SENTENCING ALTERNATIVES AND PROCEDURES

ABA STANDARD

PART I. SENTENCING AUTHORITY

1.1 WHO SHOULD SENTENCE.

AUTHORITY TO DETERMINE THE SENTENCE SHOULD BE VESTED IN THE TRIAL JUDGE AND NOT IN THE JURY. THIS REPORT DOES NOT DEAL WITH WHETHER THE DEATH PENALTY SHOULD BE AN AVAILABLE SENTENCING ALTERNATIVE AND, IF SO, WHO SHOULD PARTICIPATE IN ITS IMPOSITION.

KANSAS CODE

(1) Whenever any person has been found guilty of a crime upon verdict or plea and a sentence of death is not imposed, the court may require that a presentence investigation be conducted by the Kansas reception and diagnostic center. If such offender is sent to the Kansas reception and diagnostic center may keep him confined for a maximum of one hundred twenty (120) days or until the court calls for the return of such offender. The Kansas reception and diagnostic center shall compile a complete mental and physical evaluation of such offender and shall make its finding known to the court in the presentence report.

(2) Whenever any person has been found guilty of a crime and a presentence report has been compiled and submitted to the court, the court may adjudge any of the following:

(a) Commit the defendant to the custody of the secretary of corrections or, if confinement is for a term less than one (1) year, to jail for the confinement for the term provided by law;

(b) Impose the fine applicable to the offense;

(c) Release the defendant on probation;

(d) Suspend the imposition of the sentence;

(e) Impose any appropriate combination of (a), (b), (c) and (d).

In imposing a fine the court may authorize the payment thereof in installments. In releasing a defendant on probation the court shall direct that he be under the supervision of the secretary of corrections or the probation or parole officer

of the court or county. (K.S.A. 21-4603 (1974)).

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

(a) Class A, the sentence for which shall be death or imprisonment for life. If there is a jury trial the jury shall determine which punishment shall be inflicted. If there is a plea of guilty or if a jury trial is waived the court shall determine which punishment shall be inflicted and in so doing shall hear evidence. (K.S.A. 21-4501 (a) (1974)).

As used in this article: (1) "Court" means any court having jurisdiction and power to sentence offenders for violations of the laws of this state. (K.S.A. 21-4602 (1) (1974)).

COMMENT

Kansas complies with the Standard. Although K.S.A. 21-4501 (a) (1974) purports to confer upon the jury the power to determine which of the alternative penalties of death or life imprisonment will be imposed, the recent decision of the Supreme Court in Furman v. Georgia, 405 U.S. 812 (1972), and its companion cases, striking down the death penalty have removed this discretion from the jury. The Supreme Court of Kansas has declared the general rule to be that it is the duty of the jury in a criminal case to determine guilt or innocence of the party and it is the duty of the court to impose proper sentence after verdict has been reached. (Andrews v. Hand, 190 Kan. 109, 372 P.2d 559 (1962), cert. den., 83 S.Ct. 152).

The sentencing judgment is a judicial function and as such is unreviewable when within statutory limits and procedural safeguards have been observed. It is a function that may not be delegated; that is, the trial court may not direct itself of that responsibility. The initial grant or denial of probation is a part of the sentencing process vested in the trial court and may not arbitrarily be dispensed with, no matter how well motivated such action may be. (State v. Owens & Carlisle, 210 Kan. 628, 504 P.2d 249 (1972)).

ABA STANDARD

PART II. STATUTORY STRUCTURE AND JUDICIAL DISCRETION -- RANGE OF ALTERNATIVES

2.1 GENERAL PRINCIPLES: STATUTORY STRUCTURE.

(a) ALL CRIMES SHOULD BE CLASSIFIED FOR THE PURPOSE OF SENTENCING INTO CATEGORIES WHICH REFLECT SUBSTANTIAL DIFFERENCES IN GRAVITY. THE CATEGORIES SHOULD BE VERY FEW IN NUMBER. EACH SHOULD SPECIFY THE SENTENCING ALTERNATIVES AVAILABLE FOR OFFENSES WHICH FALL WITHIN IT. THE PENAL CODES OF EACH JURISDICTION SHOULD BE REVISED WHERE NECESSARY TO ACCOMPLISH THIS RESULT.

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

(a) Class A, the sentence for which shall be death or imprisonment for life. If there is a jury trial the jury shall determine which punishment shall be inflicted. If there is a plea of guilty or if a jury trial is waived the court shall determine which punishment shall be inflicted and in so doing shall hear evidence;

(b) Class B, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than five (5) years nor more than fifteen (15) years and the maximum of which shall be life;

(c) Class C, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one (1) year nor more than five (5) years and the maximum of which shall be twenty (20) years;

(d) Class D, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one (1) year nor more than three (3) years and the maximum of which shall be ten (10) years;

(e) Class E, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be one (1) year and the maximum of which shall be five (5) years.

(f) Unclassified felonies, which shall include all crimes declared to be felonies without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no sentence is provided in such law, the offender shall be sentenced as for a class E felony. (K.S.A. 21-4501 (1974)).

(1) For the purpose of sentencing, the following classes of misdemeanors and the punishment and the terms of confinement authorized for each class are established:

(a) Class A, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one (1) year;

(b) Class B, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed six (6) months;

(c) Class C, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one (1) month;

(d) Unclassified misdemeanors, which shall include all crimes declared to be misdemeanors without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no penalty is provided in such law, the sentence shall be a definite term of confinement in the county jail fixed by the court which shall not exceed one (1) year.

(2) Upon conviction of a misdemeanor, a person may be punished by a fine, as provided in section 21-4503, instead of or in addition to confinement, as provided in this section (K.S.A. 21-4502 (1974)).

COMMENT

Kansas conforms with the Standard. The Kansas penal code was revised in 1970 and at that time the present classification scheme for both felonies and misdemeanors was adopted.

ABA STANDARD

(b) THE SENTENCING COURT SHOULD BE PROVIDED IN ALL CASES WITH A WIDE RANGE OF ALTERNATIVES, WITH GRADATIONS OF SUPERVISORY, SUPPORTIVE AND CUSTODIAL FACILITIES AT ITS DISPOSAL SO AS TO PERMIT A SENTENCE APPROPRIATE FOR EACH INDIVIDUAL CASE.

KANSAS CODE

See K.S.A. 21-4501 and 21-4502 (1974) at 2.1 (a), supra. See also K.S.A. 1973 Supp. 21-4603, as amended by Ch. 147, L. 1974, at 1.1, supra. See also K.S.A. 21-4603 (1974).

COMMENT

Kansas partially complies with the Standard. The court has limited discretion to fix a minimum term for Class B, Class C and Class D felonies. The court has no discretion to fix the sentence for Class A or Class E felonies, nor does the court have discretion to fix any maximum sentence for felony. A wide range of discretion is allowed in fixing misdemeanor penalties. And also the court has wide discretion in respect to granting probation or suspended sentence.

ABA STANDARD

(c) THE LEGISLATURE SHCULD NOT SPECIFY A MANDATORY SENTENCE FOR ANY SENTENCING CATEGORY OR FOR ANY PARTICULAR OFFENSE.

KANSAS CODE

See K.S.A. 21-4501 and 21-4502 (1974) at 2.1 (a), supra.

COMMENT

Kansas does not comply with the Standard. The statute fixes a mandatory life sentence for class A felonies. For all other felonies the statute fixes a mandatory maximum. While the court has discretion to vary the minimum term for Class B, C and D felonies, in no case may the minimum be waived or fixed at a term less than that provided by law.

ABA STANDARD

(d) IT SHOULD BE RECOGNIZED THAT IN MANY INSTANCES IN THIS COUNTRY THE PRISON SENTENCES WHICH ARE NOW AUTHORIZED, AND SOMETIMES REQUIRED, ARE SIGNIFICANTLY HIGHER THAN ARE NEEDED IN THE VAST MAJORITY OF CASES IN ORDER ADEQUATELY TO PROTECT THE INTERESTS OF THE PUBLIC. SENTENCES OF TWENTY-FIVE YEARS OR LONGER SHOULD BE RESERVED FOR PARTICULARLY SERIOUS OFFENSES OR, UNDER THE CIRCUMSTANCES SET FORTH IN SECTIONS 2.5 (b) and 3.1 (c) (SPECIAL TERM), FOR CERTAIN PARTICULARLY DANGEROUS OFFENDERS. FOR MOST OFFENSES, ON THE OTHER HAND, THE MAXIMUM AUTHORIZED PRISON TERM OUGHT NOT TO EXCEED FIVE YEARS.

KANSAS CODE

See K.S.A. 21-4501 and 21-4502 (1974) at 2.1 (a), supra

COMMENT

Kansas does not comply with the Standard. Although maximum terms authorized by the Kansas statute exceed those indicated in the Standard, the statutory maximums are not often indicative of the actual release date. Except for class A crimes, parole eligibility is determined with reference to the minimum term. As a rule of thumb, the sentenced person becomes eligible for parole when he has served one-half of the minimum term plus six months. While parole is not assured at the date of eligibility, it seems likely that most sentenced offenders become eligible for parole within five years.

In the cases of persons sentenced for life and others serving exceptionally long terms, parole eligibility occurs after 15 years.

ABA STANDARD

2.2 GENERAL PRINCIPLE: JUDICIAL DISCRETION.

THE SENTENCE IMPOSED IN EACH CASE SHOULD CALL FOR THE MINIMUM AMOUNT OF CUSTODY OR CONFINEMENT WHICH IS CONSISTENT WITH THE PROTECTION OF THE PUBLIC, THE GRAVITY OF THE OFFENSE AND THE REHABILITATIVE NEEDS OF THE DEFENDANT.

KANSAS CODE

> This article shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law. (K.S.A. 21-4601 (1974)).

(1) In sentencing a person to prison, the court, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, shall fix the lowest minimum term which, in the opinion of said court, is consistent with the public safety, the needs of the defendant, and the seriousness of the defendant's crime.

(2) The following factors, while not controlling, shall be considered by the court in fixing the minimum term of imprisonment:

(a) The defendant's history of prior criminal activity;

(b) The extent of the harm caused by the defendant's criminal conduct;

(c) Whether the defendant intended that his criminal conduct would cause or threaten serious harm;

(d) The degree of the defendant's provocation;

(e) Whether there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(f) Whether the victim of the defendant's criminal conduct induced or facilitated its commission;

(g) Whether the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained. (K.S.A. 21-4606 (1974)).

COMMENT

Kansas partially complies with the Standard. For most felonies the court has authority to vary the minimum term according to the special needs of the offender. However, a minimum term must be adjudged in all cases in which the offender is sentenced to prison.

ABA STANDARD

2.3 SENTENCES NOT INVOLVING CONFINEMENT.

(a) THE LEGISLATURE SHOULD AUTHORIZE THE SENTENCING COURT IN EVERY CASE TO IMPOSE A SENTENCE OF PROBATION OR A SIMILAR SENTENCE NOT INVOLVING

CONFINEMENT. IT MAY BE APPROPRIATE TO PROVIDE FOR LIMITED EXCEPTIONS TO THIS PRINCIPLE, BUT ONLY FOR THE MOST SERIOUS OFFENSES SUCH AS MURDER OR TREASON.

KANSAS CODE

See K.S.A. 21-4603 (1974), at 1.1, supra.

The Kansas adult authority may adopt general rules or regulations concerning the conditions of probation or suspension of sentence. The conditions shall apply in the absence of any inconsistent conditions imposed by the court. Nothing herein contained shall limit the authority of the court to impose or modify any general or specific conditions of probation or suspension of sentence.

The probation officer may recommend and by order duly entered by the court may impose and at any time may modify any conditions of probation or suspension of sentence. Due notice shall be given to the probation officer before any such conditions are modified and he shall be given an opportunity to be heard thereon. The court shall cause a copy of any such order to be delivered to the probation officer and the probationer.

The court may include among the conditions of probation the following and any other that it deems proper:

The defendant shall

(a) Avoid injurious or vicious habits;

(b) Avoid persons or places of disreputable or harmful character;

(c) Report to the probation officer as directed;

(d) Permit the probation officer to visit him at his home or elsewhere;

(e) Work faithfully at suitable employment insofar as possible;

(f) Remain within a specified area;

(g) Pay a fine or costs, applicable to the offense, in one or several sums as directed by the court;

(h) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court;

(i) Support his dependents;

(j) Obey the laws of the United States, the state of Kansas or any other jurisdiction to whose laws he may be subject.

(K.S.A. 21-4610 (1974)).

COMMENT

Kansas complies with the Standard. The sentencing court has the power to grant probation or suspend the imposition of sentence for any crime, including crimes punishable by imprisonment for life.

ABA STANDARD

(b) THE FOLLOWING GENERAL PRINCIPLES SHOULD APPLY TO SUCH SENTENCES:

(i) THE COURT SHOULD SPECIFY AT THE TIME OF SENTENCING THE LENGTH OF ANY TERM DURING WHICH THE DEFENDANT IS TO BE SUPERVISED AND DURING WHICH THE COURT WILL RETAIN POWER TO REVOKE THE SENTENCE FOR THE VIOLATION OF SPECIFIED CONDITIONS;

(ii) NEITHER SUPERVISION NOR THE POWER TO REVOKE SHOULD BE PERMITTED TO EXTEND BEYOND A LEGISLATIVELY FIXED TIME, WHICH SHOULD IN NO EVENT EXCEED TWO YEARS FOR A MISDEMEANOR OR FIVE YEARS FOR A FELONY;

(iii) THE SENTENCE TO BE IMPOSED IN THE EVENT OF THE VIOLATION OF A CONDITION SHOULD NOT BE FIXED PRIOR TO A FINDING THAT A VIOLATION HAS OCCURRED.

