



Criminal History Webinar

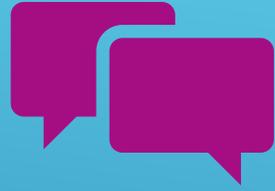
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Director

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April 29th, 2020

UPDATE FROM HB 2170 WEBINAR

- ▶ “Thus, we hold that the K.S.A. 2017 Supp. 22-3716(c)(9)(B) exception, which allows a trial court to revoke a probationer's probation without first imposing graduated sanctions if the probation was granted as a result of a dispositional departure, **applies only to probationers whose offenses or crimes of conviction occurred on or after July 1, 2017.**” *State v. Coleman*, 2020 WL 1814334, at *4 (April 10, 2020).



WEBINAR RULES

Q&A

Polling

Follow up survey



OVERVIEW

What counts as a conviction?

Scoring prior convictions

FAQ

WELCOME TO THE WEBINAR!

WHAT COUNTS AS A CONVICTION?

- ▶ Any conviction that occurred prior to the imposition of sentence in the current case
- ▶ Can't be another count in the current case
- ▶ Can't be another count that was joined for trial (consolidation)
- ▶ **Does not matter whether the crime actually occurred before sentencing in the current case; just that defendant was convicted prior to sentencing in the current case**
- ▶ K.S.A. 2019 Supp. 21-6810(a).

POLL

- ▶ John committed a theft on July 1, 2019. He was charged with the theft on July 2nd, 2019.
- ▶ Before John was picked up on the warrant, he committed a burglary in another county on July 13th, 2019.
- ▶ John pled guilty to the burglary charge and was sentenced on January 2, 2020.
- ▶ John then pled guilty to the theft charge on April 1, 2020.
- ▶ The PSI writer wants to use the burglary charge as a prior conviction, but defense counsel objects.
- ▶ **POLL QUESTION:** Can the burglary charge be counted as a prior conviction even though the offense occurred after the theft charge?

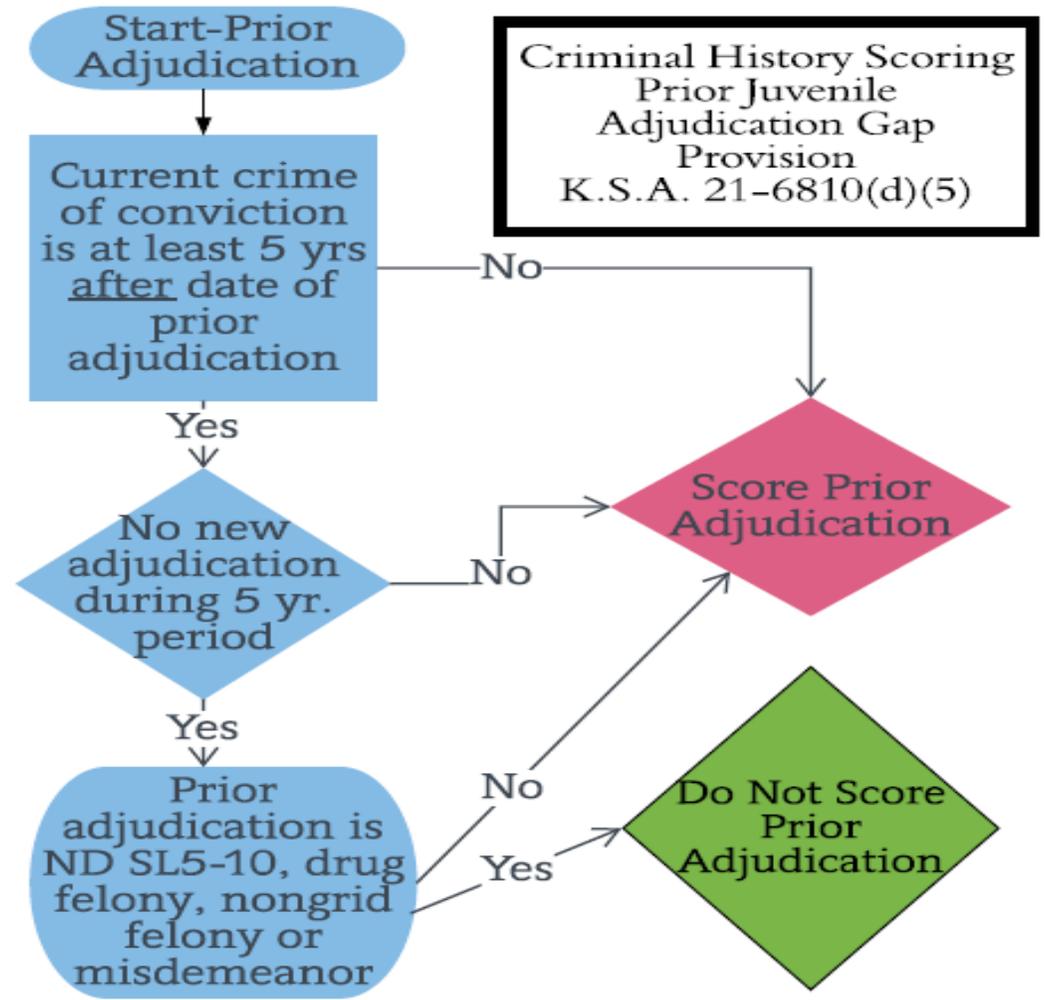
PRIOR CONVICTION CONT'D.

