



Criminal History Scoring Refresher and Updates

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Overview

Scoring Out of
State Convictions

Scoring
Misdemeanors, City
Ordinance
Violations, Municipal
Convictions

Scoring Burglaries

Roadmap: How to classify prior out of state convictions

1. FELONY OR
MISDEMEANOR?

2. PERSON OR
NON-PERSON
CRIME?

OUT OF STATE CONVICTION: FELONY OR MISDEMEANOR IN KANSAS?



See K.S.A. 2021 Supp. 21-6811(e)(2)

Person felony

- ▶ An out-of-state conviction or adjudication for the commission **of a felony offense**, or an attempt, conspiracy or criminal solicitation to commit a felony offense, **shall be classified as a person felony if one or more** of the following circumstances is present as defined by the convicting jurisdiction in the elements of the out-of-state offense:
 - ▶ (a) Death or killing of any human being;
 - ▶ (b) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;
 - ▶ (c) bodily harm or injury, physical neglect or abuse, restraint, confinement or touching of any person, without regard to degree;
 - ▶ (d) the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance; (e) possessing, viewing, depicting, distributing, recording or transmitting an image of any person;
 - ▶ (f) lewd fondling or touching, sexual intercourse or sodomy with or by any person or an unlawful sexual act involving a child under the age of consent;
 - ▶ (g) being armed with, using, displaying or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or
 - ▶ (h) entering or remaining within any residence, dwelling or habitation.

What if the prior
conviction's classification
has changed?

CLASSIFYING PRIOR CONVICTIONS

The classification of a prior conviction will be made in accordance with the law applicable at the time of the current crime of conviction. See *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).



State v. Terrell

- ▶ Current conviction of Aggravated Escape
- ▶ Prior conviction of failure to register
- ▶ Registration offense was a nonperson felony when defendant was convicted of it, but was a person felony when he was convicted of aggravated escape (*underlying offense for which he had to register for was rape which made it a PF*)
- ▶ District Court classified failure to register conviction as person felony under *Keel*



The Kansas Supreme Court held on February 18th, 2022, that under the KSGA, all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, are to be classified as person or nonperson as of the time the new crime is committed. The Court specifically said, “We conclude that the better understanding of the statutory sentencing scheme requires that all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, be classified as person or nonperson as of the time the new infraction is committed.” *State v. Terrell*, No. 122,680, 2022 WL 497319 at *5 (Kan. February 18, 2022).

QUESTIONS

1) "Are we really supposed to change in state of KS post guidelines felony convictions to misdemeanors? *Terrell* did not explicitly address felony vs. misdemeanor."

2) "Please explain how to score an old case that was a felony and may not be today. Example, DWS x 3 - is it a felony today or not?"

How should prior Possession of Marijuana cases be treated?

- ▶ We have found no cases that specifically apply *Keel* or *Terrell* to marijuana priors, but in an unpublished Court of Appeals decision, *State v. Patrick* the court applied *Keel* to a prior Driving While Habitual Violator conviction.
- ▶ When the defendant was convicted of Driving While Habitual Violator, it was a non-person felony. However, when he was convicted of the current offenses, it was classified as a non-person misdemeanor
- ▶ Applying *Keel*, the court said that it should have been classified as a misdemeanor. See *State v. Patrick*, No. 116,660, 2018 WL 4373053 (Kan.App.2018) (unpublished).
- ▶ **Using this rationale, previous First Possession of Marijuana convictions would be classified as a B misdemeanor. Thus, it would not be scored for criminal history purposes. Previous Second Possession of Marijuana convictions would be scored as Class A non-person misdemeanor.**



