability in the sentencing process and a concomitant obligation to improve the criminal justice system. The rule that the criminal statute in effect at the time the crime was committed is the penalty to be imposed serves these legitimate governmental interests and does not violate the Equal Protection Clause of the Fourteenth Amendment or § 1 of the Kansas Constitution Bill of Rights." 24 Kan. App. 2d at 446.

State v. Loffer, 24 Kan. App. 2d 495, 947 P.2d 458 (1997), *rev. denied*, 263 Kan. 889 (1998). Except for the conversion features of K.S.A. 21-4724, the provisions of the KSGA have no application to crimes committed prior to July 1, 1993. A crime is committed prior to July 1, 1993, if any of the essential elements of the crime as then defined, occurred before July 1, 1993.

Doolin v. State, 24 Kan. App. 2d 500, 947 P.2d 454 (1997). The Court of Appeals upheld the rule from *State v. Lunsford*, 257 Kan. 508, Syl. ¶ 1, 894 P.2d 200 (1995), where the Supreme Court said: "If a defendant is ineligible for conversion on any crime for which he or she is serving a sentence, he or she is ineligible for retroactive application of the sentencing guidelines."

Doolin attempted to distinguish his case from *Lunsford* by arguing that the consecutive nature of his sentences made his case different from the concurrent sentences in *Lunsford*. The

Court found, however, that there is nothing in *Lunsford* indicating that its holding is limited to cases involving concurrent sentences. Therefore, because one of Doolin's convictions made him ineligible for sentence conversion, Doolin will be ineligible for conversion on all of his sentences. See also ***Blomeyer v. State***, 22 Kan. App. 2d 382, 915 P.2d 790, *rev. denied*, 260 Kan. 991 (1996).

State v. Roseborough, 263 Kan. 378, 951 P.2d 532 (1997). Both K.S.A. 21-4724 and K.S.A. 1996 Supp. 21-4705 were construed and applied. It is a fundamental rule of statutory construction that a statute operates prospectively unless its language clearly indicates the legislature intended it to operate retroactively. An exception to the rule has been recognized for statutory change that is merely procedural or remedial in nature but a statute that defines the length or the type of criminal punishment is substantive in nature and operates prospectively.

The language of K.S.A. 21-4724(b)(1) that provides persons who committed crimes which would be classified in a presumptive nonimprisonment block of "3-H" or "3-I" of the drug grid pursuant to the provisions of subsection (c) of K.S.A. 21-4705 *and amendments thereto*, and were sentenced prior to July 1, 1993, shall have their sentences modified according to the provisions specified in the KSGA, is not a clear expression of legislative intent that all post 1993 amendments to K.S.A. 21-4705 are to be applied retroactively. A person who was sentenced according to the law applicable at the time of his or her crime has no equal protection claim on the ground that subsequent statutory amendments change the penalty for the same crime.

See also ***State v. Reason***, 24 Kan. 405, 947 P.2d 1030 (1997).

State v. Billington, 24 Kan. App. 2d 759, 953 P.2d 1059 (1998). In cases where the sentencing court intends to depart, the court must give notice to the parties of the court's intent and the reasons and factors relied upon, even if the crime took place prior to the 1994 amendments to the KSGA. Failure to consider placing an offender at the Labette Correctional Conservation Camp (Labette) will be grounds for resentencing. The Court discussed the rules relating to the notice to be given by a sentencing court of its intent to impose an upward departure sentence. The offender contended on appeal under the 1994 amendments to K.S.A. 21-4718(b), a sentencing court's notice of the intent to depart must state the type of departure intended by the court and the reasons and factors relied upon. The offender argued the sentencing court had failed to follow the 1994 rule in this case. The offender stated his revocation hearing took place after the 1994 amendments became law and the sentencing court was bound to comply with the amended language of K.S.A. 21-4718(b) even though the offender's original crime had taken place prior to 1994.

The Court concluded the 1994 amendments to K.S.A. 21-4718(b) were *procedural* changes only and under the holding in *State v. Sylva*, 248 Kan. 118, 804 P.2d 967 (1991), the 1994 amendments to K.S.A. 21-4718(b) must be applied retroactively. On a separate issue the Court found the offender's prior act of having absconded from a halfway house while on bond for over two (2) years did constitute a substantial and compelling reason for departure. Finally, the Court held the sentencing court's failure to consider placing the offender at Labette required that the sentence imposed on the offender be vacated and the matter remanded for resentencing. The Court ruled the 1994 amendment to K.S.A. 21-4603d concerning the consideration of placing certain offenders at Labette were procedural in nature and apply retroactively.