JUVENILE ADJUDICATIONS

K.S.A. 2019 Supp. 21-6810(d)(5), a juvenile adjudication will not be considered and scored if:

- ▶ the current crime of conviction is committed at least five years after the date of a prior adjudication;
- ▶ the offender has no new adjudications or convictions during such five-year period; and
- ▶ 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.

Note: Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. K.S.A. 2019 Supp. 21-6811(f).



PRIOR CONVICTION CONT'D.

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. 2019 Supp. 21-5405(a)(3); DUI, K.S.A. 8-1567; Domestic Battery, K.S.A. 2019 Supp. 21-5414; and Buying Sexual Relations, K.S.A. 2019 Supp. 21-6421.

PRIOR CONVICTION CONT'D.

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 agreements when calculating criminal history?

The journal entries might contain language that looks similar to the following from Oklahoma statutes:

Upon a verdict or plea of guilty or upon a plea of nolo contendere, **but before a judgment of guilt**, the court may, **without entering a judgment of guilt** and with the consent of the defendant, defer further proceedings upon the specific conditions prescribed by the court.

Upon completion of the conditions of the deferred judgment, and upon a finding by the court that the conditions have been met and all fines, fees, and monetary assessments have been paid as ordered, 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. **Okla. Stat. Ann. tit. 22, § 991c (West)**

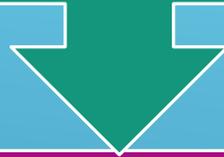
These agreements are similar to Kansas Diversions which also have no finding of guilt by a court.

PRIOR CONVICTION CONT'D.

MISDEMEANOR 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).

1. FELONY OR MISDEMEANOR?



2. PERSON OR NON PERSON

STATE V. KEEL (comparable at time of current conviction)

HOW TO DEFINE COMPARABLE?

ROADMAP: HOW TO CLASSIFY PRIOR OUT OF STATE CONVICTIONS



- ▶ Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 2019 Supp. 21-6811(e)(2).
- ▶ **If a crime is a felony in the convicting jurisdiction, it will be counted as a felony in Kansas.**

OUT OF STATE CONVICTIONS...
FELONY OR MISDEMEANOR?
K.S.A. 2019 SUPP. 21-6811



- ▶ If a crime is a misdemeanor in the convicting jurisdiction, the state of Kansas shall refer to the comparable offense under the Kansas criminal code **in effect on the date the current crime of conviction was committed** in order to classify the out-of-state crime as a class A, B or C misdemeanor.
 - ▶ If the comparable offense in the state of Kansas is a felony, the out-of-state crime shall be classified as a class A misdemeanor.
 - ▶ If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state crime **shall not be used** in classifying the offender's criminal history. K.S.A. 2019 Supp. 21- 6811 (e) (2) (B).