prior convictions of criminal threat

- ▶ The Kansas Supreme Court found that the provision in the Kansas criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), that allows for a criminal conviction if a person makes a threat in reckless disregard of causing fear is unconstitutionally overbroad. See *State v. Boettger*, 310 Kan. 800, 801, 450 P.3d 805 (2019).
- ▶ KSSC's belief is that if it can be proven a defendant was convicted of intentional criminal threat, the conviction will count. If it cannot be proven whether a defendant was convicted of reckless or intentional, it cannot be counted.
- ▶ How can this be proven?
- ▶ Case by case basis
- ▶ Issue when jury instructed on both intentional and reckless criminal threat and when the state's argument included both versions. See *State v. Lindemuth*, 470 P.3d 1279 (Kan. August 28, 2020) and *State v. Johnson*, 310 Kan. 835, 450 P.3d 790 (2019).

Although this court can take judicial notice of the original complaint in Barton County case No. 83JV61, we observe that this evidence alone does not necessarily resolve whether Rankin's juvenile adjudication for terroristic threat was based on the intentional or reckless version of the statute; the original complaint may have been amended later in the proceedings. Rankin should receive a full hearing in district court to resolve the issue. At such a hearing the district court should consider all available records in case No. 83JV61 including the original and any amended charging documents, any plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and the journal entry of adjudication. See *Obregon*, 309 Kan. at 1274 (addressing documents the district court may consider in applying modified categorical approach to determine a defendant's criminal history). *State v. Rankin*, No. 122,818, 2021 WL 1704407 at *3 (Kan. App. April 30, 2021).