STANDARDS GOVERNING THE PROCEDURES FOR REVOCATION OR MODIFICATION OF SUCH A SENTENCE ARE SET FORTH IN SECTION 5.5. STANDARDS GOVERNING THE ALTERNATIVES WHICH SHOULD BE AVAILABLE UPON THE VIOLATION OF A CONDITION ARE SET FORTH IN SECTION 6.4. DETAILED STANDARDS DEALING WITH THE TYPES OF SENTENCES NOT INVOLVING CONFINEMENT WHICH SHOULD BE AUTHORIZED, AS WELL AS THE TERMS AND CONDITIONS WHICH COULD APPROPRIATELY ACCOMPANY SUCH A SENTENCE, WILL BE SET FORTH IN A SEPARATE REPORT ON PROBATION.

KANSAS CODE

The period of suspension of sentence or probation fixed by the court shall not exceed

five (5) years in felony cases or two (2) years in misdemeanor cases, subject to renewal and extension for additional fixed periods not exceeding five (5) years in felony cases, nor two (2) years in misdemeanor cases, but in no event shall the total period of probation or suspension of sentence for a felony exceed the maximum term provided by law for the crime, except that where the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. Probation or suspension of sentence may be terminated by the court at any time and upon such termination or upon termination by expiration of the term of probation or suspension of sentence, an order to this effect shall be entered by the court.

The district court having jurisdiction of the offender may parole from sentences to confinement in the county jail. The period of such parole shall be fixed by the court and shall not exceed two (2) years and shall be terminated in the manner provided for termination of suspended sentence and probation. (K.S.A. 21-4611 (1974)). (See also K.S.A. 1974 Supp. 60-4610 at 2.3 (a), supra).

COMMENT

Kansas is in partial compliance with the Standard. The Kansas code provision is consistent with Standard 2.3 (b) (ii). Kansas practice generally complies with 2.3 (b) (i). Kansas is not in compliance with 2.3 (b) (iii) in cases where probation is granted, but where imposition of sentence is suspended, sentence is not imposed until a violation occurs.

ABA STANDARD

(c) A SENTENCE NOT INVOLVING CONFINEMENT IS TO BE PREFERRED TO A SENTENCE INVOLVING PARTIAL OR TOTAL CONFINEMENT IN THE ABSENCE OF AFFIRMATIVE REASONS TO THE CONTRARY.

KANSAS CODE

See K.S.A. 21-4601 (1974) at 2.2, supra.

COMMENT

Kansas probably complies with the Standard. There is no code provision which requires a preference for probation in the absence of affirmative reasons to the contrary. However, such a preference is reflected in the judgments of most of the sentencing courts of the state.

ABA STANDARD

2.4 PARTIAL CONFINEMENT.

(a) ATTENTION SHOULD BE DIRECTED TO THE DEVELOPMENT OF A RANGE OF SENTENCING ALTERNATIVES WHICH PROVIDE AN INTERMEDIATE SANCTION BETWEEN SUPERVISED PROBATION ON THE ONE HAND AND COMMITMENT TO A TOTAL CUSTODY INSTITUTION ON THE OTHER AND WHICH PERMIT THE DEVELOPMENT OF AN INDIVIDUALIZED TREATMENT PROGRAM FOR EACH OFFENDER. EXAMPLES OF THE TYPES OF DISPOSITIONS WHICH MIGHT BE AUTHORIZED ARE:

(i) CONFINEMENT FOR SELECTED PERIODS TO A LOCAL FACILITY DESIGNED TO PROVIDE EDUCATIONAL OR OTHER REHABILITATIVE SERVICES;

(ii) COMMITMENT TO A LOCAL FACILITY WHICH PERMITS THE OFFENDER TO HOLD A REGULAR JOB WHILE SUBJECT TO SUPERVISION OR CONFINEMENT ON NIGHTS AND WEEKENDS;

(iii) COMMITMENT TO AN INSTITUTION FOR A SHORT, FIXED TERM, FOLLOWED BY AUTOMATIC RELEASE UNDER SUPERVISION.

KANSAS CODE

See K.S.A. 21-4610 (1974) at 2.3 (a), supra.

COMMENT

The Kansas code does not expressly provide for an intermediate sanction between supervised probation and commitment to a total custody institution. However, sentencing courts frequently use their power to fix conditions of probation to accomplish the results called for by the Standard. Thus, conditions of probation imposed by Kansas courts may require residence

at a half-way house; service of a short fixed term in the county jail; a requirement of treatment at a public or private mental health facility; or other disposition consistent with the Standard. By provisions of K.S.A. 21-4601 (1974) a district court judge has the power to modify a sentence within 120 days, exercise of this power often results in short term confinement followed by probation.

ABA STANDARD

(b) THE FOLLOWING GENERAL PRINCIPLES SHOULD APPLY TO SUCH SENTENCES:

(i) THE COURT SHOULD SPECIFY AT THE TIME OF SENTENCING THE LENGTH OF ANY TERM DURING WHICH THE DEFENDANT IS TO BE SUPERVISED AND DURING WHICH THE COURT WILL RETAIN POWER TO REVOKE THE SENTENCE FOR THE VIOLATION OF SPECIFIED CONDITIONS;

(ii) NEITHER SUPERVISION, THE POWER TO REVOKE, NOR THE MAXIMUM LENGTH OF TIME DURING WHICH THE OFFENDER SHOULD BE SUBJECT TO SUCH A SENTENCE SHOULD BE PERMITTED TO EXTEND BEYOND A LEGISLATIVELY FIXED TIME, WHICH SHOULD IN NO EVENT EXCEED TWO YEARS FOR A MISDEMEANOR OR FIVE YEARS FOR A FELONY;

(iii) THE SENTENCE TO BE IMPOSED IN THE EVENT OF THE VIOLATION OF A CONDITION SHOULD NOT BE FIXED PRIOR TO A FINDING THAT A VIOLATION HAS OCCURRED.

STANDARDS GOVERNING THE PROCEDURES FOR REVOCATION OR MODIFICATION OF SUCH A SENTENCE ARE SET FORTH IN SECTION 5.5. STANDARDS GOVERNING THE ALTERNATIVES WHICH SHOULD BE AVAILABLE UPON THE VIOLATION OF A CONDITION ARE SET FORTH IN SECTION 6.4.

KANSAS CODE

See K.S.A. 21-4611 (1974) at 2.3 (b), supra.

COMMENT

Kansas is in partial compliance with the Standard. See Comment following 2.3 (b), supra.

ABA STANDARD

(c) A SENTENCE INVOLVING PARTIAL CONFINEMENT IS TO BE PREFERRED TO A SENTENCE OF TOTAL CONFINEMENT IN THE ABSENCE OF AFFIRMATIVE REASONS TO THE CONTRARY.

KANSAS CODE

See K.S.A. 21-4601 (1974) at 2.2, supra.

COMMENT

Kansas probably complies with the Standard. See Comment following 2.3 (c), supra.

ABA STANDARD

2.5 TOTAL CONFINEMENT.

(a) FOR EACH OF THE CATEGORIES OF OFFENSES DESIGNATED PURSUANT TO SECTION 2.1 (a), THE LEGISLATURE SHOULD SPECIFY THE TERM, IF ANY, FOR WHICH A SENTENCE OF COMMITMENT TO A CORRECTIONAL INSTITUTION CAN BE IMPOSED. SUCH SENTENCES SHOULD BE AUTHORIZED IN ACCORDANCE WITH THE STRUCTURE DETAILED IN PART III OF THIS REPORT.

KANSAS CODE

See K.S.A. 21-4501 and 25-4502 (1974) at 2.1 (a), supra.

COMMENT

Kansas complies generally with the Standard. Deviations from the structure detailed in Part III of the published report are commented on later.

ABA STANDARD

(b) AS STATED IN SECTION 2.1 (d), MANY SENTENCES AUTHORIZED BY STATUTE IN THIS COUNTRY ARE, BY COMPARISON TO OTHER COUNTRIES AND IN TERMS OF THE NEEDS OF THE PUBLIC, EXCESSIVELY LONG FOR THE VAST MAJORITY OF CASES. THEIR LENGTH IS UNDOUBTEDLY THE PRODUCT OF CONCERN FOR PROTECTION AGAINST THE MOST EXCEPTIONAL CASES, MOST NOTABLY THE PARTICULARLY DANGEROUS OFFENDER AND THE PROFESSIONAL CRIMINAL. IT WOULD BE MORE DESIRABLE FOR THE PENAL CODE TO DIFFERENTIATE EXPLICITLY BETWEEN MOST OFFENDERS AND SUCH EXCEPTIONAL CASES, BY PROVIDING LOWER, MORE REALISTIC SENTENCES FOR THE FORMER AND AUTHORIZING A SPECIAL TERM FOR THE LATTER. THE ADVISORY COMMITTEE WOULD ENDORSE A SPECIAL TERM IN SUCH A CONTEXT, BUT ONLY ON THE FOLLOWING ASSUMPTIONS:

(i) PROVISION FOR SUCH A SPECIAL TERM WILL BE ACCOMPANIED BY A SUBSTANTIAL AND GENERAL REDUCTION OF THE TERMS AVAILABLE FOR MOST OFFENDERS; AND

(ii) ADEQUATE CRITERIA WILL BE DEVELOPED AND STATED IN THE ENABLING LEGISLATION WHICH CAREFULLY DELINEATE THE TYPE OF OFFENDER ON WHOM SUCH A SPECIAL TERM CAN BE IMPOSED; AND

(iii) PRECAUTIONS WILL BE TAKEN, SUCH AS BY THE REQUIREMENT OF PROCEDURES WHICH ASSURE THE ADEQUATE DEVELOPMENT OF INFORMATION ABOUT THE OFFENDER AND BY PROVISION FOR APPELLATE REVIEW OF THE SENTENCE, TO ASSURE THAT SUCH A SPECIAL TERM WILL NOT BE IMPOSED IN CASES WHERE IT IS NOT WARRANTED; AND

(iv) THE SENTENCE AUTHORIZED IN SUCH CASES WILL BE STRUCTURED IN ACCORDANCE WITH THE PRINCIPLES REFLECTED IN SECTION 3.1 (c); AND

(v) THE NECESSARY PROCEDURES WILL BE DEVELOPED IN ACCORDANCE WITH THE PRINCIPLES REFLECTED IN SECTION 5.5.

SUCH SPECIAL TERMS SHOULD NOT BE AUTHORIZED FOR MISDEMEANORS AND OTHER LESSER OFFENSES.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

The Standard appears to embody a recommendation rather than a Standard. In Kansas increased penalties are provided by K.S.A. 21-4504 (1974) applicable to the habitual offender. Otherwise the Kansas statutes make no provision for a special term.

ABA STANDARD

(c) A SENTENCE NOT INVOLVING TOTAL CONFINEMENT IS TO BE PREFERRED IN THE ABSENCE OF AFFIRMATIVE REASONS TO THE CONTRARY. EXAMPLES OF LEGITIMATE REASONS FOR THE SELECTION OF TOTAL CONFINEMENT IN A GIVEN CASE ARE:

(i) CONFINEMENT IS NECESSARY IN ORDER TO PROTECT THE PUBLIC FROM FURTHER CRIMINAL ACTIVITY BY THE DEFENDANT; OR

(ii) THE DEFENDANT IS IN NEED OF CORRECTIONAL TREATMENT WHICH CAN NOT EFFECTIVELY BE PROVIDED IF HE IS PLACED IN TOTAL CONFINEMENT.

(iii) IT WOULD UNDULY DEPRECIATE THE SERIOUSNESS OF THE OFFENSE TO IMPOSE A SENTENCE OTHER THAN TOTAL CONFINEMENT. ON THE OTHER HAND, COMMUNITY HOSTILITY TO THE DEFENDANT IS NOT A LEGITIMATE BASIS FOR IMPOSING A SENTENCE OF TOTAL CONFINEMENT.

KANSAS CODE

See K.S.A. 21-4603 (c) and (d) (1974) at 1.1, supra, and K.S.A. 21-4610 (1974) at 2.3 (a), supra. Also see K.S.A. 21-4601 (1974) at 2.2, supra.

COMMENT

Kansas probably complies with the Standard. See Comment following 2.3 (c).

ABA STANDARD

2.6 SPECIAL FACILITIES.

(a) IT IS DESIRABLE, BOTH ON A LOCAL AND ON A STATEWIDE, AREAWIDE OR NATIONWIDE BASIS, THAT FACILITIES BE DEVELOPED TO PROVIDE SPECIAL TREATMENT FOR CERTAIN TYPES OF OFFENDERS, PARTICULARLY THE YOUNG, AND THAT THE COURT BE AUTHORIZED AS A SENTENCING ALTERNATIVE TO EMPLOY SUCH FACILITIES IN APPROPRIATE CASES.

KANSAS CODE

After conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 21-4604 (1974), the trial judge may order the defendant committed to a state hospital or any suitable local mental health facility for mental examination, evaluation and report. If adequate private facilities are available and if the defendant is willing to assume the expense thereof such commitment may be to a private hospital. A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not be detained for more than 120 days under a commitment made under this section. (K.S.A. 22-3429 (1974)).

If the report of the examination authorized by the preceding section shows that the defendant

is in need of psychiatric care and treatment and that such treatment may materially aid in his rehabilitation and that the defendant and society is not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to any state or county institution provided for the reception, care, treatment and maintenance of mentally ill persons. The court may direct that the defendant be detained in such institution until further order of the court or until the defendant is discharged under 22-3431. No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted. The trial judge shall, at the time of such commitment, make an order imposing liability upon the defendant, or such person or persons responsible for the support of the defendant, or upon the county or the state, as may be proper in such case, for the cost of admission, care and discharge of such defendant.

The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentence to a jail, or to the custody of the director of penal institutions had been imposed in this case. (K.S.A. 22-3430 (1974)).

COMMENT

Kansas appears to comply with the Standard.