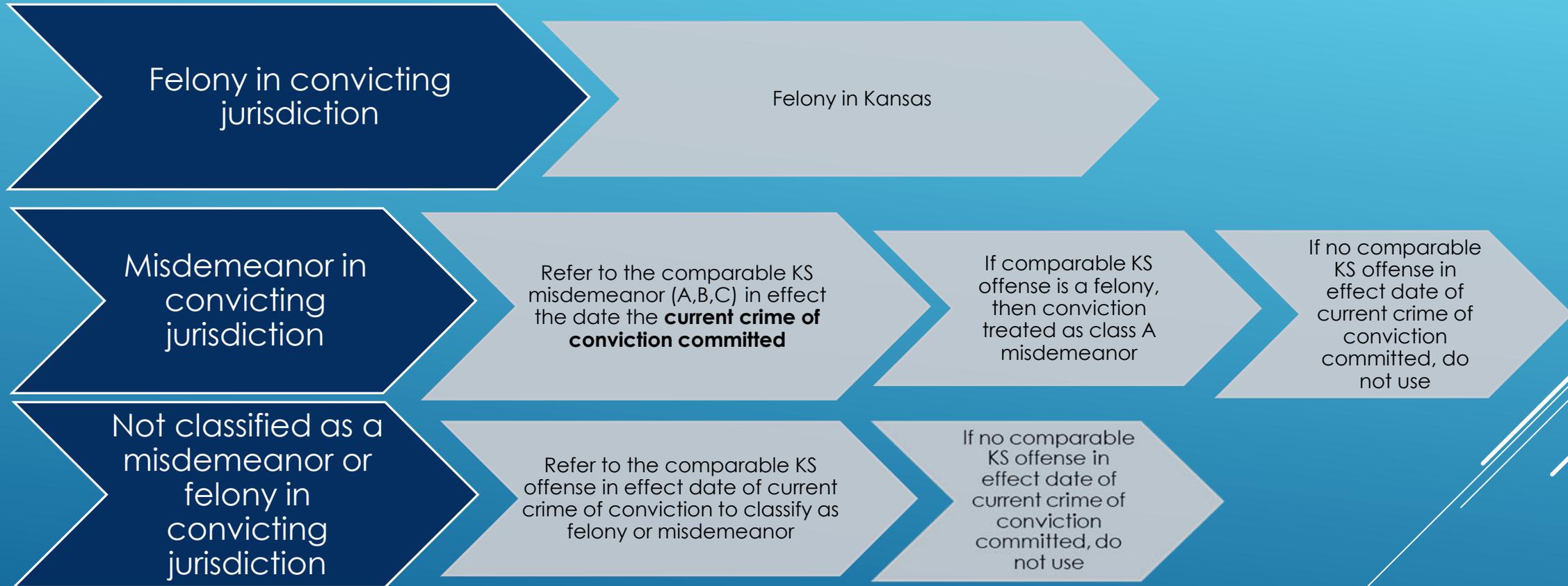
OUT OF STATE CONVICTIONS...
FELONY OR MISDEMEANOR?
K.S.A. 2019 SUPP. 21-6811

OUT OF STATE CONVICTIONS... FELONY OR MISDEMEANOR? CONT'D. K.S.A. 2019 SUPP. 21-6811

- ▶ If a crime is not classified as either a felony or a misdemeanor in the convicting jurisdiction, the state of Kansas shall refer to the comparable offense under the Kansas criminal code in effect on the date the **current crime of conviction was committed** to classify the out-of-state crime as either a felony or a misdemeanor. If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall not be used in classifying the offender's criminal history.



OUT OF STATE CONVICTION: FELONY OR MISDEMEANOR IN KANSAS?



K.S.A. 2019 Supp. 21-6811(e)(2)

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).



FAQ

How should prior Possession of Marijuana cases be treated?

