

Honorable Ernest L. Johnson, Chair
Honorable Richard M. Smith, Vice Chair
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Sam Brownback, Governor

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
Representative Pat Colloton, Chair

SENATE BILL 368 - PROPONENT

KANSAS SENTENCING COMMISSION
Scott M. Schultz, Executive Director
March 14, 2012

Thank you for the opportunity to present testimony in support of Senate Bill 368. The Kansas Sentencing Commission (KSC) is a 17-member oversight body charged with monitoring sentencing trends, collecting and analyzing sentencing data, and providing objective guidance regarding sentencing policy. The purpose of the KSC is to provide accurate, objective information to policy-makers and stakeholders in the criminal justice system.

The KSC provides key services to policy makers, criminal justice agencies, the judiciary and the public, including:

- Annual prison population projections;
- Prison bed impact statements for legislation;
- Felony sentencing data;
- Administration of the 2003 SB 123 treatment payment process; and
- Ongoing research to identify innovative ways of improving the criminal justice system.

My testimony will address the following points:

1. Historical perspective of the Kansas Sentencing Guidelines Act (KSGA) and the 2003 SB 123 nonprison sanction program;
2. Current status of 2003 SB 123;
3. Present proposal to modify the 2003 SB 123 program; and
4. Present proposal to expand the criminal drug grid to include drug severity level D3 C-D as a border box and D4 C-D offenders as presumptive probation.

Historical Perspective

The KSGA was promulgated in 1993 after concerns of proportionality and fairness in sentencing arose. The current nondrug and drug grids were implemented in an attempt to remedy these problems. In 1991, Attorney General Robert Stephan chaired the newly formed Kansas Sentencing Commission that was tasked with presenting a working plan to the Legislature. Drug crimes were a hot button issue back then and a separate drug grid with longer lengths of sentences was proposed. In 1993, only three presumptive probation boxes existed (4G-4I) on the drug grid. See Attachment A.

As the KSGA became more established, there was a need to expand the border boxes and presumptive

probation ranges to allow offenders committing drug severity level three E-I and four E-I to be considered for probation without the necessity of filing a departure motion with the court. See Attachments B and C.

K.S.A. 21-4729 (Nonprison sanction, certified drug abuse treatment) was created by 2003 Senate Bill 123. The goal of certified drug abuse treatment was to provide community-based punishment and the opportunity for treatment to nonviolent adult offenders with drug abuse problems in order to more effectively address the revolving door of drug addicts through the state prisons, which should be reserved for serious, violent offenders. Sentences under K.S.A. 21-4729 result in a drug severity level 4 convictions and require the offenders to participate in a certified drug abuse treatment program under the supervision of community corrections.

Current Status of 2003 SB 123

Drug abuse treatment from certified treatment facilities, in lieu of incarceration, resulted in several changes to sentencing practices and procedures for offenders convicted of felony drug possession. These changes focus on various levels of treatment options, establishment of certain and immediate sanctions for drug usage and a comprehensive continuum of sanctions that include offender accountability while safeguarding public safety. Provisions of this sentencing policy include the following elements:

1. All "pure" drug possession convictions are sentenced on severity level 4 of the drug grid;
2. Adult offenders with current possession convictions, criminal history 4-E, 4-F, 4-G, 4-H and 4-I (presumptive probation boxes) of the drug grid, with no prior convictions for drug trafficking, drug manufacture or drug possession with intent to sell receive mandatory drug abuse treatment and community supervision through community corrections;
3. Adult offenders with current possession convictions, criminal history 4-A, 4-B, 4-C and 4-D (presumptive prison boxes) of the drug grid, with no prior convictions for drug trafficking, drug manufacture or drug possession with intent to sell are eligible for drug abuse treatment if the court finds that placement of these offenders in a drug abuse treatment program will not jeopardize public safety;
4. This finding by the court is necessary due to these offenders having person felony convictions in their criminal history. These person felony convictions can only be severity level 8, 9, or 10 or nongrid offenses for consideration of placement in a drug abuse treatment program;
5. Placement of offenders with prior person felony convictions (severity level 8, 9 or 10 or nongrid offenses) are subject to the departure sentencing procedures. K.S.A. 2011 Supp. 21-6824(e) (formerly K.S.A. 21-4729(e)). Such offenders may also be subject to postrelease if revoked from SB 123 treatment and required to complete an underlying prison sentence. See K.S.A. 2011 Supp. 22-3716(e);
6. The court will commit the offender sentenced under K.S.A. 2011 Supp. 21-6824 to participation in a certified drug abuse treatment program and community supervision through Community Corrections. This offender will remain in a certified drug abuse treatment program and under the supervision of Community Corrections until determined suitable for discharge from treatment and supervision by the court. The offender may remain in a certified drug abuse treatment program and/or on supervision for a period **not to exceed 18 months. The KSC is authorized to pay for treatment for up to 18 months from the first scheduled treatment date;**
7. The sentencing court shall determine the extent, if any an offender is able to pay for the drug abuse assessment and treatment. The sentencing court may delegate that task to community corrections;
8. Upon successful completion of the drug abuse treatment program, the offender may be discharged and is not subject to a period of postrelease supervision;