ABA STANDARD

(b) EMPLOYMENT OF SUCH FACILITIES SHOULD NOT RESULT IN COMMITMENT OR SUPERVISION FOR A PERIOD LONGER THAN WOULD OTHERWISE BE AUTHORIZED FOR THE OFFENSE INVOLVED. WHILE IT MAY BE APPROPRIATE TO EXCEPT MISDEMEANORS AND OTHER LESSER OFFENSES FROM THIS GENERAL PRINCIPLE, COMMITMENT OR

SUPERVISION FOR A LONGER PERIOD OF TIME SHOULD NOT BE AUTHORIZED UNLESS THE FOLLOWING CONDITIONS ARE MET:

(i) A PRESENTENCE REPORT (SECTIONS 4.1 - 4.5) SUPPLEMENTED BY A REPORT OF THE EXAMINATION OF THE DEFENDANT'S MENTAL, EMOTIONAL AND PHYSICAL CONDITION (SECTION 4.6) HAS BEEN OBTAINED AND CONSIDERED; AND

(ii) THE COURT FINDS SPECIFICALLY THAT A PROPER TREATMENT PROGRAM IS AVAILABLE AND THAT THE DEFENDANT WILL BENEFIT FROM THE PROGRAM; AND

(iii) THE MAXIMUM PERIOD FOR WHICH SUCH COMMITMENT OR SUPERVISION CAN EXTEND IS FIXED BY STATUTE AT NO LONGER THAN TWO YEARS; AND

(iv) AT THE CONCLUSION OF ONE YEAR THE CUSTODIAL OR SUPERVISORY AUTHORITIES ARE REQUIRED TO REVIEW THE PROGRESS OF THE DEFENDANT AND ARE REQUIRED TO MAKE A SHOWING TO THE SENTENCING COURT TO THE EFFECT THAT THE CONTEMPLATED TREATMENT IS ACTUALLY BEING ADMINISTERED TO THE DEFENDANT AND OUTLINING THE PROGRESS WHICH THE DEFENDANT HAS MADE; AND

(v) AS PROVIDED IN SECTION 6.3, THE SENTENCING COURT HAS THE AUTHORITY AT ANY TIME TO TERMINATE THE COMMITMENT OR SUPERVISION.

(c) COMMITMENTS OR TREATMENT PROGRAMS OTHER THAN AS A PART OF THE SENTENCING PROCESS FOLLOWING A CRIMINAL CONVICTION ARE BEYOND THE SCOPE OF THIS REPORT.

KANSAS CODE

> Whenever it appears to the chief medical officer of the institution to which a person has been committed under section 22-3430, that such person is not dangerous to himself or others and that he will not be improved by further detention in such institution, such person shall be returned to the court where he was convicted and shall be sentenced, committed, granted probation or discharged as the court deems best under the circumstance. The time spent in a state or county institution pursuant to a commitment under section 22-3430 shall be credited against any sentence, confinement or imprisonment imposed on the defendant. (K.S.A. 22-3431 (1974)). (See also K.S.A. 22-3430 (1974) at 2.6 (a), supra).

COMMENT

Kansas complies with the Standard. K.S.A. 22-3430 (1974) expressly provides that "no period of detention under this section shall exceed the

maximum term provided by law for the crime of which the defendant has been convicted." If the committed person continues to need treatment following his discharge, a civil commitment may be undertaken.

Standard 2.6 (c) requires no Comment.

ABA STANDARD

2.7 FINES.

(a) THE LEGISLATURE SHOULD DETERMINE THE OFFENSES OR CATEGORIES OF OFFENSES FOR WHICH A FINE WOULD BE AN APPROPRIATE SENTENCE, AND SHOULD STATE THE MAXIMUM FINE WHICH CAN BE IMPOSED. EXCEPT IN THE CASE OF OFFENSES COMMITTED BY A CORPORATION, THE LEGISLATURE ORDINARILY SHOULD NOT AUTHORIZE THE IMPOSITION OF A FINE FOR A FELONY UNLESS THE DEFENDANT HAS GAINED MONEY OR PROPERTY THROUGH THE COMMISSION OF THE OFFENSE.

KANSAS CODE

(1) A person who has been convicted of a felony may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(a) For a class B or C felony, a sum not exceeding $10,000;

(b) For a class D or E felony, a sum not exceeding $5,000;

(2) A person who has been convicted of a misdemeanor may, in addition to or instead of the confinement authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(a) For a class A misdemeanor, a sum not exceeding $2,500;

(b) For a class B misdemeanor, a sum not exceeding $1,000;

(c) For a class C misdemeanor, a sum not exceeding $500;

(d) For an unclassified misdemeanor, any sum authorized by the statute that defines the crime; if no penalty is provided in such law, the fine shall not exceed $2,500;

(3) As an alternative to any of the above, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender. (K.S.A. 21-4503 (1974)).

(1) When the law authorizes any other disposition, a fine shall not be imposed as the sole and exclusive punishment unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, the court is of the opinion that the fine alone suffices for the protection of the public.

(2) The court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) The defendant has derived a pecuniary gain from the crime; or

(b) The court is of the opinion that a fine is adapted to deterrence of the crime involved or to the correction of the offender.

(3) In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose. (K.S.A. 21-4607 (1974)). (See also K.S.A. 21-4603 (b) (1974) at 1.1, supra).

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(b) WHETHER TO IMPOSE A FINE IN A PARTICULAR CASE, ITS AMOUNT UP TO THE AUTHORIZED MAXIMUM, AND THE METHOD OF PAYMENT SHOULD REMAIN WITHIN THE DISCRETION OF THE SENTENCING COURT. THE COURT SHOULD BE EXPLICITLY AUTHORIZED TO PERMIT INSTALLMENT PAYMENTS OF ANY IMPOSED FINE, ON CONDITIONS TAILORED TO THE MEANS OF THE PARTICULAR OFFENDER.

KANSAS CODE

See K.S.A. 21-4602 (b) (1974) at 1.1, supra, 21-4503 (1974) at 2.7 (a), supra, and 21-4607 (1974) at 2.7 (a), supra, and 21-4603 (1974) at 1.1, supra.

(1) When a defendant is adjudged to pay a fine and costs, the court may order him to be committed to the county jail until such fine

and costs are paid or may make an order providing for the payment of such fines and costs in installments. (K.S.A. 22-3425 (1974)).

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(c) IN DETERMINING WHETHER TO IMPOSE A FINE AND ITS AMOUNT, THE COURT SHOULD CONSIDER:

(i) THE FINANCIAL RESOURCES OF THE DEFENDANT AND THE BURDEN THAT PAYMENT OF A FINE WILL IMPOSE, WITH DUE REGARD TO HIS OTHER OBLIGATIONS;

(ii) THE ABILITY OF THE DEFENDANT TO PAY A FINE ON AN INSTALLMENT BASIS OR ON OTHER CONDITIONS TO BE FIXED BY THE COURT;

(iii) THE EXTENT TO WHICH PAYMENT OF A FINE WILL INTERFERE WITH THE ABILITY OF THE DEFENDANT TO MAKE ANY ORDERED RESTITUTION OR REPARATION TO THE VICTIM OF THE CRIME; AND

(iv) WHETHER THERE ARE PARTICULAR REASONS WHICH MAKE A FINE APPROPRIATE AS A DETERRENT TO THE OFFENSE INVOLVED OR APPROPRIATE AS A CORRECTIVE MEASURE FOR THE DEFENDANT.

REVENUE PRODUCTION IS NOT A LEGITIMATE BASIS FOR IMPOSING A FINE.

KANSAS CODE

See K.S.A. 21-4607 (1974) at 2.7 (a), supra.

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(d) IT WOULD BE APPROPRIATE FOR THE LEGISLATURE TO ENDORSE IN THE PENAL CODE STANDARDS SUCH AS THOSE SPECIFIED IN SUBSECTION (c). THEY ARE IN ANY EVENT COMMENDED TO SENTENCING COURTS AS GUIDES TO THE EXERCISE OF DISCRETION.

KANSAS CODE

See K.S.A. 21-4607 (1974) at 2.7 (a), supra.

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(e) THE COURT SHOULD NOT BE AUTHORIZED TO IMPOSE ALTERNATIVE SENTENCES, E.G., "THIRTY DOLLARS OR THIRTY DAYS". THE EFFECT OF NONPAYMENT OF A FINE SHOULD BE DETERMINED AFTER THE FINE HAS NOT BEEN PAID AND AFTER EXAMINATION OF THE REASONS FOR NONPAYMENT. THE COURT'S RESPONSE TO NONPAYMENT SHOULD BE GOVERNED BY THE STANDARDS SET FORTH IN SECTION 6.5.

KANSAS CODE

Any person confined in the county jail for failure to pay a fine or costs may be released by the court which imposed sentence, upon satisfactory proof that such person is unable to pay such fine and costs. A release under this section shall not discharge a person from his liability to pay the fine and costs adjudged against him, but they may thereafter be collected by execution as on judgments in civil cases. (K.S.A. 22-3425 (2) (1974)). (See also K.S.A. 22-4603 (1974) at 1.1, supra).

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(f) IN FIXING THE MAXIMUM FINE FOR SOME OFFENSES, THE LEGISLATURE SHOULD CONSIDER THE FEASIBILITY OF EMPLOYING AN INDEX OTHER THAN A DOLLAR AMOUNT IN CASES WHERE IT MIGHT BE APPROPRIATE. FOR EXAMPLE, A FINE RELATIVE TO THE AMOUNT OF THE GAIN MIGHT BE APPROPRIATE IN CASES WHERE THE DEFENDANT HAS PROFITED BY HIS CRIME, OR A FINE RELATIVE TO SALES,

PROFITS, OR NET ANNUAL INCOME MIGHT BE APPROPRIATE IN SOME CASES, SUCH AS BUSINESS OR ANTITRUST OFFENSES, IN ORDER TO ASSURE A REASONABLY EVEN IMPACT OF THE FINE ON DEFENDANTS OF VARIANT MEANS.

KANSAS CODE

See K.S.A. 21-4503 (3) (1974) at 2.7 (a), supra, which authorizes as an alternative maximum "any greater sum not exceeding double the pecuniary gain derived from the crime by the offender".

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(g) LEGISLATIVE ATTENTION SHOULD ALSO BE DEVOTED TO THE DESIRABILITY OF A SPECIAL SCHEDULE OF FINES FOR OFFENSES COMMITTED BY CORPORATIONS.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas does not comply with the Standard.

ABA STANDARD

PART III. STATUTORY STRUCTURE AND JUDICIAL DISCRETION - TOTAL CONFINEMENT

3.1 MAXIMUM TERM.

(a) FOR EACH OF THE CATEGORIES OF OFFENSES DESIGNATED PURSUANT TO SECTION 2.1 (a), THE LEGISLATURE SHOULD SPECIFY THE MAXIMUM PERIOD, IF ANY, FOR WHICH A SENTENCE OF COMMITMENT TO A CORRECTIONAL INSTITUTION MAY BE IMPOSED.

KANSAS CODE

See K.S.A. 21-4501 (1974) and 21-4502 (1974) at 2.1 (a), supra.

COMMENT

Kansas partially complies with the Standard. Although a maximum term is fixed by the legislature for each class of offenses, in the case of felonies the court must impose the maximum provided by law. In the case of misdemeanors the court may fix any term up to the maximum provided in the statute.

ABA STANDARD

(b) IF SUCH A SENTENCE IS IMPOSED, THE COURT SHOULD BE AUTHORIZED TO FIX IN THE PARTICULAR CASE ANY MAXIMUM PERIOD UP TO THE LEGISLATIVE LIMIT.

KANSAS CODE

See K.S.A. 21-4501 (1974) and K.S.A. 21-4502 (1974) at 2.1 (a), supra.

COMMENT

Kansas complies with the Standard with respect to misdemeanors only. Kansas does not comply with the Standard with respect to felonies.

ABA STANDARD

(c) IF A SPECIAL TERM IS AUTHORIZED FOR EXCEPTIONAL CASES IN ACCORDANCE WITH THE PRINCIPLES STATED IN SECTION 2.5 (b), IT SHOULD BE RELATED IN SEVERITY TO THE SENTENCE OTHERWISE PROVIDED FOR THE OFFENSE. IN ADDITION, THE FOLLOWING GENERAL PRINCIPLES SHOULD APPLY:

(i) THE SENTENCING COURT SHOULD BE AUTHORIZED TO FIX A MAXIMUM TERM AT ANY POINT FROM THE MAXIMUM OTHERWISE APPLICABLE UP TO A LEGISLATIVELY PRESCRIBED LIMIT. AS AN OUTSIDE LIMIT FOR EXTREME CASES, TWENTY-FIVE YEARS OUGHT TO BE THE MAXIMUM AUTHORIZED PRISON TERM;

(ii) THE COURT SHOULD BE AUTHORIZED TO FIX A MINIMUM TERM IN ACCORDANCE WITH THE PRINCIPLES STATED IN SECTION 3.2;

(iii) WHETHER TO SENTENCE A PARTICULAR OFFENDER TO THE NORMAL TERM OR TO THE SPECIAL TERM SHOULD BE A MATTER FOR THE DISCRETION OF THE SENTENCING COURT. SUCH DISCRETION SHOULD BE EXERCISED IN FAVOR OF IMPOSING A SPECIAL TERM ONLY IF APPLICATION OF THE SPECIFIED STATUTORY CRITERIA SUPPORTS THE CONCLUSION THAT THE DEFENDANT FITS WITHIN THE EXCEPTIONAL CLASS, AND IF THE COURT ALSO CONCLUDES THAT COMMITMENT FOR SUCH A SPECIAL TERM IS NECESSARY IN ORDER TO PROTECT THE PUBLIC FROM FURTHER CRIMINAL CONDUCT BY THE DEFENDANT.

KANSAS CODE

See K.S.A.21-4504 (1974) at 3.3, infra.