- ▶ 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).
- ▶ We have found no cases that specifically apply *Keel* 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.**



CLASSIFYING PRIOR CONVICTIONS

What test should be used to determine if an out of state conviction is a non-person or person felony in Kansas?



DEFINING COMPARABLE: RECENT HISTORY

- ▶ *State v. Vandervort*
- ▶ For purposes of determining criminal history, the offenses need only be comparable, not identical. *State v. Vandervort*, 276 Kan. 164, 174, 72 P.3d 925 (2003). If the Kansas crime is the closest approximation to the out-of-state offense, it constitutes the comparable offense. See *id.*
- ▶ Crimes don't have to be identical

DEFINING
COMPARABLE:
RECENT
HISTORY
CONT'D.

- ▶ *State v. Wetrich*
- ▶ “identical or narrower test”
- ▶ 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).

DEFINING COMPARABLE: RECENT HISTORY CONT'D.

- ▶ In *Wetrich*, where the defendant had a prior Missouri burglary conviction, the Court found that the prior conviction had to be classified as a nonperson felony because two elements of the Missouri statute were broader than the Kansas burglary statute. See *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018).
- ▶ Missouri's statute required a broader mental state element because the Kansas crime required the entry be done with the specific intent to commit a felony, theft or sexual battery, therein, whereas, the specific intent required for the Missouri crime is that the burglar's purpose is to commit any crime. See *id.* at 992.
- ▶ Furthermore, in the Kansas crime, the structure involved must be a dwelling whereas in Missouri, the structure was more broadly defined to include, in addition to a structure where any person lives, such non-dwelling places as a business, government office, school, church, roller-skating rink, or bus station. See *id.* at 993.

2019 LEGISLATIVE CHANGES (SB 18)

- ▶ **K.S.A. 21-6811(e)(3)(B)**
- ▶ 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;

2019 LEGISLATIVE CHANGES (SB 18) CONT'D.

- ▶ **K.S.A. 21-6811(e)(3)(B)**
- ▶ (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.

2019 LEGISLATIVE CHANGES (SB 18) CONT'D.

- ▶ K.S.A. 21-6811 (ii) 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 the elements of the out-of-state felony offense that resulted in the conviction or adjudication necessarily prove that a person was present during the commission of the offense. **For purposes of this clause, the person present must be someone 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. The presence of a person includes physical presence and presence by electronic or telephonic communication.**

2019 LEGISLATIVE CHANGES (SB 18) CONT'D.

- ▶ K.S.A. 21-6811(e)(3)(A) 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.

What Law Applies and When?

May 2019

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
29	30	1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31	1	2
3	4	5	6	7	8	9

Offender commits crime
On Monday the 14th

Offender pleaded
Guilty on Friday
the 17th

Legislature changes the
Statute by which offender
Was convicted and sentenced
on Monday the 28th

Offender is sentenced
On Friday the 24th

“The legality of a sentence is fixed at a discrete moment in time—the moment the sentence was pronounced. At that moment, a pronounced sentence is either legal or illegal according to then-existing law.” → What does that mean?



THE LAW THAT APPLIES TO A CRIMINAL CASE IS THE LAW THAT WAS IN EFFECT AT THE TIME OF THE CRIME!



- ▶ The criminal statutes and penalties that were in effect at the time that the crime occurred are controlling unless the Legislature explicitly gives retrospective effect to statutory changes made after the commission of the crime.
- ▶ A statute generally only operates prospectively unless: (1) the language of the statute demonstrates the Legislature's clear intent that it operate retrospectively or (2) the statutory change is procedural and does not prejudice the substantive rights of the parties.
- ▶ The penalty provisions of a criminal offense are substantive and therefore will only operate retrospectively if the statute's language expresses a clear legislative intent to do so.
- ▶ The prescription of a punishment for a criminal act is substantive, not procedural, law.

PRIOR BURGLARY CONVICTIONS

- ▶ K.S.A. 2019 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.

PRIOR BURGLARY CONVICTIONS CONT'D.