9. If the Court finds that an offender has demonstrated a pattern of intentional non-compliance or has refused to participate in the drug abuse treatment program or, the offender has been convicted of a new felony offense, the offender shall be discharged from this program and be subject to the revocation provisions of K.S.A. 21-4603d(n). Such revocation results in the offender serving the underlying prison term without credit for time spent participating in this program; and
10. Offenders revoked from this drug abuse treatment/community corrections supervision program who serve their underlying prison term are not subject to a period of postrelease supervision unless the offender was sentenced to the treatment pursuant to a general departure or through K.S.A. 2011 Supp. 21-6824(a)(2) (formerly K.S.A. 21-4729(a)(2)). In such cases, if the offender is revoked from the treatment and required to serve an underlying sentence the offender will be subject to a period of postrelease supervision. K.S.A. 2011 Supp. 21-6604(n) (formerly K.S.A. 21-4603d(n)), K.S.A. 2011 Supp. 21-6824(e) (formerly K.S.A. 21-4729(e)) and K.S.A. 22-3716(e).

The SB 123 program has been a success. The following table summarizes the total prison admission reductions each fiscal year since the implementation of SB 123. Please note that the program was not implemented until November 2003 and those nine months showed only a small amount of activity. The number of SB 123 cases has stabilized with duration of the program.

Fiscal Year	Direct Prison Admission Reduction	SB 123 Revocation to Prison Admission Reduction	Total Prison Admission Reduction
2004	85	41	127
2005	115	128	244
2006	133	154	287
2007	151	144	295
2008	168	150	317
2009	124	127	252
2010	135	124	259
2011	142	162	304

The following table demonstrates the direct cost and benefit of SB 123 Substance Abuse Treatment programs by fiscal year. Since the implementation of SB 123, this policy has saved the State an estimated total of \$10.1 million.

Fiscal Year	SB 123 Expenditure	Money Collected	Actual SB123 Cost	Prison Cost Avoidance	Estimated Money Saved
2004	\$ 998,467.75	\$ 15,948.04	\$ 982,519.71	\$ 2,525,000.00	\$ (1,542,480.29)
2005	\$ 5,106,505.20	\$ 150,224.27	\$ 4,956,280.93	\$ 6,150,000.00	\$ (1,193,719.07)
2006	\$ 7,861,395.40	\$ 213,588.86	\$ 7,647,806.54	\$ 8,325,000.00	\$ (677,193.46)
2007	\$ 8,642,249.50	\$ 202,853.89	\$ 8,439,395.61	\$ 8,875,000.00	\$ (435,604.39)
2008	\$ 8,640,578.25	\$ 229,649.20	\$ 8,410,929.05	\$ 9,875,000.00	\$ (1,464,070.95)
2009	\$ 7,677,082.00	\$ 382,769.17	\$ 7,294,312.83	\$ 8,450,000.00	\$ (1,155,687.17)
2010	\$ 7,450,262.75	\$ 405,707.81	\$ 7,044,554.94	\$ 8,650,000.00	\$ (1,605,445.06)
2011	\$ 7,058,160.50	\$ 314,313.00	\$ 6,743,847.50	\$ 8,775,000.00	\$ (2,031,152.50)
Total	\$53,434,701.35	\$ 1,915,054.24	\$51,519,647.11	\$ 61,625,000.00	\$ (10,105,352.89)

In FY 2010, a total number of 1,062 sentences were imposed to SB 123 drug treatment programs, representing 42% of the total drug probation sentences (2,531). Of these sentences, 77% were convicted of the crime of drug possession under K.S.A. 21-36a06 (formerly 65-4160), and 22.4% were convicted of the crime of drug possession under K.S.A. 21-36a06, (formerly 65-4162). An evaluation of the criminal history disclosed that 92.6% of the offenders were in the criminal history E-I.