COMMENT

The Kansas statute authorizes a special term only in the case of habitual offenders. To that extent, the discretion conferred upon the court conforms generally with the Standard.

ABA STANDARD

3.2 MINIMUM TERM.

(a) BECAUSE THERE ARE SO MANY FACTORS IN AN INDIVIDUAL CASE WHICH CANNOT BE PREDICTED IN ADVANCE, IT IS UNSOUND FOR THE LEGISLATURE TO REQUIRE THAT THE COURT IMPOSE A MINIMUM PERIOD OF IMPRISONMENT WHICH MUST BE SERVED BEFORE AN OFFENDER BECOMES ELIGIBLE FOR PAROLE OR FOR THE LEGISLATURE TO PRESCRIBE SUCH A MINIMUM TERM ITSELF. IT IS LIKEWISE UNSOUND FOR THE LEGISLATURE TO CONDITION PAROLE ELIGIBILITY UPON SERVICE OF A SPECIFIED PORTION OF THE MAXIMUM TERM.

(b) WHILE RECOGNIZING THAT THERE ARE IN ADDITION SUBSTANTIAL ARGUMENTS AGAINST JUDICIAL AUTHORITY TO SELECT AND IMPOSE MINIMUM SENTENCES, A MAJORITY OF THE ADVISORY COMMITTEE WOULD SUPPORT A STATUTE WHICH AUTHORIZES BUT DOES NOT REQUIRE THE SENTENCING COURT TO IMPOSE, WITHIN CAREFULLY PRESCRIBED LEGISLATIVE LIMITS, A MINIMUM SENTENCE WHICH MUST BE SERVED BEFORE AN OFFENDER BECOMES ELIGIBLE FOR PAROLE.

KANSAS CODE

See K.S.A. 21-4501 (1974) and 21-4502 (1974) at 2.1 (a), supra.

COMMENT

Kansas does not comply with Standards 3.2 (a) and (b) with respect to felonies.

The statute requires that the court in sentencing an offender to confinement shall in every case fix a minimum sentence, which shall not be less than one year. In the case of class B, C and D felonies, the court has discretion in fixing the minimum within legislatively prescribed limits. In the case of the class E felony, the minimum must be at least five years

and in each other case the minimum term must be at least one year. In most instances, parole eligibility is achieved by service of the minimum term of the sentence less work and good behavior credit. However, regardless of the minimum sentence fixed by the court, the adult authority may parole any inmate classified in the lowest security classification after the expiration of 120 days from the date of sentence. (See Ch. 403, L. 1974).

ABA STANDARD

(c) MINIMUM SENTENCES ARE RARELY APPROPRIATE, AND SHOULD IN ALL CASES BE REASONABLY SHORT. AUTHORITY TO IMPOSE A MINIMUM TERM SHOULD BE CIRCUMSCRIBED BY THE FOLLOWING STATUTORY LIMITATIONS:

(i) THE LEGISLATURE SHOULD SPECIFY FOR EACH OF THE CATEGORIES OF OFFENSES DESIGNATED PURSUANT TO SECTION 2.1 (a) THE HIGHEST MINIMUM PERIOD OF IMPRISONMENT WHICH CAN BE IMPOSED;

(ii) MINIMUM SENTENCES AS LONG AS TEN OR FIFTEEN YEARS SHOULD BE STRICTLY CONFINED TO LIFE SENTENCES. LONGER MINIMUM SENTENCES SHOULD NOT BE AUTHORIZED;

(iii) IN ORDER TO PRESERVE THE PRINCIPLE OF INDETERMINACY, THE COURT SHOULD NOT BE AUTHORIZED TO IMPOSE A MINIMUM SENTENCE WHICH EXCEEDS ONE-THIRD OF THE MAXIMUM SENTENCE ACTUALLY IMPOSED;

(iv) THE COURT SHOULD NOT BE AUTHORIZED TO IMPOSE A MINIMUM SENTENCE UNTIL A PRESENTENCE REPORT (SECTION 4.1 - 4.5), SUPPLEMENTED BY A REPORT OF THE EXAMINATION OF THE DEFENDANT'S MENTAL, EMOTIONAL AND PHYSICAL CONDITION (SECTION 4.6), HAS BEEN OBTAINED AND CONSIDERED;

(v) THE COURT SHOULD BE DIRECTED TO CONSIDER PRIOR TO THE IMPOSITION OF A MINIMUM TERM WHETHER MAKING A NON-BINDING RECOMMENDATION TO THE PAROLE AUTHORITIES RESPECTING WHEN THE OFFENDER SHOULD FIRST BE CONSIDERED FOR PAROLE WILL SATISFY THE FACTORS WHICH SEEM TO CALL FOR A MINIMUM TERM. SUCH A RECOMMENDATION SHOULD BE REQUIRED TO RESPECT THE LIMITATIONS PROVIDED IN SUBSECTIONS (ii) AND (iii);

(vi) IMPOSITION OF A MINIMUM SENTENCE SHOULD REQUIRE THE AFFIRMATIVE ACTION OF THE SENTENCING COURT. THE COURT SHOULD BE AUTHORIZED TO IMPOSE A MINIMUM SENTENCE ONLY AFTER A FINDING THAT CONFINEMENT FOR A MINIMUM TERM IS NECESSARY IN ORDER TO PROTECT THE PUBLIC FROM FURTHER CRIMINAL CONDUCT BY THE DEFENDANT;

(vii) AS PROVIDED IN SECTION 6.2, THE COURT SHOULD BE AUTHORIZED TO REDUCE AN IMPOSED MINIMUM SENTENCE TO TIME SERVED UPON MOTION OF THE CORRECTIONS AUTHORITIES MADE AT ANY TIME.

KANSAS CODE

See K.S.A. 21-4501 (1974) at 2.1 (a), supra.

(1) In sentencing a person to prison, the court, having regard to the nature and circumstances

of the crime and the history, character and condition of the defendant, shall fix the lowest minimum term which, in the opinion of said court, is consistent with the public safety, the needs of the defendant, and the seriousness of the defendant's crime.

(2) The following factors, while not controlling, shall be considered by the court in fixing the minimum term of imprisonment:

(a) The defendant's history of prior criminal activity;

(b) The extent of the harm caused by the defendant's criminal conduct;

(c) Whether the defendant intended that his criminal conduct would cause or threaten serious harm;

(d) The degree of the defendant's provocation;

(e) Whether there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(f) Whether the victim of the defendant's criminal conduct induced or facilitated its commission;

(g) Whether the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained. (K.S.A. 21-4606 (1974)). See also K.S.A. 21-4603 (1974) at 6.1, infra).

COMMENT

Kansas complies with the limitations suggested in Standard 3.2 (c) to the extent indicated hereafter.

(i) Kansas is in compliance;

(ii) Kansas is in compliance;

(iii) Kansas is in compliance;

(iv) Kansas complies to the extent that the court is authorized, but is not required to obtain a presentence report including a report of the examination of the defendant's mental, emotional and physical condition, in every case;

(v) Kansas does not comply;

(vi) Kansas does not comply; and

(vii) Kansas is in compliance.

ABA STANDARD

3.3 HABITUAL OFFENDERS.

(a) SENTENCES AUTHORIZED UNDER PRESENT HABITUAL OFFENDER LEGISLATION SHOULD BE REVISED, WHERE NECESSARY, TO CONFORM TO THE FOLLOWING STANDARDS:

(i) ANY INCREASED TERM WHICH CAN BE IMPOSED BECAUSE OF PRIOR CRIMINALITY SHOULD BE RELATED IN SEVERITY TO THE SENTENCE OTHERWISE PROVIDED FOR THE NEW OFFENSE:

(ii) THE SENTENCING COURT SHOULD BE AUTHORIZED TO FIX A MAXIMUM TERM AT ANY POINT FROM THE MAXIMUM OTHERWISE APPLICABLE UP TO A LEGISLATIVELY PRESCRIBED LIMIT. AS AN OUTSIDE LIMIT FOR EXTREME CASES, TWENTY-FIVE YEARS OUGHT TO BE THE MAXIMUM AUTHORIZED PRISON TERM.

(iii) THE COURT SHOULD BE AUTHORIZED TO FIX A MINIMUM TERM IN ACCORDANCE WITH THE PRINCIPLES STATED IN SECTION 3.2.

KANSAS CODE

Every person convicted a second or more time of a felony, the punishment for which is confinement in the custody of the director of penal institutions, upon motion of the prosecuting attorney, may be by the trial judge sentenced to an increased punishment as follows:

(1) If the defendant has previously been convicted of not more than one felony:

(a) The court may fix a minimum sentence of not less than the least nor more than twice the greatest minimum sentence authorized by K.S.A. 1972 Supp. 21-4501 for the crime for which the defendant stands convicted; and

(b) Such court may fix a maximum sentence of not less than the maximum provided by K.S.A. 1972 Supp. 21-4501 for such crime for more than twice such maximum;

(2) If the defendant has previously been convicted of two (2) or more felonies:

(a) The court may fix a minimum sentence of not less than the least nor more than three times the greatest minimum sentence authorized by K.S.A. 1972 Supp. 21-4501 for the crime for which the defendant stands convicted; and

(b) Such court may fix a maximum sentence of not less than the maximum prescribed by K.S.A. 1972 Supp. 21-4501 for such crime, nor more than life.

(3) Subsections (1) and (2) of this section shall be applicable only to those convicted criminals initially sentenced after the effective date of this act. In the event that any defendant has been convicted prior to the effective date of this act and sentenced under K.S.A. 21-107a, and thereafter is for any reason returned to the court imposing the initial sentence, he shall be resentenced under the provisions of K.S.A. 21-107 a as it existed prior to July 1, 1970.

(4) In the event that any portion of a sentence imposed under K.S.A. 21-107a, or under subsections (1) and (2) of this section, is determined to be invalid by any court because a prior felony conviction is itself invalid, upon resentencing the court may consider evidence of any other prior felony conviction that could have been utilized under K.S.A. 21-107a, or under subsections (1) and (2) of this section, at the time the original sentence was imposed, whether or not it was introduced at that time, except that if the defendant was originally sentenced as a second offender, he shall not be resentenced as a third offender.

(5) The provisions of this section shall not be applicable to: (a) Any person convicted of a crime for which the punishment is confinement in the custody of the director of penal institutions and where a prior conviction of a felony is a necessary element of such crime; or (b) any person convicted of a felony for which the punishment is confinement in the custody of the director of penal institutions and where a prior conviction of such felony is considered in establishing the class of felony for which such person may be sentenced.

A judgment may be rendered pursuant to this section only after the court finds from competent evidence the fact of former convictions for felony committed by the prisoner, in or out of the state. (K.S.A. 21-4504 (1974)).

COMMENT

Kansas complies partially with the Standard. The increased term which can be imposed is related in severity to the sentence otherwise provided for the new offense. The sentencing court is authorized to fix a maximum between the maximum otherwise applicable and the legislatively perscribed limit. However, the maximum frequently may exceed twenty-five years.

With respect to the fixing of the minimum term, see the Comment following 3.2, supra.

ABA STANDARD

(b) WHETHER TO SENTENCE A PARTICULAR OFFENDER TO THE NORMAL TERM OR TO A SPECIAL TERM ON GROUNDS OF HABITUAL CRIMINALITY SHOULD BE A MATTER FOR THE DISCRETION OF THE SENTENCING COURT, AND SHOULD BE DETERMINED AT THE TIME OF SENTENCING. AN ADDITIONAL TERM SHOULD ONLY BE PERMITTED IF THE COURT FINDS THAT SUCH A TERM IS NECESSARY IN ORDER TO PROTECT THE PUBLIC FROM FURTHER CRIMINAL CONDUCT BY THE DEFENDANT, AND IN SUPPORT OF THIS FINDING ALSO FINDS THAT:

(i) THE OFFENDER HAS PREVIOUSLY BEEN CONVICTED OF TWO FELONIES COMMITTED ON DIFFERENT OCCASIONS, AND THE PRESENT OFFENSE IS A THIRD FELONY COMMITTED ON AN OCCASION DIFFERENT FROM THE FIRST TWO. A PRIOR OFFENSE COMMITTED WITHIN ANOTHER JURISDICTION MAY BE COUNTED IF IT WAS PUNISHABLE BY CONFINEMENT IN EXCESS OF (ONE YEAR). A PRIOR OFFENSE SHOULD NOT BE COUNTED IF THE OFFENDER HAS BEEN PARDONED ON THE GROUND OF INNOCENCE, OR IF THE CONVICTION HAS BEEN SET ASIDE IN ANY POST-CONVICTION PROCEEDING; AND

(ii) LESS THAN FIVE YEARS HAVE ELAPSED BETWEEN THE COMMISSION OF THE PRESENT OFFENSE AND EITHER THE COMMISSION OF THE LAST PRIOR FELONY OR THE OFFENDER'S RELEASE, ON PAROLE OR OTHERWISE, FROM A PRISON SENTENCE OR OTHER COMMITMENT IMPOSED AS A RESULT OF A PRIOR FELONY CONVICTION; AND

(iii) THE OFFENDER WAS MORE THAN (21) YEARS OLD AT THE TIME OF THE COMMISSION OF THE NEW OFFENSE.

KANSAS CODE

See K.S.A. 1971 Supp. 21-4504 at 3.3 (a), supra.

COMMENT

Kansas partially complies with the Standard. Kansas is in compliance to the extent that the imposition of the habitual penalty is a matter for the discretion of the sentencing court. Also, if a conviction has been reversed or set aside or the offender has been pardoned on the ground of innocence, the conviction shall not be counted. The specific conditions set out in the standards are not found in the Kansas statute. It appears, however, that the court might, as a matter of judicial discretion, observe such criteria.