See also ***State v. Williams***, 24 Kan. App. 2d 447, 946 P.2d 98 (1997).

NOTE: The requirement to consider the placement of certain offenders at Labette pursuant to K.S.A. 21-4603d applies to women as well as to men.

Karlowski v. Simmons, 24 Kan. App. 2d 887, 954 P.2d 728 (1998). "A defendant who is on probation from a suspended sentence is not entitled to have his sentence converted pursuant to K.S.A. 1993 Supp. 22-3717(f) of the Kansas Sentencing Guidelines Act." At Syl. ¶ 1. "The fact that a defendant was on probation under a suspended sentence is not the equivalent of his being on conditional release as that term is used in K.S.A. 1993 Supp. 22-3717(f)." At Syl. ¶ 2.

Bradley v. State, 25 Kan. App. 2d 433, 965 P.2d 228, *rev. denied*, 266 Kan. 1107 (1998). Citing the decisions in *Chiles v. State*, 254 Kan. 888, 869 P.2d 707, *cert. denied*, 513 U.S. 850 (1994), *Doolin v. State*, 24 Kan. App. 2d 500, 947 P.2d 454 (1997) and *State v. Lunsford*, 257 Kan. 508, 894 P.2d 200 (1995), the Court rejected the offender's claims that his indeterminate sentence should be retroactively converted to a determinate sentence. The Court stated in part: "The Kansas Sentencing Guidelines Act provides for limited retroactive sentence conversion. Eligibility for retroactive sentence conversion is defined as follows: The Kansas Department of Corrections shall prepare a sentencing guidelines report on all inmates imprisoned as of July 1, 1993, except those who have convictions for crimes which, if committed on or after July 1, 1993, would constitute a severity level 1, 2, 3 or 4 felony on the sentencing guidelines grid for nondrug crimes. K.S.A. 21-4724(c)(1)." At Syl. ¶ 1.

The Court held the offender's pre-guidelines conviction for voluntary manslaughter equates to a severity level 3, person felony under K.S.A. 21-3403 and thus the offender is ineligible for retroactive sentence conversion. When the offender was returned to prison for a technical violation of his parole, the offender's length of stay in prison was controlled by pre-guidelines law and the offender was not eligible to serve only 90 days for a parole revocation as would have been the case for a KSGA sentence.

Fanning v. State, 25 Kan. App. 2d 469, 967 P.2d 1083, *rev. denied*, 266 Kan. 1108 (1998). Addressing the issue of whether the provisions of a 1993 amendment to K.S.A. 75-5217(b) should be applied retroactively to offenders with sentences received prior to July 1, 1993, the Court said in part: "Postrelease supervision" is a phrase with particular technical meaning under the Kansas Sentencing Guidelines Act." At Syl. ¶ 1. "Parole and postrelease supervision are not synonymous." At Syl. ¶ 2. "The postrelease revocation provisions under K.S.A. 1993 Supp. 75-5217(b) do not apply to individuals convicted before July 1, 1993." At Syl. ¶ 3. "Failure to give retroactive application to K.S.A. 1993 Supp. 75-5217(b) to individuals convicted before July 1, 1993, is not violative of equal protection." At Syl. ¶ 4.

Wadsworth v. State, 25 Kan. App. 2d 484, 967 P.2d 337, *rev. denied*, 266 Kan. 1116 (1998). The offender sought to withdraw his guilty plea based on an argument that he had not been informed that the sentencing court could impose his sentences consecutively. The sentencing court denied the offender's petition in its entirety and the Court affirmed the sentencing court's decision. Ruling on the offender's appeal, the Court said in part: "It is a better practice for a district court to inform a defendant prior to a plea of guilty or nolo contendre of the possibility that sentences can be run consecutively. However, neither statutes nor case law requires the court to provide such information to the defendant." At Syl. ¶ 1.