The goals of decreasing recidivism, promoting public safety and saving money on prison costs have been accomplished. But to attempt to reduce recidivism further and determine efficiencies within the program, the substance abuse and treatment policy needed to be reviewed to monitor its effectiveness.

SB 368 – Fine Tuning a Well-Oiled Machine

The use of evidence-based practices in the criminal justice arena has played a critical role in this recommendation by the KSC. The last five years has seen data that indicates utilizing proven standard assessments can reduce recidivism, while at the same time target funding where it may be best utilized. In 2011, the KSC appointed a SB 123 subcommittee to study whether suggested improvements could be made in the program to better protect our citizens and use of their tax dollars. Based on information received by the KSC at the 2011 Kansas Sentencing Commission Workshop and recommendations from Marshall Clements of the Counsel of State Governments Justice Center and Kristin Bechtel of Crime and Justice Institute, validated research demonstrates that over-supervision of low risk offenders actually increases recidivism rather than decreasing it. The recommendations further support evidence that the most intense and costly programming and treatment should be focused on offenders that present a moderate or high risk to offend rather than those offenders with low risk or need. In response to this data, the SB 123 subcommittee proposed that:

1. Each SB 123 offender receive a paid assessment with SB 123 funds;
2. Mandatory treatment would not be required for low risk and low need offenders and should not be funded by the SB 123 program. To that end, all SB 123 offenders that are assessed at LSI-R Level IV should not have mandatory or funded treatment. LSI-R Level I-III offenders with low designated Substance Abuse Subtle Screening Inventory (SASSI) scores will not receive mandatory or funded treatment;
3. LSI-R Level I-III offenders with high designated scores on the SASSI would receive paid mandatory treatment; and
4. If the offender scores low on the SASSI regardless of the LSI-R Level, the offender would not have mandatory treatment or be funded by the SB 123 program.

The chart below better illustrates this proposed policy change:

SB 123 level 4D				
LSI-R Risk Level and LSI-R score	SASSI Score	Assessment Funded	Treatment Mandatory	Treatment Funded
I (33 and above)	High	Y	Y	Y
	Low	Y	N	N
II (25 - 32)	High	Y	Y	Y
	Low	Y	N	N
III (17 - 24)	High	Y	Y	Y
	Low	Y	N	N
IV (0 - 16)	high or low	Y	N	N

On January 27, 2012, the KSC met for its monthly meeting. After extensive discussions regarding this issue, the KSC recommends the above policy change in order to further reduce recidivism and costs by only targeting those offenders which have moderate to higher risk and needs levels. See Attachment D.

Proportionality of the Sentencing Grids

The proposed legislation in SB 368 also modifies the current drug sentencing grid. The KSC at its January meeting also agreed to recommend extending the presumptive probation box on drug severity level 4 to C-D while extending the border box on drug severity level 3 to C-D. This modification will make the drug grid consistent or more proportional with the current nondrug grid. See Attachment E. Examples of this disparity can be found in Attachment F. As is evident, person felonies for offenders with criminal history C receive presumptive probation and shorter length of sentences while those with the same criminal history that possess or sell even small amounts of drugs are presumptive prison. In the continuing evolution of the guidelines, it is necessary to expand the drug grid.

Conclusion

The KSC supports this proposal as it is consistent with the goals of the KSGA:

1. to promote public safety by incarcerating violent offenders;
2. to reduce sentence disparity to ensure the elimination of any racial, geographical or other bias that may exist; and
3. to establish sentences that are proportionate to the seriousness of the offense and the degree of injury to the victim.

The bed impact assessment and fiscal note also corroborates the KSC's recommendations that SB 123 should be modified and the border boxes and presumptive probation boxes should be expanded to include drug severity level 3C-3D and level 4C-4D, respectively.

I appreciate your time and attention to this important proposal, and I'd be happy to answer questions that you may have.