ABA STANDARD

3.4 MULTIPLE OFFENSES: SAME STATE; CONCURRENT AND CONSECUTIVE TERMS.

(a) AFTER CONVICTIONS OF MULTIPLE OFFENSES WHICH ARE SEPARATELY PUNISHABLE OR IN CASES WHERE THE DEFENDANT IS SERVING A PRISON SENTENCE

AT THE TIME OF CONVICTION, THE QUESTION OF WHETHER TO IMPOSE CONCURRENT OR CONSECUTIVE SENTENCES SHOULD BE A MATTER FOR THE DISCRETION OF THE SENTENCING COURT.

KANSAS CODE

> (1) When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences or probation have been revoked, such sentences shall run concurrently or consecutively as the court directs. Whenever the record is silent as to the manner in which two or more sentences imposed at the same time shall be served, they shall be served concurrently. (K.S.A. 1971 Supp. 21-4608 (1)).

COMMENT

Kansas complies with the Standard. In Witt v. State, 197 Kan. 363, 416 P.2d 717 (1966) the Supreme Court held that when two or more offenses are charged in the same information it is within the discretionary powers of the trial judge to prescribe whether the sentences shall be served concurrently or consecutively.

ABA STANDARD

(b) CONSECUTIVE SENTENCES ARE RARELY APPROPRIATE. AUTHORITY TO IMPOSE A CONSECUTIVE SENTENCE SHOULD BE CIRCUMSCRIBED BY THE FOLLOWING STATUTORY LIMITATIONS:

(i) THE AGGREGATE MAXIMUM OF CONSECUTIVE TERMS SHOULD NOT BE PERMITTED TO EXCEED THE TERM AUTHORIZED FOR AN HABITUAL OFFENDER (SECTION 3.3) FOR THE MOST SERIOUS OF THE OFFENSES INVOLVED. IF THERE IS NO PROVISION FOR AN HABITUAL OFFENDER FOR THE OFFENSES INVOLVED, THERE SHOULD BE A CEILING ON THE AGGREGATE OF CONSECUTIVE TERMS WHICH IS RELATED TO THE SEVERITY OF THE OFFENSES INVOLVED; AND

(ii) THE AGGREGATE MINIMUM OF CONSECUTIVE TERMS SHOULD BE GOVERNED BY THE LIMITATIONS STATED IN SECTION 3.2; AND

(iii) THE COURT SHOULD NOT BE AUTHORIZED TO IMPOSE A CONSECUTIVE SENTENCE UNTIL A PRESENTENCE REPORT (SECTIONS 4.1 - 4.5), SUPPLEMENTED BY A REPORT OF THE EXAMINATION OF THE DEFENDANT'S MENTAL, EMOTIONAL AND PHYSICAL CONDITION (SECTION 4.6), HAS BEEN OBTAINED AND CONSIDERED; AND

(iv) IMPOSITION OF A CONSECUTIVE SENTENCE SHOULD REQUIRE THE AFFIRMATIVE ACTION OF THE SENTENCING COURT. THE COURT SHOULD BE AUTHORIZED TO IMPOSE A CONSECUTIVE SENTENCE ONLY AFTER A FINDING THAT CONFINEMENT FOR SUCH A TERM IS NECESSARY IN ORDER TO PROTECT THE PUBLIC FROM FURTHER CRIMINAL CONDUCT BY THE DEFENDANT.

THESE LIMITATIONS SHOULD ALSO APPLY TO ANY SENTENCE FOR AN OFFENSE COMMITTED PRIOR TO THE IMPOSITION OF SENTENCE FOR ANOTHER OFFENSE, WHETHER THE PREVIOUS SENTENCE FOR THE OTHER OFFENSE HAS BEEN SERVED OR REMAINS TO BE SERVED.

KANSAS CODE

(2) Any person who commits a crime while on parole or conditional release and is convicted and sentenced therefor, shall serve such sentence concurrently or consecutively with the term or terms under which he was released, as the court directs.

(3) In calculating the time to be served on concurrent and consecutive sentences, the following rules shall apply:

(a) When indeterminate terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum term and the shorter maximum terms merge in and are satisfied by conditional release or discharge on the longest maximum term if such terms are imposed on the same date.

(b) When concurrent terms are imposed on different dates computation will be made to determine which term or terms require the longest period of incarceration to reach parole eligibility, conditional release and net maximum dates, and that sentence will be considered the controlling sentence. The parole eligibility date may be computed and projected on one sentence and the conditional release date and net maximum may be computed and projected on one sentence and the conditional release date and net maximum may be computed and projected from another to determine the controlling sentence.

(c) When indeterminate terms imposed on the same date are to be served consecutively, the minimum terms are added to arrive at an

aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum terms are added to arrive at an aggregate maximum equal to the sum of all maximum terms.

(d) When indeterminate sentences are imposed to be served consecutively to sentences previously imposed in any other court, or the sentencing court, the aggregated minimum and maximums shall be computed from the date of the earliest sentence and commitment to which additional sentences are imposed as consecutive for the purpose of determining the sentence begins date, parole eligibility, conditional release and net maximum dates.

(e) When consecutive sentences are imposed which are to be served consecutive to sentences for which a prisoner has been on probation, parole or conditional release, the parole eligibility, conditional release and net maximum dates shall be adjusted by the amount of time served on probation, parole or conditional release.

(4) When a definite and an indefinite term run consecutively, the period of the definite term is added to both the minimum and maximum of the indeterminate term and both sentences are satisfied by serving the indeterminate term. (K.S.A. 1971 Supp. 21-4608 (2) to (4)). (See also K.S.A. 1971 Supp. 21-4608 (1) at 3.4 (a), supra).

COMMENT

Kansas does not comply with the Standard. Notwithstanding the absence of statutory limitations, the sentencing court probably has power to observe the conditions of the Standard in the imposition of sentence.

ABA STANDARD

(c) CORRECTIONS AND PAROLE AUTHORITIES SHOULD BE DIRECTED TO CONSIDER AN OFFENDER COMMITTED UNDER MULTIPLE SENTENCES AS THOUGH HE HAD BEEN COMMITTED FOR A SINGLE TERM THE LIMITS OF WHICH WERE DEFINED BY THE CUMULATIVE EFFECT OF THE MULTIPLE SENTENCES.

KANSAS CODE

See K.S.A. 21-4608 (3) (d) and (4) (1974), supra.

COMMENT

Kansas complies with the Standard.

ABA STANDARD

3.5 MULTIPLE OFFENSES: DIFFERENT STATES.

(a) THE FAILURE TO INTEGRATE PRISON SENTENCES FOR CRIMES COMMITTED IN DIFFERENT STATES SERIOUSLY INHIBITS A CONSISTENT, COHERENT TREATMENT PROGRAM DURING CONFINEMENT. SIMILARLY, DETAINERS TYPICALLY PREVENT THE PHASING OF THE INDIVIDUAL BACK INTO THE COMMUNITY AT THE OPTIMAL TIME. IT IS THEREFORE HIGHLY DESIRABLE THAT MULTIPLE SENTENCES OF IMPRISONMENT IMPOSED BY DIFFERENT STATES BE SERVED AT ONE TIME AND UNDER ONE CORRECTIONAL AUTHORITY. IT IS ALSO DESIRABLE THAT ALL OUTSTANDING CHARGES OF OFFENSES COMMITTED IN DIFFERENT STATES BE DISPOSED OF PROMPTLY. METHODS OF IMPLEMENTING THESE PRINCIPLES BY NECESSARY INTERSTATE AND FEDERAL-STATE AGREEMENTS SHOULD BE EXPLORED AND EFFECTED.

(b) AS A PRELIMINARY AND IMMEDIATE STEP TOWARDS THE SOLUTION OF THESE PROBLEMS, THE LEGISLATURE SHOULD REQUIRE THAT SENTENCING COURTS CONSIDER ALL PRISON SENTENCES IMPOSED IN OTHER STATES, BOTH THOSE WHICH HAVE BEEN SERVED AND THOSE WHICH REMAIN TO BE SERVED. THE FOLLOWING GENERAL PRINCIPLES SHOULD APPLY IN SUCH CASES:

(i) THE COURT SHOULD NOT BE EMPOWERED TO IMPOSE A SENTENCE WHICH WHEN ADDED TO THE OUT-OF-STATE SENTENCES WOULD EXCEED ANY LIMITATIONS (SECTION 3.4) WHICH WOULD BE IN EFFECT HAD ALL OF THE OFFENSES OCCURRED WITHIN THE STATE OF THE SENTENCING COURT;

(ii) THE COURT SHOULD BE AUTHORIZED TO IMPOSE A SENTENCE TO RUN CONCURRENTLY WITH OUT-OF-STATE SENTENCES, EVEN THOUGH THE TIME WILL BE SERVED IN AN OUT-OF-STATE INSTITUTION;

(iii) SENTENCES TO BE SERVED CONSECUTIVELY TO AN OUT-OF-STATE SENTENCE ARE RARELY APPROPRIATE. IMPOSITION OF SUCH A SENTENCE SHOULD REQUIRE THE AFFIRMATIVE ACTION OF THE SENTENCING COURT, AND SHOULD BE PERMITTED ONLY AFTER A FINDING THAT CONFINEMENT FOR SUCH A TERM IS NECESSARY IN ORDER TO PROTECT THE PUBLIC FROM FURTHER CRIMINAL CONDUCT BY THE DEFENDANT.

(c) SUBJECT TO ANY PERMISSIBLE CUMULATION OF SENTENCES BY THE SENTENCING COURT (SUBSECTION [b]), THE LEGISLATURE SHOULD ALSO DIRECT THAT PRISON AUTHORITIES AUTOMATICALLY AWARD CREDIT AGAINST THE MAXIMUM TERM AND ANY MINIMUM TERM OF AN IN-STATE SENTENCE FOR ALL TIME SERVED IN AN OUT-OF-STATE INSTITUTION SINCE THE COMMISSION OF THE OFFENSE. IN ADDITION, THE LEGISLATURE SHOULD PROVIDE THAT IN NO EVENT SHOULD DETAINERS HAVE THE EFFECT OF IMPARING OR POSTPONING PAROLE ELIGIBILITY OR IN ANY WAY AFFECTING THE CONDITIONS OF SERVING A SENTENCE.

KANSAS CODE

When a defendant is sentenced in a state court and is also under sentence from a federal court or is subject to sentence in a federal court for an offense committed prior to his sentence in state court, the court may direct that custody of the defendant may be relinquished to federal authorities and that such state sentences as are imposed may run concurrently with any federal sentence imposed. (K.S.A. 21-4608 (5) (1974)).

COMMENT

Kansas does not comply with the Standard. Except for section 21-4608 (5), the Kansas code does not deal with problems arising from unserved prison sentences in other jurisdictions. It appears that legislation will be necessary to implement this Standard.

ABA STANDARD

3.6 CREDIT.

(a) CREDIT AGAINST THE MAXIMUM TERM AND ANY MINIMUM TERM SHOULD BE GIVEN TO A DEFENDANT FOR ALL TIME SPENT IN CUSTODY AS A RESULT OF THE CRIMINAL CHARGE FOR WHICH A PRISON SENTENCE IS IMPOSED OR AS A RESULT OF THE CONDUCT ON WHICH SUCH A CHARGE IS BASED. THIS SHOULD SPECIFICALLY INCLUDE CREDIT FOR TIME SPENT IN CUSTODY PRIOR TO TRIAL, DURING TRIAL, PENDING SENTENCE, PENDING THE RESOLUTION OF AN APPEAL, AND PRIOR TO ARRIVAL AT THE INSTITUTION TO WHICH THE DEFENDANT HAS BEEN COMMITTED.

KANSAS CODE

In any criminal action in which the defendant is convicted upon a plea of guilty or trial by court or jury, the judge, if he sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and his parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the journal entry of conviction, such date shall be established to reflect and shall be computed as an allowance for the time which the defendant has spent in

jail pending the disposition of the defendant's case. In recording the commencing date of such sentence the date as specifically set forth by the court in the journal entry of conviction shall be used as 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. Such jail time credit is not to be considered to reduce the minimum or maximum terms of confinement as are authorized by law for the offense of which the defendant has been convicted. (K.S.A. 21-4614 (1974)).

(1) A defendant who is found to be incompetent to stand trial shall be committed for treatment to any appropriate state, county or private institution during the continuance of that condition. Upon application of the defendant and in the discretion of the court, the defendant may be released to any appropriate private institution upon terms and conditions as the court may prescribe.

(2) When reasonable grounds exist to believe that a defendant who has been adjudged incompetent to stand trial is now competent the court in which the criminal case is pending shall conduct a hearing in accordance with section 22-3302 to determine the person's present mental condition. Reasonable notice of such hearings shall be given to the prosecuting attorney, the defendant and to his attorney of record, if any. If the court, following such hearing, finds the defendant to be competent the proceedings pending against him shall be resumed.

(3) A defendant committed to a public institution under the provisions of this section who is thereafter sentenced for the crime charged at the time of his commitment may be credited with all or any part of the time during which he was committed and confined in such public institution. (K.S.A. 22-3303 (1974)).

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(b) CREDIT AGAINST THE MAXIMUM TERM AND ANY MINIMUM TERM SHOULD BE GIVEN TO A DEFENDANT FOR ALL TIME SPENT IN CUSTODY UNDER A PRIOR SENTENCE IF HE IS LATER RE-PROSECUTED AND RE-SENTENCED FOR THE SAME OFFENSE OR FOR ANOTHER OFFENSE BASED ON THE SAME CONDUCT. IN THE CASE OF SUCH A RE-PROSECUTION, THIS SHOULD INCLUDE CREDIT IN ACCORDANCE WITH SUBSECTION (a) FOR ALL TIME SPENT IN CUSTODY AS A RESULT OF BOTH THE ORIGINAL CHARGE AND ANY SUBSEQUENT CHARGE FOR THE SAME OFFENSE OR FOR ANOTHER OFFENSE BASED ON THE SAME CONDUCT.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas complies with the Standard. In Jackson v. State, 204 Kan. 841, 466 P.2d 305 (1970), the Supreme Court held that where a new and valid sentence is substituted for a void sentence, the prisoner is entitled to be credited with time already served.