State v. Sisk, 266 Kan. 41, 966 P.2d 671 (1998). The offender had a pre-guidelines sentence that

he sought to have converted to a KSGA determinate sentence under the provision found at K.S.A. 1993 Supp. 22-3717(f). Reversing the decision of the sentencing court, the Court held that K.S.A. 1993 Supp. 22-3717(f) only applies to cases where a person was on parole and then "was sentenced to prison." In this case, the offender was on parole and was sentenced to county jail for a third time DUI conviction. The Court held being sentenced to jail is not the same as being sentenced to prison, and therefore the offender was not entitled to the conversion of his preguidelines sentence under the terms of K.S.A. 1993 Supp. 22-3717(f).

Regarding the appeal of an illegal sentence in general, the Court said: "An illegal sentence is defined as either a sentence imposed by a court without jurisdiction; a sentence which does not conform to the statutory provision, either in the character or the term of the punishment authorized; or a sentence which is ambiguous with respect to the time and manner in which it is to be served." At Syl. ¶ 3.

Thompson v. State, 25 Kan. App. 2d 659, 967 P.2d 361 (1998). The Court said: "Where the State has stipulated to a defendant's erroneous criminal history and the defendant's sentence is converted on the basis of that criminal history, the State cannot later move to correct the sentence conversion as an illegal sentence under K.S.A. 22-3504." At Syl. ¶ 1. The Court based its ruling on *State v. Strickland*, 23 Kan. App. 2d 615, 933 P.2d 782, *rev. denied*, 262 Kan. 968 (1997), which held when the State fails to find convictions in an offender's criminal history, the State cannot later amend and increase the severity level of the offender's criminal history for the conviction at issue.

Adams v. State, 27 Kan. App. 2d 292, 5 P.3d 1002, *rev. denied*, 269 Kan. 931 (2000). Extending the ruling from *State v. Sisk*, 266 Kan. 41, 966 P.2d 671 (1998), the Court held that under the clear terms of K.S.A. 1993 Supp. 22-3717(f) that was effective between July 1, 1993, and March 24, 1994, an inmate may not qualify for an indeterminate sentence conversion unless he or she was on parole or conditional release for a crime committed before July 1, 1993, or committed a new crime after July 1, 1993, and was sentenced to prison for the new crime. The Court further held a parole revocation for technical reasons does not qualify as a crime under K.S.A. 1993 Supp. 22-3717(f).

Price v. State, 28 Kan. App. 2d 854, 21 P.3d 1021, *rev. denied*, 271 Kan 1037 (2001). The offender was convicted of aggravated burglary and rape in 1973. He received a 5 to 20 year indeterminate sentence for each conviction, to be served consecutively. The Kansas Department of Corrections (KDOC) aggregated these sentences to a term of 10 to 40 years and after serving 20 years, the offender was conditionally released on January 20, 1993. However, on August 4, 1994, the offender was returned to the KDOC for technical violations of his release.

The KDOC reviewed the offender's records and notified him that the severity level of his rape conviction made the offender ineligible for retroactive application of the Kansas Sentencing Guidelines Act (KSGA) for the conversion of the aggravated burglary sentence. The offender filed a K.S.A. 60-1507 motion for a KSGA conversion of his sentence based upon the argument that he had already served the maximum sentence of twenty years for his rape conviction and it should not be counted against him for conversion purposes of the aggravated burglary conviction.

The standard of review is abuse of discretion by the trial court in refusing to grant the offender a hearing on his habeas corpus motion. The Court noted K.S.A. 21-4724 is the basis for the conversion of pre KSGA sentences to a KSGA sentence. Pursuant to *State v. Bell*, 6 Kan.

App. 2d 573, 631 P.2d 254 (1981), the Court stated in part: "By definition, the term "consecutive sentences" means sentences "following in a train, succeeding one another in a regular order, with an uninterrupted course of succession, and having no interval or break." 21 Am. Jur. 2d, Criminal Law § 547." 6 Kan. App. 2d 573 at page 574. Thus the offender "was either on conditional release for aggravated burglary or for rape, but not for both offenses." *Price*, 28 Kan. App. 2d 854.

In order to determine which sentence the offender had served first, the Court noted that Kansas has no statute that specifies the sequence of consecutive sentences. In addition, if the sentencing court does not specify which sentence is to be served first, then the order becomes that in which the sentences were rendered. See 24 C.J.S., Criminal Law, Section 1588. In this case the sentencing court did not specify the sequence in which the sentences were to be served. However, the charge for aggravated burglary was the first verdict the jury decided and the conviction for rape followed. In addition, the Journal Entry listed the aggravated burglary as Count I, then the rape conviction as Count II. Thus, the Court found the first sentence served was the one for the aggravated burglary, not the rape and the offender was not eligible for a KSGA conversion.