SENTENCING RANGE - DRUG OFFENSES

Category	A	B	C	D	E	F	G	H	I
Severity Level 1	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

LEGEND
Presumptive Probation
Presumptive Imprisonment

Attachment A

Recommended probation terms are:
 36 months for felons classified in Severity Levels 1 - 3
 24 months for felons classified in Severity Level 4

Postrelease supervision terms are:
 24 months for felons classified in Severity Levels 1 - 3
 12 months for felons classified in Severity Level 4

1996

SENTENCING RANGE - DRUG OFFENSES

Category =>	A	B	C	D	E	F	G	H	I
Severity Level 1	3+ Felonies	2 Felonies	1 Person & Felony	1 Felony	3+ Nonfelonies	2 Nonfelonies	1 Nonfelony	3+ Misd.	1 Misd. No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	21 20 18	20 19 18
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

LEGEND
Recommended Probation
Post-release Supervision
Prison
Presumptive Imprisonment

Recommended probation terms are:
 36 months for felons classified in Severity Levels 1 - 3
 24 months for felons classified in Severity Level 4

Post-release supervision terms are:
 For felons committed before 4/20/95
 24 months for felons classified in Severity Levels 1 - 3
 12 months for felons classified in Severity Level 4

For felons committed on or after 4/20/95
 36 months for felons classified in Severity Levels 1 - 3
 24 months for felons classified in Severity Level 4

Attachment B

SENTENCING RANGE - DRUG OFFENSES

Category	A	B	C	D	E	F	G	H	I
Severity Level 1	Person 3+ Felonies	Person 2 Felonies	1 Person & 1 Nonperson Felonies	Person 1 Felony	Nonperson 3+ Felonies	Nonperson 2 Felonies	Nonperson 1 Felony	Mid. 2+.	Mid. No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	25 24 23	23 22 20	19 18 17	16 15 14
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	19 17 16	16 15 14	14 13 12	12 11 10

LEGEND
Presumptive Probation
Presumptive Imprisonment

Probation Terms are:

36 months recommended for felonies classified in Severity Levels 1-2

18 months (up to) for felonies classified in Severity Level 3

12 months (up to) for felonies classified in Severity Level 4

Postrelease Supervision Terms are:

36 months for felonies classified in Severity Levels 1-2

24 months for felonies classified in Severity Level 3

12 months for felonies classified in Severity Level 4 except for some

K.S.A. 65-4160 and 65-4162 offenses on and after 11/01/03.

Postrelease for felonies committed before 4/20/95 are:

24 months for felonies classified in Severity Levels 1-3

12 months for felonies classified in Severity Level 4

Comparison of Nondrug Grid Crimes to Drug Grid Crimes

Statute	Nondrug Grid	SL/Crim. History	Presumptive Punishment	Statute	Drug Grid	SL/Crim. History	Presumptive Punishment
21-5807(a)(1)	Burglary - Dwelling	7C	25-29 mos. Probation	21-5705(a)(7)	Cultivate, distribute or poss. with intent to distribute controlled substances in K.S.A. 65-4105(b)	3C	37-42 mos. Prison
21-5812(a)(1)(D)	Arson - Non-Dwelling	7C	25-29 mos. Probation	21-5705(a)(4)	Cultivate, distribute, or possess with intent to distribute controlled substances or analogs; hallucinogenics in K.S.A. 65-4105(d) or 65-3107(g) or 65-4109(g), 1 st offense [Formerly K.S.A. 21-36a05(a)(4)]	3C	37-42 mos. Prison
21-5413(b)(1)(C)	Agg. Battery	7C	25-29 mos. Probation	21-5706(a)	Possession of opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (d)(1) of K.S.A. 65-4107 or controlled substance analog [Formerly K.S.A. 21-36a06(a)]	4C	28-32 mos. Prison
21-5412(b)(3)	Agg. Assault	7C	25-29 mos. Probation	21-5706(b)(1)	Possession of depressant or analog; [Formerly K.S.A. 21-36a06(b)(1)]	4C	28-32 mos. Prison
21-5427(a)(1)	Stalking - 2 nd or subsequent conviction	7C	25-29 mos. Probation	21-5706(b)(2)	Possession of stimulant or analog; [Formerly K.S.A. 21-36a06(b)(2)]	4C	28-32 mos. Prison
21-5409(b)(2)(E)	Agg. Interference with Parental Custody	7C	25-29 mos. Probation	21-5706(b)(3)	Drugs; Possession of hallucinogenic or analog; [Formerly K.S.A. 21-36a06(b)(3)]	4C	28-32 mos. Prison