ABA STANDARD

(c) IF A DEFENDANT IS SERVING MULTIPLE SENTENCES, AND IF ONE OF THE SENTENCES IS SET ASIDE AS THE RESULT OF DIRECT OR COLLATERAL ATTACK, CREDIT AGAINST THE MAXIMUM TERM AND ANY MINIMUM TERM OF THE REMAINING SENTENCES SHOULD BE GIVEN FOR ALL TIME SERVED SINCE THE COMMISSION OF THE OFFENSES ON WHICH THE SENTENCES WERE BASED.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas complies with the Standard. There is no Kansas code provision or reported decision on the point. However, consistent with Jackson v. State, supra, it would seem likely that credit would be given under these circumstances.

ABA STANDARD

(d) IF THE DEFENDANT IS ARRESTED ON ONE CHARGE AND LATER PROSECUTED ON ANOTHER CHARGE GROWING OUT OF CONDUCT WHICH OCCURRED PRIOR TO HIS ARREST, CREDIT AGAINST THE MAXIMUM TERM AND ANY MINIMUM TERM OF ANY SENTENCE RESULTING FROM SUCH PROSECUTION SHOULD BE GIVEN FOR ALL TIME SPENT IN CUSTODY UNDER THE FORMER CHARGE WHICH HAS NOT BEEN CREDITED AGAINST ANOTHER SENTENCE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas probably complies with the Standard to the extent indicated at 3.6, supra. However, there is no code provision or case law that provides authority for this position.

ABA STANDARD

(e) THE CREDIT REQUIRED TO BE GIVEN BY THIS SECTION SHOULD BE AWARDED BY THE PROCEDURE SPECIFIED IN SECTION 5.8.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas probably does not comply with the Standard. See Comment following 5.8, infra.

ABA STANDARD

3.7 REDUCTION OF CONVICTION.

IF THE DEFENDANT HAS BEEN CONVICTED OF A FELONY, AND IF THE COURT, CONSIDERING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTER OF THE DEFENDANT, CONCLUDES THAT IT WOULD BE UNDULY HARSH TO SENTENCE THE DEFENDANT TO THE TERM NORMALLY APPLICABLE TO THE OFFENSE, THE COURT SHOULD BE AUTHORIZED TO REDUCE THE OFFENSE TO A LOWER CATEGORY OF FELONY, OR TO A MISDEMEANOR, AND TO IMPOSE SENTENCE ACCORDINGLY.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas does not comply with the Standard. However, the court might under the circumstances stated, set aside the conviction and order a new trial. See K.S.A. 1971 Supp. 22-3501.

ABA STANDARD

3.8 RE-SENTENCES.

WHERE A CONVICTION OR SENTENCE HAS BEEN SET ASIDE ON DIRECT OR COLLATERAL ATTACK, THE LEGISLTURE SHOULD PROHIBIT A NEW SENTENCE FOR THE SAME OFFENSE OR A DIFFERENT OFFENSE BASED ON THE SAME CONDUCT WHICH IS MORE SEVERE THAN THE PRIOR SENTENCE LESS TIME ALREADY SERVED.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas complies with the Standard as a result of judicial decision and not legislative action.

In State v. Daegele, 206 Kan. 379, 479 P.2d 891, (1970) the Supreme Court held that upon resentencing the trial court is limited to a consideration of identical facts existing when the original sentence was imposed.

ABA STANDARD

PART IV. INFORMATIONAL BASIS FOR SENTENCE

4.1 PRESENTENCE REPORT: GENERAL PRINCIPLES.

(a) THE LEGISLATURE SHOULD SUPPLY ALL COURTS TRYING CRIMINAL CASES WITH THE RESOURCES AND SUPPORTING STAFF TO PERMIT A PRESENTENCE INVESTIGATION AND A WRITTEN REPORT OF ITS RESULTS IN EVERY CASE.

KANSAS CODE

The secretary of corrections shall appoint probation and parole officers in a number sufficient to administer the provisions of this act. Such probation and parole officers shall be within the classified service of the Kansas civil service act. All probation and parole officers employed by the state director of probation and parole with the approval of the board of probation and parole under the provisions of K.S.A. 22-3713 (1974), immediately prior to the effective date of this act shall be employed in the same or comparable positions by the secretary of corrections and shall retain all rights and status acquired under the provision of the Kansas civil service act. Nothing contained in this section shall be construed to alter or change the retirement plan or retirement status of the employees who under the provisions of this section are placed under the control of the secretary. Probation or parole officers shall have and exercise police powers to the same extent as other law enforcement officers and such powers may be exercised by them anywhere within the state. Probation and parole officers shall, in addition to their regular compensation, receive their actual and necessary traveling and other expenses incurred in the performance of their official duties. (K.S.A. 1974 Supp. 75-5214).

In any judicial district in this state composed of a single county and now having, or which may hereafter have three (3) or more divisions of the district court, the judges of the district court of such judicial district may create a board of paroles, to be known as such, which shall be composed of the judges of the district court of such district. The senior judge in point of

service shall be ex officio chairman of said board of paroles; and the clerk of the district court shall be ex officio clerk of said board of paroles, but said clerk shall have no vote. Said judges may appoint a parole officer or such parole officers as may be deemed necessary to perform the duties required by the board: Provided, That the bailiffs of the courts in such judicial districts may serve as parole officers in addition to their duties as bailiffs. Said parole officer or officers shall perform such duties as may be required by the board of paroles and shall also perform such other duties as may be required by the judges of the district court, said officer or officers to serve at the pleasure of the judges, but said parole officer or officers shall have no vote. (K.S.A. 20-2301 (1974)).

The secretary shall be responsible for such parole and probation investigations and supervision as may be requested by the courts or by the Kansas adult authority. He shall divide the state into districts and assign probation and parole officers to serve in the various districts and courts, and shall obtain officer quarters for staff in each district as may be necessary. He shall assign the secretarial, bookkeeping and accounting work to clerical employees, including receipt and disbursement of money. He shall direct the work of the probation and parole officers and other employees assigned to him; shall formulate methods of investigation, supervision, record keeping and reports; shall conduct training courses for the staff; and shall seek to cooperate with all agencies, public and private, which are concerned with the treatment or welfare of persons on probation or parole. (K.S.A. 1974 Supp. 75-5215).

Probation and parole officers shall investigate all persons referred to them for investigation by the secretary or by any court in which they are authorized to serve. They

shall furnish to each person released under their supervision a written statement of the conditions of probation or parole and shall instruct him regarding these conditions. They shall keep informed of his conduct and condition and use all suitable methods to aid and encourage him and to bring about improvement in his conduct and condition. Probation and parole officers shall keep detailed records of their work; and shall make such reports in writing and perform such other duties as may be incidental to those above enumerated as the court or secretary may require. They shall coordinate their work with that of social welfare agencies. (K.S.A. 1974 Supp. 75-5216).

Whenever a defendant is convicted of a crime or offense, the court before whom the conviction is had may request a presentence investigation by a probation officer. Whenever an investigation is requested, the probation officer shall promptly inquire into the circumstances of the offense; the attitude of the complainant or victim, and of the victim's immediate family, where possible, in cases of homicide; and the criminal record, social history, and present condition of the defendant. All local and state police agencies shall furnish to the probation officer such criminal records as the probation officer may request. Where in the opinion of the court it is desirable, the investigation shall include a physical and mental examination of the defendant. If a defendant is committed to any institution, the investigating agency shall send a report of its investigation to the institution at the time of commitment. (K.S.A. 21-4604 (1974)).

COMMENT

Kansas partially complies with the Standard. Probation services are supplied by the state department of Probation and Parole to most of the judicial districts of the state. In single county districts having three or more divisions of the district court, of which there are four in the state, the judges of the district court are constituted as boards of parole and are authorized to employ a probation staff. Although probation service is available to all courts of the state, the probation agencies probably do not have sufficient staff and resources to permit a presentence investigation and written report in every case.

ABA STANDARD

(b) THE COURT SHOULD EXPLICITLY BE AUTHORIZED BY STATUTE TO CALL FOR SUCH AN INVESTIGATION AND REPORT IN EVERY CASE. THE STATUTE SHOULD ALSO PROVIDE THAT SUCH AN INVESTIGATION AND REPORT SHOULD BE MADE IN EVERY CASE WHERE INCARCERATION FOR ONE YEAR OR MORE IS A POSSIBLE DISPOSITION, WHERE THE DEFENDANT IS LESS THAN [21] YEARS OLD, OR WHERE THE DEFENDANT IS A FIRST OFFENDER, UNLESS THE COURT SPECIFICALLY ORDERS TO THE CONTRARY IN A PARTICULAR CASE.

(c) STANDARDS RELATING TO THE PREPARATION AND CONTENTS OF THE PRESENTENCE REPORT WILL BE DEVELOPED IN A SEPARATE REPORT ON PROBATION.

KANSAS CODE

See K.S.A. 21-4604 (1974) at 4.1 (a), supra.

COMMENT

Kansas partially complies with the Standard. While a sentencing court has the authority to request an investigation by a probation officer in the case of every conviction, the statute does not require such an investigation report in cases where incarceration for one year or more is a possible disposition, where the defendant is less than twenty-one years old or where the defendant is a first offender. The use of the presentence investigation service is wholly optional with the sentencing court. (State v. Johnson, 201 Kan. 126, 439 P.2d 86 (1968)).

ABA STANDARD

4.2 PRESENTENCE REPORT: WHEN PREPARED.

(a) EXCEPT AS AUTHORIZED IN SUBSECTION (b), THE PRESENTENCE INVESTIGATION SHOULD NOT BE INITIATED UNTIL THERE HAS BEEN AN ADJUDICATION OF GUILT.

(b) IT IS APPROPRIATE TO COMMENCE THE PRESENTENCE INVESTIGATION PRIOR TO AN ADJUDICATION OF GUILT ONLY IF:

(i) THE DEFENDANT, WITH THE ADVICE OF COUNSEL IF HE SO DESIRES, HAS CONSENTED TO SUCH ACTION; AND

(ii) ADEQUATE PRECAUTIONS ARE TAKEN TO ASSURE THAT NOTHING DISCLOSED BY THE PRESENTENCE INVESTIGATION COMES TO THE ATTENTION OF THE PROSECUTION, THE COURT, OR THE JURY PRIOR TO AN ADJUDICATION OF GUILT. THE COURT SHOULD BE AUTHORIZED, HOWEVER, TO EXAMINE THE REPORT PRIOR TO THE ENTRY OF A PLEA ON REQUEST OF THE DEFENSE AND THE PROSECUTION.

KANSAS CODE

See K.S.A. 1971 Supp. 21-4604.

COMMENT

Kansas complies substantially with the Standard. The Kansas code contains no authorization for a presentence investigation prior to conviction.

ABA STANDARD

4.3 PRESENTENCE REPORT: DISCLOSURE; GENERAL PRINCIPLES.

THE PRESENTENCE REPORT SHOULD NOT BE A PUBLIC RECORD. IT SHOULD BE AVAILABLE ONLY TO THE FOLLOWING PERSONS OR AGENCIES UNDER THE CONDITIONS STATED:

(i) THE REPORT SHOULD BE AVAILABLE TO THE SENTENCING COURT FOR THE PURPOSE OF ASSISTING IT IN DETERMINING THE SENTENCE. THE REPORT SHOULD ALSO BE AVAILABLE TO ALL JUDGES WHO ARE TO PARTICIPATE IN A SENTENCING COUNCIL DISCUSSION OF THE DEFENDANT (SECTION 7.1);

(ii) THE REPORT SHOULD BE AVAILABLE TO PERSONS OR AGENCIES HAVING A LEGITIMATE PROFESSIONAL INTEREST IN THE INFORMATION LIKELY TO BE CONTAINED THEREIN. EXAMPLES OF SUCH PERSONS OR AGENCIES WOULD BE A PHYSICIAN OR PSYCHIATRIST APPOINTED TO ASSIST THE COURT IN SENTENCING, AN EXAMINING FACILITY, A CORRECTIONAL INSTITUTION, OR A PROBATION OR PAROLE DEPARTMENT;

(iii) THE REPORT SHOULD BE AVAILABLE TO REVIEWING COURTS WHERE RELEVANT TO AN ISSUE ON WHICH AN APPEAL HAS BEEN TAKEN;

(iv) THE REPORT SHOULD BE AVAILABLE TO THE PARTIES UNDER THE CONDITIONS STATED IN SECTION 4.4.

KANSAS CODE

> The judge shall make the presentence report, any report that may be received from the diagnostic center, and other diagnostic reports, available to the attorney for the state and to the counsel for the defendant when requested by them, or either of them. Such reports shall be part of the record but shall be sealed and opened only on order of the court.
>
> If a defendant is committed to a state institution such reports shall be sent to the director of penal institutions. (K.S.A. 1971 Supp. 21-4605).

COMMENT

Kansas complies with the Standard. Part (iii) is not applicable in Kansas.

ABA STANDARD

4.4 PRESENTENCE REPORT: DISCLOSURE; PARTIES.

(a) FUNDAMENTAL FAIRNESS TO THE DEFENDANT REQUIRES THAT THE SUBSTANCE OF ALL DEROGATORY INFORMATION WHICH ADVERSELY AFFECTS HIS INTERESTS AND WHICH HAS NOT OTHERWISE BEEN DISCLOSED IN OPEN COURT SHOULD BE CALLED TO THE ATTENTION OF THE DEFENDANT, HIS ATTORNEY, AND OTHERS WHO ARE ACTING ON HIS BEHALF.