- ▶ K.S.A. 2019 Supp. 21-6811 (d)
- ▶ Burglary is, without authority, entering into or remaining within any:
- ▶ **PERSON** (1) K.S.A. 2019 Supp. 21-5807 (a) (1) Dwelling, with intent to commit a felony, theft or sexually motivated crime therein
- ▶ **NON-PERSON** (2) K.S.A. 2019 Supp. 21-5807 (a) (2) or (a) (3)
 - ▶ (2) building, manufactured home, mobile home, tent or other structure which is not a dwelling, with intent to commit a felony, theft or sexually motivated crime therein; or
 - ▶ (3) vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony, theft or sexually motivated crime therein.

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)

- ▶ 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).

STATE V. DICKEY CONT'D



DICKEY APPLIED IN STATE V. MARSHALL

- ▶ Defendant was sentenced in his current crime during the brief window when residential burglaries were treated as non-person felonies.
- ▶ He tried to say that *Keel* applies, and thus, his 5 prior burglaries should all be treated as NPF
- ▶ The classification of prior burglaries is controlled specifically by statute, not *Keel*. See *State v. Marshall*, No. 119,710, 2019 WL 5849911 at *6 (Kan.App.2019) (unpublished opinion).
- ▶ “Therefore, for a defendant convicted under the post-KSGA burglary statutes—in which “dwelling” is included as an element of the offense—the district court does not engage in impermissible judicial fact-finding when it classifies the defendant's prior residential burglary conviction as a person felony under K.S.A. 2018 Supp. 21-6811(d)(1) **as long as it is clear from the record the defendant was convicted under the section of the burglary statute in which “dwelling” is an essential element of the offense.**” *Id.* at *7.

DUI PRIORS – OUT OF STATE CONVICTIONS

- ▶ Out of state convictions can be counted in determining whether the DUI conviction is the second, third, fourth or greater. This applies to DUI and Commercial DUI.
- ▶ For the purposes of determining whether an offense is comparable, the following shall be considered: 1. The name of the out-of-jurisdiction offense; 2. The elements of the out-of-jurisdiction offense; and 3. Whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense. K.S.A. 2019 Supp. 8-1567(j) and K.S.A. 2019 Supp. 8- 2,144(o).
- ▶ Reminder: Criminal history, except as provided in each specific statute for determining whether the crime is the second, third, fourth or subsequent such offense, is not relevant to the punishment for nongrid offenses.

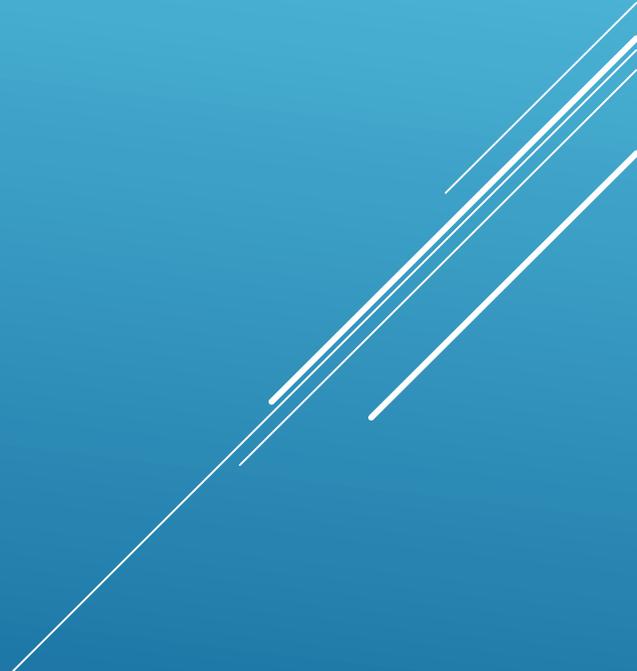
REMINDERS

- ▶ **DRMS AND LAMINATES ARE AVAILABLE TO ORDER!**
 - ▶ NOW ACCEPTING CREDIT CARDS
 - ▶ <https://www.sentencing.ks.gov>
- ▶ **Next Webinar**
 - ▶ June 3rd @ 11:00

QUESTIONS, COMMENTS,
CONCERNS?

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