Juvenile Adjudications

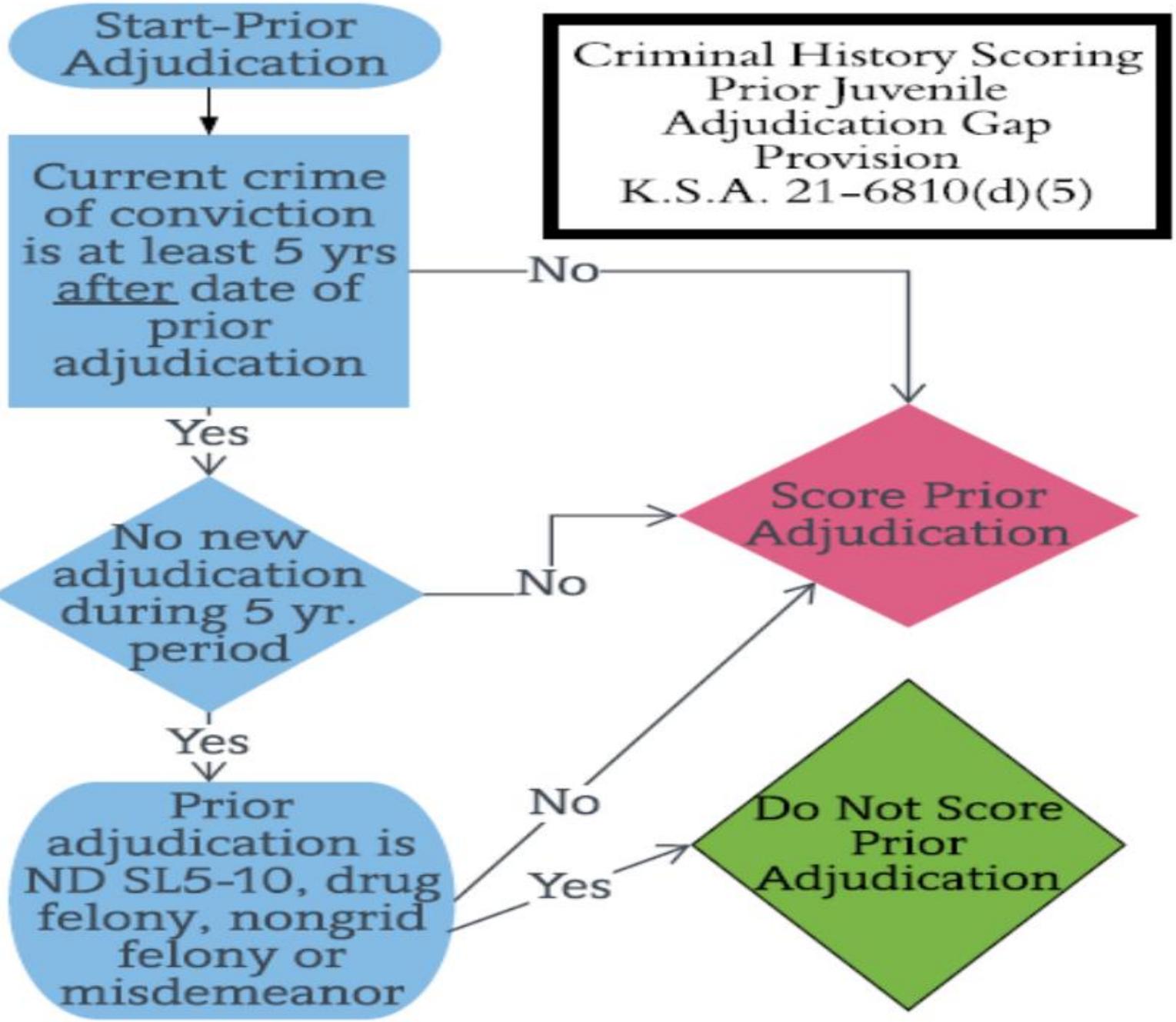
GAP
Provision

Decay

Special
Rules

Juvenile Adjudications

Except for adjudications that have decayed pursuant to K.S.A. 2021 Supp. 21-6810(d)(4) and (d)(5), prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history classification. Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. K.S.A. 2021 Supp. 21-6811(f).



K.S.A. 21-6810

(4) Except as otherwise provided, a juvenile adjudication will decay if the current crime of conviction is committed after the offender reaches the age of 25, and the juvenile adjudication is for an offense:

- (A) Committed before July 1, 1993, which would have been a class D or E felony, if committed by an adult;
- (B) committed on or after July 1, 1993, which would be a nondrug severity level 5 through 10 felony, a nongrid felony or any drug felony, if committed by an adult; or
- (C) which would be a misdemeanor, if committed by an adult.

(5) A juvenile adjudication will not be considered and scored if:

- (A) The current crime of conviction is committed at least five years after the date of the prior adjudication;
- (B) the offender has no new adjudications or convictions during such five-year period; and
- (C) the juvenile adjudication is for an offense that would be a nondrug severity level 5 through 10 felony, drug felony, nongrid felony or misdemeanor, if committed by an adult.

Why is this such a confusing topic? Because there are two parts in the juvenile criminal history scoring provisions. The first is the one we are dealing with now i.e. the offender is 25, the crime is in a certain category. The second part (**juvenile gap provision which was added in 2017**) is where the scorer would need to take into account whether 5 years had passed since the prior adjudication and you are dealing with the **current** crime of conviction.

Juvenile Decay

In K.S.A. 2021 Supp. 21-6810(d)(4), a juvenile adjudication will decay if the current crime of conviction is committed after the offender reaches the age of 25, and the adjudication is for an offense:

- Committed before July 1, 1993, which would have been a class D or E felony, if committed by an adult;
- Committed on or after July 1, 1993, which would have been a nondrug severity level 5-10 felony, a nongrid felony, or any drug felony, if committed by an adult; or
- Would be a misdemeanor, if committed by an adult.

Question

The offense occurred on his 27th birthday in 2020. The adjudication was for a level 5 person felony when he was 17 in 2011 and he had a conviction for a level 5 person felony that occurred in 2012 when he was 18 and then a conviction in 2018 for a level 8 person felony which would have occurred when he was 24. Since this offense occurred when he was 27 does the adjudication decay or does it count on criminal history since he had convictions within 5 years of the adjudication.