(b) THIS PRINCIPLE SHOULD BE IMPLEMENTED BY REQUIRING THAT THE SENTENCING COURT PERMIT THE DEFENDANT'S ATTORNEY, OR THE DEFENDANT HIMSELF IF HE HAS NO ATTORNEY, TO INSPECT THE REPORT. THE PROSECUTION SHOULD ALSO BE SHOWN THE REPORT IF IT IS SHOWN TO THE DEFENSE. IN EXTRAORDINARY CASES, THE COURT SHOULD BE PERMITTED TO EXCEPT FROM DISCLOSURE PARTS OF THE REPORT WHICH ARE NOT RELEVANT TO A PROPER SENTENCE, DIAGNOSTIC OPINION WHICH MIGHT SERIOUSLY DISRUPT A PROGRAM OF REHABILITATION, OR SOURCES OF INFORMATION WHICH HAS BEEN OBTAINED ON A PROMISE OF CONFIDENTIALITY. IN ALL CASES WHERE PARTS OF THE REPORT ARE NOT DISCLOSED UNDER SUCH AUTHORITY, THE COURT SHOULD BE REQUIRED TO STATE FOR THE RECORD THE REASONS FOR ITS ACTION AND TO INFORM THE DEFENDANT AND HIS ATTORNEY THAT INFORMATION HAS NOT BEEN DISCLOSED. THE ACTION OF THE COURT IN EXCEPTING INFORMATION FROM DISCLOSURE SHOULD BE SUBJECT TO APPELLATE REVIEW.

(c) THE RESOLUTION OF ANY CONTROVERSY AS TO THE ACCURACY OF THE PRESENTENCE REPORT SHOULD BE GOVERNED BY THE PRINCIPLES STATED IN SECTIONS 4.5 (b), 5.3 (d), 5.3 (f), AND 5.4 (a).

KANSAS CODE

See K.S.A. 1971 Supp. 21-4605 at 4.3, supra.

COMMENT

Kansas complies with the Standard. The Kansas statute requires that the presentence report and supporting data be shown to the prosecuting attorney and counsel to the defendant, or either of them, upon request. Thus, it appears that there is substantial compliance with the Standard. But, there is no provision for excepting parts of the report from disclosure in the interests of the rehabilitation program or for the purpose of protecting sources of information obtained on a promise of confidentiality. Also, there is no procedure provided for resolving controversies as to the accuracy of the presentence report.

ABA STANDARD

4.5 PRESENTENCE REPORT: TIME OF DISCLOSURE: PRESENTENCE CONFERENCE.

(a) THE INFORMATION MADE AVAILABLE TO THE PARTIES UNDER SECTION 4.4 SHOULD BE DISCLOSED SUFFICIENTLY PRIOR TO THE IMPOSITION OF SENTENCE AS TO AFFORD A REASONABLE OPPORTUNITY FOR VERIFICATION.

(b) IN CASES WHERE THE PRESENTENCE REPORT HAS BEEN OPEN TO INSPECTION, EACH PARTY SHOULD BE REQUIRED PRIOR TO THE SENTENCING PROCEEDING TO NOTIFY THE OPPOSING PARTY AND THE COURT OF ANY PART OF THE REPORT WHICH HE INTENDS TO CONTROVERT BY THE PRODUCTION OF EVIDENCE. IT MAY THEN BE ADVISABLE FOR THE COURT AND THE PARTIES TO DISCUSS THE POSSIBILITY OF AVOIDING THE RECEPTION OF EVIDENCE BY A STIPULATION AS TO THE DISPUTED PART OF THE REPORT. A RECORD OF THE RESOLUTION OF ANY ISSUE AT SUCH A CONFERENCE SHOULD BE PRESERVED FOR INCLUSION IN THE RECORD OF THE SENTENCING PROCEEDING (SECTION 5.7 [a] [iii]).

KANSAS CODE

No comparable Kansas code provision.

COMMENT

The Kansas code does not comply with the Standard. Presumably the procedure suggested in Standard 4.5 could be implemented by a local rule or policy.

ABA STANDARD

4.6 ADDITIONAL SERVICES.

(a) THE SENTENCING DECISION IS OF SUCH COMPLEXITY THAT EACH SENTENCING COURT MUST HAVE AVAILABLE TO IT A BROAD RANGE OF SERVICES AND FACILITIES FROM WHICH IT CAN OBTAIN MORE COMPLETE INFORMATION ABOUT THE DEFENDANT'S MENTAL, EMOTIONAL AND PHYSICAL CONDITION THAN CAN BE AFFORDED IN THE PRESENTENCE REPORT. THE COURT SHOULD BE ABLE TO EMPLOY SUCH SERVICES IN ANY CASE IN WHICH MORE DETAILED INFORMATION OF THIS TYPE IS DESIRED AS THE BASIS FOR A SENTENCE.

(b) THE NEED FOR SUCH ADDITIONAL SERVICES CAN AND SHOULD BE MET BY A COMBINATION OF LOCAL SERVICES OR FACILITIES, SUCH AS BY AUTHORITY TO EMPLOY LOCAL PHYSICIANS OR CLINICS ON A CASE-BY-CASE BASIS, AND OF REGIONAL, STATEWIDE OR NATIONWIDE SERVICES OR FACILITIES, SUCH AS A CENTRAL RECEPTION AND DIAGNOSTIC CENTER.

(c) THERE IS AN URGENT NEED FOR THE VARIOUS DISCIPLINES WHICH ARE IN A POSITION TO PROVIDE SUCH SERVICES TO DEVELOP PROFESSIONAL STANDARDS BY WHICH HIGH QUALITY CAN BE ASSURED.

(d) REPORTS WHICH RESULT FROM THE USE OF SUCH SERVICES OR FACILITIES SHOULD BE SUBJECT TO THE SAME DISCLOSURE AND VERIFICATION PROVISIONS AS THOSE WHICH GOVERN PRESENTENCE REPORTS (SECTIONS 4.3 - 4.5, 5.4).

KANSAS CODE

> After conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 1969 Supp. 21-4604, the trial judge may order the defendant committed to a state hospital or any suitable local mental health facility for mental examination, evaluation and report. If adequate private facilities are available and if the defendant is willing to assume the expense thereof such commitment may be to a private hospital. A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not be detained for more than 120 days under a commitment made under this section. (K.S.A. 1971 Supp. 22-3429).

COMMENT

Kansas complies with the Standard to the extent that the code permits psychiatric examination as part of the presentence investigation. On the other hand, the implementation of the code provision may be limited by want of available facilities.

ABA STANDARD

PART V. SENTENCING PROCEDURES

5.1 SENTENCING JUDGE.

(a) IF GUILT WAS DETERMINED AFTER A TRIAL, THE JUDGE WHO PRESIDED AT THE TRIAL SHOULD IMPOSE THE SENTENCE UNLESS THERE ARE COMPELLING REASONS IN A SPECIFIC CASE TO PROVIDE OTHERWISE. TO ACCOMMODATE CASES WHERE IT BECOMES NECESSARY FOR ANOTHER JUDGE TO IMPOSE THE SENTENCE, A SYSTEM SHOULD BE ESTABLISHED TO ACQUAINT THE NEW JUDGE WITH WHAT OCCURRED AT THE TRIAL.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas practice complies with the Standard.

ABA STANDARD

(b) IF GUILT WAS DETERMINED BY PLEA, IT IS STILL DESIRABLE THAT THE SAME JUDGE WHO ACCEPTED THE PLEA IMPOSE THE SENTENCE. IT IS RECOGNIZED, HOWEVER, THAT THE ROTATION PRACTICES OF MANY COURTS MAKE IT IMPOSSIBLE IN MANY INSTANCES FOR THE SAME JUDGE TO SIT IN BOTH CAPACITIES. IN ANY EVENT, THE JUDGE WHO IMPOSES SENTENCE SHOULD ASCERTAIN THE FACTS CONCERNING THE PLEA AND THE OFFENSE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas practice complies with the Standard.

ABA STANDARD

(c) MANAGEMENT OF THE DOCKET SHOULD BE CONTROLLED BY THE COURT AND SHOULD NOT BE SUBJECT TO MANIPULATION BY EITHER PARTY. WHERE POSSIBLE, IT IS DESIRABLE THAT THE SAME JUDGE SENTENCE ALL DEFENDANTS WHO WERE INVOLVED IN THE SAME OFFENSE.

KANSAS CODE

> In every judicial district having more than one division, the Supreme Court may designate an administrative judge who shall have general control over the assignment of cases within said district subject to supervision by the Supreme Court. (K.S.A. 1971 Supp. 20-329).
>
> "... the judges of each judicial district comprised of one county which has more than one judge, shall by rule provide for the assignment of the various cases, both civil and criminal, in the district, to the individual judges." (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 120).

COMMENT

Kansas complies with the Standard.

ABA STANDARD

5.2 MULTIPLE OFFENSES: CONSOLIDATION FOR SENTENCING; PLEADING TO PRIOR OFFENSES.

(a) TO THE EXTENT POSSIBLE, ALL OUTSTANDING CONVICTIONS SHOULD BE CONSOLIDATED FOR SENTENCING AT ONE TIME. ALL OUTSTANDING CHARGES SHOULD BE DISPOSED OF PROMPTLY AND SHOULD LIKEWISE BE CONSOLIDATED FOR SENTENCING AT ONE TIME. CHARGES FILED AFTER SENTENCING SHOULD BE PROMPTLY PROSECUTED. ANY SENTENCE IMPOSED ON AN OFFENDER ALREADY UNDER SENTENCE FOR ANOTHER OFFENSE SHOULD BE INTEGRATED WITH THE PRIOR SENTENCE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas partially complies with the Standard. The Kansas code makes no provision for consolidation of other convictions for sentencing in the instant proceeding. At the same time, the code contemplates the integration of sentences presently imposed with those for which the offender is already under sentence. Also, Kansas has enacted the Uniform Mandatory Disposition of Detainers Act (K.S.A. 1971 Supp. 22-4301, et seg.) which requires prompt disposition of prosecutions against imprisoned persons.

ABA STANDARD

(b) AFTER CONVICTION AND BEFORE SENTENCE, THE DEFENDANT SHOULD BE PERMITTED TO PLEAD GUILTY TO OTHER OFFENSES HE HAS COMMITTED WHICH ARE WITHIN THE JURISDICTION OF THE SENTENCING COURT OR ANY OTHER COURT OF COORDINATE OR INFERIOR JURISDICTION IN THE SAME STATE. IT MAY BE APPROPRIATE TO PROVIDE THAT THE PLEA SHOULD NOT BE ACCEPTED WITHOUT THE WRITTEN CONSENT OF THE OFFICIAL RESPONSIBLE FOR PROSECUTING THE CHARGE. SUBMISSION OF SUCH A PLEA SHOULD CONSTITUTE A WAIVER OF ANY OBJECTIONS WHICH THE DEFENDANT OTHERWISE MIGHT HAVE TO VENUE OR, WHERE NO CHARGE HAS YET BEEN FILED, TO FORMAL CHARGE. IF SUCH A PLEA IS TENDERED AND ACCEPTED, THE COURT SHOULD SENTENCE THE DEFENDANT FOR ALL OF THE OFFENSES IN ONE PROCEEDING, SUBJECT TO THE LIMITATIONS ON CONSECUTIVE SENTENCES STATED IN SECTION 3.4.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas does not comply with the Standard.

ABA STANDARD

5.3 DUTIES OF COUNSEL.

(a) THE DUTIES OF THE PROSECUTION AND DEFENSE ATTORNEYS DO NOT CEASE UPON CONVICTION. WHILE IT SHOULD BE RECOGNIZED THAT SENTENCING IS THE FUNCTION OF THE COURT, THE ATTORNEYS NEVERTHELESS HAVE A DUTY OF ASSISTING THE COURT IN AS HELPFUL A MANNER AS POSSIBLE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas practice probably complies with the Standard. The Kansas code does not spell out the duties of counsel at the sentencing stage. On the other hand, Kansas has adopted the code of professional responsibility and to the extent that specific responsibilities can be inferred from that code, they are matters of duty under the Kansas practice.

For a more comprehensive comment, with respect to the duties of counsel at the sentencing stage, see analysis of Standards relating to the Prosecution Function and the Defense Function.

ABA STANDARD

(b) THE PROSECUTOR SHOULD RECOGNIZE THAT THE SEVERITY OF THE SENTENCE IS NOT NECESSARILY AN INDICATION OF THE EFFECTIVENESS OR THE EFFICIENCY OF HIS OFFICE. IN ADDITION, THE PROSECUTOR, NO LESS THAN THE JUDGE, HAS THE DUTY TO RESIST CLAMOR BY THE MEDIA OF PUBLIC COMMUNICATIONS.

(c) UNLESS ASKED BY THE SENTENCING COURT, OR UNLESS THE PRODUCT OF PLEA DISCUSSIONS OR AGREEMENT, THE PROSECUTOR ORDINARILY SHOULD NOT MAKE ANY SPECIFIC RECOMMENDATIONS AS TO THE APPROPRIATE SENTENCE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Available information is not available to determine if Kansas complies with the Standard. Generalizations are probably impossible as to the attitudes of Kansas prosecutors toward the severity of sentence and his disposition to recommend sentences to the court. There are 105 prosecutors in the state, each of whom is an autonomous officer. In the absence of code provision, there is probably a considerable amount of variation from one county to another.