SENTENCING RANGE

NON-DRUG OFFENSES												
	A	B	C	D	E	F	G	H	I	TERMS	POST REL	
	3+ Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3+ Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2+ Misdemeanor	1 Misd. No Record			
1	653/620/592	618/586/554	285/272/258	267/253/240	246/234/221	226/214/203	208/196/184	186/176/166	165/155/147	36	36	
2	493/467/442	460/438/416	216/205/194	200/190/181	184/174/165	168/160/152	154/146/138	138/131/123	123/117/109	36	36	
3	247/233/221	228/216/206	107/102/96	100/94/89	92/88/82	83/79/74	77/72/68	71/66/61	61/59/55	36	36	
4	172/162/154	162/154/144	75/71/68	69/66/62	64/60/57	59/56/52	52/50/47	48/45/42	43/41/38	36	36	
5	136/130/122	128/120/114	60/57/53	55/52/50	51/49/46	47/44/41	43/41/38	39/36/33	36/32/31	36	24	
6	46/43/40	41/39/37	38/36/34	36/34/32	32/30/28	29/27/25	26/24/22	23/21/19	21/20/19	24	24	
7	34/32/30	31/29/27	29/27/25	26/24/22	23/21/19	19/18/17	17/16/15	14/13/12	13/12/11	24	12	
8	23/21/19	20/19/18	19/18/17	17/16/15	15/14/13	13/12/11	11/10/9	11/10/9	9/8/7	18	12	
9	17/16/15	15/14/13	13/12/11	13/12/11	11/10/9	10/9/8	9/8/7	8/7/6	7/6/5	12	12	
10	13/12/11	12/11/10	11/10/9	10/9/8	9/8/7	8/7/6	7/6/5	7/6/5	7/6/5	12	12	

Postrelease for felonies committed before 4/20/95 are:

24 months for felonies classified in Severity Levels 1-6

12 months for felonies classified in Severity Levels 7-10

Presumptive Imprisonment
Border Box
Presumptive Probation

DRUG OFFENSES												
	A	B	C	D	E	F	G	H	I	TERMS	POST REL	
	3+ Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3+ Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2+ Misd.	1 Misd. No Record			
1	204/194/185	196/186/176	187/178/169	179/170/161	170/162/154	167/158/150	162/154/146	161/150/142	154/146/138	36	36	
2	83/78/74	77/73/68	72/68/65	68/64/60	62/59/55	59/56/52	57/54/51	54/51/49	51/49/46	36	36	
3	51/49/46	47/44/41	42/40/37	36/34/32	32/30/28	29/27/25	26/24/23	23/21/19	20/19/18	18	24	
4	42/40/37	36/34/32	32/30/28	26/24/23	22/20/18	18/17/16	16/15/14	14/13/12	12/11/10	12	12*	

Probation Terms are:

*18 months (up to) for felonies classified in Severity Level 3 and, on and after July 1, 2009, felony cases sentenced pursuant to K.S.A. 21-6824 [formerly 21-4729 (SB 123)]

Postrelease for felonies committed before 4/20/95 are:

24 months for felonies classified in Severity Levels 1-3
 12 months for felonies classified in Severity Level 4
 12 months for felonies classified in Severity Level 4 except for some K.S.A. 2010 Supp. 21-5706 [formerly 21-36a06] offenses on and after 1/10/103 that have no postrelease supervision time.

Proposed Border Box
Proposed Presumptive Probation

"Good Time" Sentencing Reductions

Pre 4/20/95 - 20% reduction
 Post 4/19/95 - 15% reduction
 Post 1/1/08 - 20% D3-4 or SL7-10

Felony Fines
 Off Grid or DGSL1 \$500,000
 SL1-SL5 or DGSL2-DGSL3 \$300,000
 SL6-SL10 or DGSL4 \$100,000

PROPOSED SENTENCING RANGE - DRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level 1	3+ Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3+ Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2+ Misd.	1 Misd. No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32					
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

Proposed Border Box
Proposed Presumptive Probation
LEGEND
Presumptive Probation

Probation Terms are:

36 months recommended for felonies classified in Severity Levels 1-2

18 months (up to) for felonies classified in Severity Level 3 and, on and after July 1, 2009, felony cases sentenced pursuant to K.S.A. 2011 Supp. 21-6824 (formerly 21-4729 SB 125)

12 months (up to) for felonies classified in Severity Level 4

Postrelease Supervision Terms are:

36 months for felonies classified in Severity Levels 1-2

24 months for felonies classified in Severity Level 3

12 months for felonies classified in Severity Level 4 except for some unlawful possession offenses committed on and after 11/01/03 pursuant to K.S.A. 2011 Supp. 21-5706 (formerly K.S.A. 21-36a06)

Postrelease for felonies committed before 4/20/95 are:

24 months for felonies classified in Severity Levels 1-3

12 months for felonies classified in Severity Level 4