- ▶ **17- level 5 person- 2011**
- ▶ 18-level 5 person-2012
- ▶ 24- level 5 person-2018
- ▶ PSI- Current conviction- now 27 in 2020

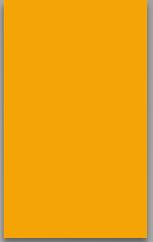
There is only one juvenile adjudication in the criminal history of the offender. It is the level 5 person offense that occurred when the offender was 17. Does that person felon count in the offender's criminal history score? No. It decays. Here is why. First, it does not fall into the non-decay category of level 1 through 4. Second, the offender has reached the age of 25. Third, the crime, if committed by an adult, would be a nondrug severity level 5 through 10 felony, a nongrid felony or any drug felony.

Are traffic infractions “convictions” for decay purposes?

- ▶ Are the defendants 2015 convictions for driving with no proof of insurance and an illegal tag “convictions” for purposes of preventing the decay of prior juvenile adjudications?
- ▶ “We hold that prior convictions cannot decay under K.S.A. 2017 Supp. 21-6810(d)(5)(B) if the defendant has any adjudication or conviction within five years from the prior juvenile adjudication. Nothing in the statute indicates the Legislature intended that only certain adjudications or convictions would qualify for exclusion under the language “no new adjudications or convictions during such five-year period.” K.S.A. 2017 Supp. 21-6810(d)(5)(B). Jones’ interpretation does not give the statute “effect as written,” but rather requires us to speculate as to the legislative intent by reading the language “so as to add something not readily found in the statute.” *Ayers*, 309 Kan. at 164. Because the district court did not err in interpreting the statute, the district court correctly found Jones did not meet the requirements for decay of his prior juvenile adjudications under K.S.A. 2017 Supp. 21-6810(d)(5). Jones’ 2015 misdemeanor convictions, while not scorable in criminal history on their own, do preclude decay of his earlier juvenile adjudications under subsection (d)(5)(B) because those misdemeanors were committed within the five years after the date of the prior juvenile adjudications. As a result, the district court did not err in calculating Jones’ criminal history.” *State v. Jones*, No. 122,756, 2021 WL 2386044 at *5 (Kan. App. 2021)(unpublished opinion)(review granted September 27, 2021).
- ▶ Defendant argues no because they cannot be counted in his criminal history
- ▶ **Kansas Supreme Court has granted review!!!**

Diversions

Diversions are not “convictions” and are therefore not included in criminal history, except as otherwise provided by law for current convictions of: Involuntary Manslaughter, K.S.A. 2021 Supp. 21-5405(a)(3); DUI, K.S.A. 8-1567; Domestic Battery, K.S.A. 2021 Supp. 21-5414; and Buying Sexual Relations, K.S.A. 2021 Supp. 21-6421.



What about
deferred
adjudications?

Deferred Adjudications

- ▶ Deferred adjudications and other processes that result in a finding of guilt without punishment from a foreign jurisdiction may be counted in the defendant's criminal history. See *State v. Macias*, 30 Kan. App. 2d 79, 39 P.3d 85 (2002). **However, an entry of a judgment of guilt by the foreign court is necessary to meet Kansas' definition of a conviction.** See *State v. Hankins*, 304 Kan. 226, 372 P. 3d 1124 at 1132 (2016).
- ▶ In *State v. Hankins*, where a defendant completed Oklahoma's deferred judgment procedure successfully, the Court found that there was no conviction for criminal history purposes because the defendant was discharged from the program without a court adjudication of guilt and a court order to expunge his guilty plea and to dismiss his case without prejudice. See *id.* at 1132.
- ▶ Additionally, in *State v. Looney*, where the defendant had pled guilty to enter Texas' deferred judgment program and had not finished his probationary period, the Court found that there was no conviction for criminal history purposes because the court never entered a judgment or adjudication of guilt. *State v. Looney*, No. 117,398, 2018 WL 3485727 (Kan.App.2018) (unpublished).