State v. Puckett, 33 Kan. App. 2d 813, 108 P.3d 1015 (2005). Defendant appealed after his probation was revoked and he was ordered to serve his prison sentence. Defendant claimed that the trial court should have reduced his post-release period from 36 months to 24 months, due to 2000 legislative amendments to K.S.A. 22-3717. The Court of Appeals agreed that defendant's postrelease should have been reduced but that it was the Department of Corrections rather than the trial court that was responsible for applying the retroactivity provisions of the 2000 amendments. The Court affirmed the trial court's decision and directed that the defendant seek relief from the Department of Corrections.

STATUTORY INTERPRETATION ISSUES

State v. Barnes, 31 Kan. App. 2d 825, 74 P.3d 591 (2003). The defendant in this case was convicted under K.S.A. 21-3703(b)(3), "theft of property regardless of the value from three separate mercantile establishments within a period of 72 hours as part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct," a severity level 9, nonperson felony. The defendant had repeatedly used a coupon while working as a cashier at Dillon's which resulted in a loss to the store of $204.

On appeal, Defendant claimed that the statute required theft from three different establishments and, therefore did not apply to his acts. The state argued that the word "or" in the statute provided two different felony violations under this statute. The Court found the statute to be somewhat vague but concluded that the statute does provide two different types of violations and, because the defendant had repeatedly stolen in a common scheme or course of conduct, he was appropriately convicted of felony theft.

State v. Walker, 280 Kan. 513, 124 P.3d 39 (2005). Defendant appealed his sentence for a drug severity level 2 offense and a count of possession of pseudoephedrine. Defendant argued that under *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188 (2002), the court should use drug severity level 4 when calculating the pseudoephedrine count but, because that count was a drug

severity level 1 offense, the criminal history should be applied to that count as the primary offense pursuant to K.S.A. 21-4720(b)(2).

The Supreme Court reviewed prior cases and held that a drug severity level 1 offense remains such; under the identical offense doctrine, a defendant merely receives a lesser sentence. However, the provisions of K.S.A. 21-4720(b)(2) governing the determination of the primary offense were uncertain and ambiguous when dealing with circumstances where the severity level of the offense does not match the sentence imposed. Therefore, the Court looked to the intent of the statute and held that the statute should be construed to require that the primary crime be the one with the highest severity level ranking which is *actually* sentenced. Using that severity level's applicable penalties would therefore effect the legislative intent that the primary crime be the one with the longest sentence imposed under the guidelines.

State v. de la Cerda, 279 Kan. 408, 109 P.3d 1248 (2005). Defendant appealed after his guilty plea to second-time possession of cocaine, a drug severity level 2 crime. After defendant committed the offense, the Legislature enacted SB123, which provided that simple possession offenses were to be sentenced at a drug severity level 4. Defendant argued that since he was not sentenced until after the enactment of SB123 he should have been sentenced at a drug severity level 4 instead of level 2. The Court noted the general rule that defendants are sentenced using the statute in effect at the time of the offense and, after reviewing the legislative history of SB 123, held it does not apply retroactively. The Court affirmed the drug severity level 2 sentence imposed.

State v. Post, 279 Kan. 664, 112 P.3d 116 (2005). Defendant challenged the trial court's imposition of a no-contact order as a condition of incarceration. Defendant alleged there was no statutory authority for imposing additional conditions upon an offender sentenced to prison. The Supreme Court agreed and vacated the illegal no-contact order after reviewing K.S.A. 2004 Supp. 21-4603d(a) (authorized dispositions). This statute establishes authorized dispositions for crimes committed after the sentencing guidelines were introduced and permits a trial court to impose any appropriate combination of the listed dispositions. Prior to the guidelines, however, the appellate courts interpreted the "any appropriate combination" language to apply only to combinations of entire subsections, and not to merely "any parts thereof." The Court reasoned that because the Legislature could have rewritten K.S.A. 21-4603d(a) in light of these prior decisions but chose to use essentially the same language from pre-guidelines scheme, the rule continues to be that courts can impose additional conditions only when an offender is sentenced to probation or community corrections, not imprisonment.