What should you be looking for in these out-of-state deferred adjudication agreements?

- ▶ From *Hankins*: Although at times the parties refer to Okla. Stat. tit. 22, § 991c as a deferred sentencing statute, the statute does more than defer sentencing; it defers the entry of judgment. The statute requires a guilty verdict or the offender's plea of guilty or nolo contendere, but the court does not enter a judgment of guilt. Okla. Stat. tit. 22, § 991c(A) (1998 Supp.). Instead, the court imposes conditions on the deferred judgment, akin to the conditions of a diversion agreement in this state. If the court finds that the offender has met all of the conditions of the deferred judgment, including the payment of all monetary assessments, “the defendant shall be discharged without a court judgment of guilt, and the court shall order the verdict or plea of guilty or plea of nolo contendere to be expunged from the record and the charge shall be dismissed with prejudice to any further action.”
- ▶ The court in *Hankins* is relying on Kansas's definition of conviction found on K.S.A. 21-5111 which states the following:
 - ▶ (d) “Conviction” includes a judgment of guilt entered upon a plea of guilty.

Misdemeanors/Municipal Convictions

1. Misdemeanor or Felony?

Misdemeanor in convicting jurisdiction → Refer to comparable KS misdemeanor (A, B, C) in effect the date the current crime of conviction committed → if comparable KS offense is a felony, then conviction treated as class A misdemeanor → if no comparable KS offense in effect date of current crime of conviction committed, do not use. See K.S.A. 21-6811(e)(2)(B).

2. Person vs. Nonperson?

- ▶ In designating a misdemeanor as person or nonperson, comparable offenses under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a comparable person offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall be classified as a nonperson crime. K.S.A. 21-6811(e)(3)(A).
- ▶ What is comparable? For an out-of-state conviction to be comparable to an offense under the Kansas criminal code, the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced. *State v. Wetrich*, 307 Kan. 552, 559, 412 P.3d 984 (2018)

Converting Misdemeanors to Person Felonies

- ▶ Prior adult convictions and juvenile adjudications for class A person misdemeanors and class B person misdemeanors convert to person felonies at a rate of 3 to 1.
 - ▶ If the resulting number is a fraction, do not convert the fractional portion because these figures must be in whole numbers. For example, eight person misdemeanor convictions and/or juvenile person adjudications would be converted to two person felony convictions (i.e., $8 \div 3 = 2$). Do not count the remaining "unconverted" or fractional person misdemeanor convictions and/or juvenile person adjudications in the felony score. However, the two remaining convictions and/or adjudications in the example should still be listed in the Person Misdemeanor section. See K.S.A. 2021 Supp. 21-6811(a).
- ▶ The Assault Rule
 - ▶ Every three prior adult convictions or juvenile adjudications of misdemeanor assault (a class C person misdemeanor), as defined in K.S.A. 21-3408, prior to its repeal, or subsection (a) of K.S.A. 2021 Supp. 21-5412, that occurred within a period of three years commencing immediately prior to the date of conviction for the current crime, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 2021 Supp. 21-6811(a).
- ▶ Check out page 45 of the DRM!

Misdemeanors/Municipal Convictions

A previous misdemeanor conviction in which the defendant was denied counsel and sentenced to a term of imprisonment, even if such term of imprisonment was suspended or conditioned upon a nonprison sanction, may not be counted in the offender's criminal history or used for enhancement purposes. See *State v. Long*, 43 Kan. App. 2d 328, 225 P.3d 754, 759-760 (2010).

Prior Missouri Ordinance Violation

- ▶ Prior Missouri municipal ordinance violation (Lake Lotawana) for endangering welfare of child
- ▶ This ordinance violation is not a crime under Missouri state law and Lake Lotawana doesn't consider the violation to be a felony or a misdemeanor
- ▶ City Code designates other violations to be misdemeanors but not this one
- ▶ “In Smith's case, the ordinance violation is not a crime under Missouri state law. And even if it were, the Lake Lotawana Municipal Code, which is the applicable jurisdiction, cannot serve as authority for such an upgrading because it specifically lists some other offenses as misdemeanors—but not this one, i.e., endangering a child's welfare.” *State v. Smith*, 309 Kan. 929, 939, 441 P.3d 472 (2019).

Missouri Ordinance Violation Cont'd.

- ▶ 3 Missouri ordinance violations treated as person misdemeanors, converted to one PF
- ▶ 2x Assault, violation of PFA
- ▶ Missouri ordinance violations are considered quasi-criminal and not considered crimes under Missouri law
- ▶ KCMO Municipal Code does not score these violations as felonies or misdemeanors, even though others are
- ▶ The violations could not be used to determine the defendant's criminal history score because municipal ordinance violations are not crimes under Missouri state law. See *State v. Cross*, No. 121,517, 2020 WL 5079891 at *4 (Kan. App. 2020) (unpublished opinion).

Scoring Prior Burglaries

- ▶ K.S.A. 2021 Supp. 21-6811 (d)
- ▶ Prior burglary adult convictions and juvenile adjudications will be scored for criminal history purposes as follows:
 - ▶ (1) As a prior person felony if the prior conviction or adjudication was classified as a burglary as defined in K.S.A. 21-3715(a), prior to its repeal, or K.S.A. 2019 Supp. 21-5807(a)(1), and amendments thereto.
 - ▶ (2) As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary as defined in K.S.A. 21-3715(b) or (c), prior to its repeal, or K.S.A. 2019 Supp. 21-5807(a)(2) or (a)(3), and amendments thereto.

State v. Dickey

- ▶ 301 Kan. 1018, 350 P.3d 1054 (2015) (*Dickey I*)
- ▶ Dickey had a prior in state 1992 burglary adjudication
- ▶ When he was convicted of the prior burglary, there was no dwelling requirement
- ▶ Prior burglary convictions are specifically controlled by statute
- ▶ “Determining whether Dickey's prior burglary involved a dwelling would necessarily involve judicial factfinding that goes beyond merely finding the existence of a prior conviction or the statutory elements constituting that prior conviction. Accordingly, we agree with the Court of Appeals that classifying Dickey's prior burglary adjudication as a person felony violates his constitutional rights as described under *Descamps* and *Apprendi*.” *Id.* at 1021.
- ▶ Thus, prior adjudication must be scored as NPF. See *id.*

CATEGORICAL APPROACH

statute forming the basis of the defendant's prior conviction contains a single set of elements constituting the crime. [nondivisible statute]

A sentencing court cannot look beyond elements of prior statute to compare to comparable crime in Kansas.

MODIFIED CATEGORICAL APPROACH

Statute forming the basis of the defendant's prior conviction contains multiple, alternate versions of the crime [divisible statute]

At least one of the versions matches the elements of the comparable crime in KS.

Sentencing court can look beyond the elements of the statute and examine a limited class of documents to determine which of a statute's alternative elements should be compared to the current KS offense.

Documents include charging documents, plea agreements, jury instructions, verdict forms, and transcripts from plea colloquies as well as findings of fact and conclusions of law from a bench trial.

See *State v. Dickey*, 301 Kan. 1018, 1037-1039, 350 P.3d 1054 (2015)(Dickey I)

State v. Dickey cont'd

If the burglary statute that the defendant was previously convicted under, lacks the element of a dwelling, the convictions would then require a prohibited judicial finding that the “structures” burglarized are dwellings. Because that finding goes beyond merely identifying the statutory elements of the prior burglary conviction, it is prohibited by *Descamps* and *Apprendi*, as applied in *Dickey*. See *State v. Tonge*, No. 119,543, 2019 WL 4383304 at *5 (Kan.App. 2019) (unpublished opinion).



QUESTIONS?

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