ABA STANDARD

(d) THE DUTIES OF THE PROSECUTOR WITH RESPECT TO EACH SPECIFIC SENTENCE SHOULD INCLUDE THE FOLLOWING STEPS:

(i) THE PROSECUTOR SHOULD SATISFY HIMSELF THAT THE FACTUAL BASIS FOR THE SENTENCE WILL BE BOTH ADEQUATE AND ACCURATE, AND THAT THE RECORD OF THE SENTENCING PROCEEDING WILL ACCURATELY REFLECT RELEVANT CIRCUMSTANCES OF THE OFFENSE AND CHARACTERISTICS OF THE DEFENDANT WHICH WERE NOT DISCLOSED DURING THE GUILT PHASE OF THE CASE:

(a) IF THE PROSECUTOR HAS ACCESS TO THE PRESENTENCE REPORT, HE SHOULD MEASURE IT AGAINST INFORMATION AT HIS DISPOSAL AND PREPARE HIMSELF TO AMPLIFY PARTS WHICH DO NOT SUFFICIENTLY REVEAL MATTERS WHICH ARE RELEVANT TO A PROPER SENTENCE. THE PROSECUTOR SHOULD ALSO TAKE PROPER STEPS TO CONTROVERT ANY INACCURACIES IN THE REPORT. THE FIRST SUCH STEP SHOULD NORMALLY INVOLVE AN ATTEMPT TO AVOID THE FORMAL PRODUCTION OF EVIDENCE IN OPEN COURT BY REACHING AN INFORMAL AGREEMENT WITH THE DEFENSE ATTORNEY;

(b) IF THE PROSECUTOR DOES NOT HAVE ACCESS TO THE PRESENTENCE REPORT, HE SHOULD PRESENT AT THE SENTENCING PROCEEDING THOSE FACTS AT HIS DISPOSAL WHICH ARE NOT KNOWN BY HIM TO BE BEFORE THE COURT AND WHICH ARE RELEVANT TO A PROPER SENTENCE;

(ii) THE PROSECUTOR SHOULD DISCLOSE TO THE DEFENSE AND TO THE COURT AT OR PRIOR TO THE SENTENCING PROCEEDING ALL INFORMATION IN HIS FILES WHICH IS FAVORABLE TO THE DEFENDANT ON THE SENTENCING ISSUE;

(iii) IF A PLEA WAS THE RESULT OF PLEA DISCUSSIONS OR AN AGREEMENT WHICH INCLUDED A POSITION ON THE SENTENCE, THE PROSECUTOR SHOULD DISCLOSE ITS TERMS TO THE COURT;

(iv) THE PROSECUTOR SHOULD DETERMINE WHETHER THERE ARE GROUNDS FOR THE IMPOSITION OF A SPECIAL TERM BASED ON PARTICULAR CHARACTERISTICS OF THE DEFENDANT (SECTIONS 2.5 (b), 3.1 (c), 3.3). IF HE FINDS SUCH GROUNDS, HE SHOULD CAUSE THE NOTICE CONTEMPLATED BY SECTION 5.5 (b) (i) TO BE SERVED ON THE DEFENDANT AND HIS ATTORNEY. HE MAY THEN PREPARE A FACTUAL CASE FOR PRESENTATION AT THE SENTENCING PROCEEDING.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas partially complies with the Standard. See Comment at 5.3 (a), supra. As to (d) (iii), Kansas is in conformity. See State v. Caldwell, 208 K. 674, 493 P. 2d 235 (1972) and comments under "Pleas of Guilty."

ABA STANDARD

(e) THE DEFENSE ATTORNEY SHOULD RECOGNIZE THAT THE SENTENCING STAGE IS THE TIME AT WHICH FOR MANY DEFENDANTS THE MOST IMPORTANT SERVICE OF THE ENTIRE PROCEEDING CAN BE PERFORMED.

(f) THE DUTIES OF THE DEFENSE ATTORNEY WITH RESPECT TO EACH SPECIFIC SENTENCE SHOULD INCLUDE THE FOLLOWING STEPS:

(i) THE ATTORNEY SHOULD FAMILIARIZE HIMSELF WITH ALL OF THE SENTENCING ALTERNATIVES THAT ARE AVAILABLE FOR THE OFFENSE OF WHICH HIS CLIENT HAS BEEN CONVICTED AND WITH COMMUNITY AND OTHER FACILITIES WHICH MAY BE OF ASSISTANCE IN A PLAN FOR MEETING THE NEEDS OF THE DEFENDANT. SUCH PREPARATION SHOULD ALSO INCLUDE FAMILIARIZATION WITH THE PRACTICAL CONSEQUENCES OF DIFFERENT SENTENCES, AND WITH THE NORMAL PATTERN OF SENTENCES FOR THE OFFENSE INVOLVED;

(ii) THE ATTORNEY SHOULD EXPLAIN THE CONSEQUENCES OF THE LIKELY SENTENCES TO THE DEFENDANT AND ASSURE HIMSELF THAT THE DEFENDANT UNDERSTANDS THE NATURE OF THE SENTENCING PROCEEDING. THE ATTORNEY SHOULD ASCERTAIN THE VIEWS OF HIS CLIENT ONCE SUCH INFORMATION HAS BEEN CONVEYED;

(iii) THE ATTORNEY SHOULD SATISFY HIMSELF THAT THE FACTUAL BASIS FOR THE SENTENCE WILL BE BOTH ADEQUATE AND ACCURATE, AND THAT THE RECORD OF THE SENTENCING PROCEEDINGS WILL ACCURATELY REFLECT RELEVANT CIRCUMSTANCES OF THE OFFENSE AND CHARACTERISTICS OF THE DEFENDANT WHICH WERE NOT DISCLOSED DURING THE GUILT PHASE OF THE CASE:

(a) IF THE ATTORNEY HAS ACCESS TO THE PRESENTENCE REPORT, THIS DUTY SHOULD AT A MINIMUM INVOLVE VERIFICATION OF THE ESSENTIAL BASES OF THE REPORT AND AMPLIFICATION AT THE SENTENCING PROCEEDING OF PARTS WHICH SEEM TO BE INADEQUATE. THE ATTORNEY SHOULD ALSO TAKE PROPER STEPS TO CONTROVERT ANY INACCURACIES IN THE REPORT. THE FIRST SUCH STEP SHOULD NORMALLY INVOLVE AN ATTEMPT TO AVOID THE FORMAL PRODUCTION OF EVIDENCE IN OPEN COURT BY REACHING AN INFORMAL AGREEMENT WITH THE PROSECUTOR;

(b) IF THE ATTORNEY DOES NOT HAVE ACCESS TO THE PRESENTENCE REPORT, THIS DUTY SHOULD AT A MINIMUM INVOLVE AN ATTEMPT TO THE BEST OF THE MEANS AT HIS DISPOSAL TO ASCERTAIN THE RELEVANT FACTS. THE ATTORNEY SHOULD ALSO HAVE THE OBLIGATION TO PRESENT AT THE SETNENCING PROCEEDING ALL FACTS WHICH ARE NOT KNOWN BY HIM TO BE BEFORE THE COURT AND WHICH IN THE INTEREST OF HIS CLIENT OUGHT TO BE CONSIDERED IN REACHING A SENTENCE;

(iv) IF A PLEA WAS THE RESULT OF PLEA DISCUSSIONS OR AN AGREEMENT WHICH INCLUDED A POSITION OF THE PROSECUTOR ON THE SENTENCE, THE ATTORNEY SHOULD DISCLOSE ITS TERMS TO THE COURT;

(v) IN APPROPRIATE CASES, THE ATTORNEY SHOULD MAKE SPECIAL EFFORTS TO INVESTIGATE THE DESIRABILITY OF A DISPOSITION WHICH WOULD PARTICULARLY MEET THE NEEDS OF THE DEFENDANT, SUCH AS PROBATION ACCOMPANIED BY EMPLOYMENT OF COMMUNITY FACILITIES OR COMMITMENT TO AN INSTITUTION

FOR SPECIAL TREATMENT. IF SUCH A DISPOSITION IS AVAILABLE AND SEEMS APPROPRIATE, THE ATTORNEY, WITH THE CONSENT OF THE DEFENDANT, SHOULD MAKE A RECOMMENDATION AT THE SENTENCING PROCEEDING THAT IT BE UTILIZED.

(g) IT IS INAPPROPRIATE FOR EITHER PROSECUTION OR DEFENSE COUNSEL TO RE-TRY AN INDIVIDUAL SENTENCE IN THE MEDIA OF PUBLIC COMMUNICATION.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

As in the case of the prosecutor, the duties of the defense counsel at the sentencing stage are not spelled out in the code. To the extent that the specific duties enumerated in 5.3 (e) and (f) are enjoined by the Code of Professional Responsibility, Kansas complies with the Standard. See comments under prior section 5.3 (d).

ABA STANDARD

5.4 SENTENCING PROCEEDING.

(a) AS SOON AS PRACTICABLE AFTER THE DETERMINATION OF GUILT AND THE EXAMINATION OF ANY PRESENTENCE REPORTS (SECTIONS 4.1 - 4.6), A PROCEEDING SHOULD BE HELD AT WHICH THE SENTENCING COURT SHOULD:

(i) ENTERTAIN SUBMISSIONS BY THE PARTIES WHICH ARE RELEVANT TO THE SENTENCE;

(ii) AFFORD TO THE DEFENDANT HIS RIGHT OF ALLOCUTION;

(iii) IN CASES WHERE GUILT WAS DETERMINED BY PLEA, INFORM ITSELF, IF NOT PREVIOUSLY INFORMED, OF THE EXISTENCE OF PLEA DISCUSSIONS OR AGREEMENTS AND THE EXTENT TO WHICH THEY INVOLVE RECOMMENDATIONS AS TO THE APPROPRIATE SENTENCE.

KANSAS CODE

> When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, or the finding of the court and and asked whether he has any legal cause to show why judgment should not be rendered. If none is shown the court shall pronounce judgment against the defendant. (K.S.A. 1971 Supp. 22-3422).

COMMENT

Kansas practice complies with the Standard. As to the duty of the sentencing court to inform itself concerning the existence of plea discussions or agreements and the extent to which they involve recommendations as to the appropriate sentence, see State v. Caldwell, cited at 5.3 (d), supra.

ABA STANDARD

(b) WHERE THE NEED FOR FURTHER EVIDENCE HAS NOT BEEN ELIMINATED BY A PRESENTENCE CONFERENCE (SECTION 4.5 [b]), EVIDENCE OFFERED BY THE PARTIES ON THE SENTENCING ISSUE SHOULD BE PRESENTED IN OPEN COURT WITH FULL RIGHTS OF CONFRONTATION, CROSS-EXAMINATION AND REPRESENTATION BY COUNSEL.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas practice conforms with the Standard.

ABA STANDARD

5.5 SPECIAL REQUIREMENTS.

(a) THE SENTENCING COURT SHOULD BE REQUIRED TO OBTAIN AND CONSIDER A PRESENTENCE REPORT (SECTIONS 4.1 - 4.5) SUPPLEMENTED BY A REPORT OF THE DEFENDANT'S MENTAL, EMOTIONAL AND PHYSICAL CONDITION (SECTION 4.6) PRIOR TO THE IMPOSITION OF A MINIMUM TERM OF IMPRISONMENT (SECTION 3.2), A CONSECUTIVE SENTENCE (SECTION 3.4), A SENTENCE AS AN HABITUAL OFFENDER (SECTION 3.3), OR A SPECIAL TERM BASED ON EXCEPTIONAL CHARACTERISTICS OF THE DEFENDANT (SECTIONS 2.5 [b], 3.1 [c]).

(b) THE SENTENCING COURT SHOULD NOT BE AUTHORIZED TO IMPOSE A SENTENCE AS AN HABITUAL OFFENDER (SECTION 3.3) OR A SENTENCE BASED ON EXCEPTIONAL CHARACTERISTICS OF THE DEFENDANT (SECTIONS 2.5 [b], 3.1 [c]) WITHOUT TAKING THE FOLLOWING ADDITIONAL STEPS:

(i) WRITTEN NOTICE SHOULD BE SERVED ON THE DEFENDANT AND HIS ATTORNEY OF THE PROPOSED GROUND ON WHICH SUCH A SENTENCE COULD BE BASED A SUFFICIENT TIME PRIOR TO THE IMPOSITION OF SENTENCE SO AS TO ALLOW THE PREPARATION OF A SUBMISSION ON BEHALF OF THE DEFENDANT; AND

(ii) WITH THE EXCEPTION OF THE PRESENTENCE REPORT AND ANY SUPPLEMENTAL REPORTS ON THE DEFENDANT'S MENTAL, EMOTIONAL AND PHYSICAL CONDITION, ALL OF THE EVIDENCE PRESENTED TO SUSTAIN THE PROPOSED GROUNDS ON WHICH SUCH A SENTENCE COULD BE BASED SHOULD BE PRESENTED IN OPEN COURT WITH FULL RIGHTS OF CONFRONTATION, CROSS-EXAMINATION AND REPRESENTATION BY COUNSEL. THE DEFENDANT SHOULD BE AFFORDED AN OPPORTUNITY TO OFFER OPPOSITION TO THE PROPOSED ACTION; AND

(iii) THE PRESENTENCE REPORT AND ANY SUPPLEMENTAL REPORTS ON THE DEFENDANT'S MENTAL, EMOTIONAL AND PHYSICAL CONDITION SHOULD BE DISCLOSED TO THE PROSECUTION AND THE DEFENSE AT LEAST TO THE EXTENT REQUIRED BY SECTIONS 4.4 AND 4.5; AND

(iv) EACH OF THE FINDINGS REQUIRED AS THE BASIS FOR SUCH A SENTENCE SHOULD BE FOUND TO EXIST BY A PREPONDERANCE OF THE EVIDENCE, AND SHOULD BE APPEALABLE TO THE EXTENT NORMALLY APPLICABLE TO SIMILAR FINDINGS; AND

(v) IF THE CONVICTION WAS BY PLEA, IT SHOULD AFFIRMATIVELY APPEAR ON THE RECORD THAT THE PLEA WAS ENTERED WITH KNOWLEDGE THAT SUCH A SENTENCE WAS A POSSIBILITY. IF IT DOES NOT SO APPEAR ON THE RECORD, THE DEFENDANT SHOULD NOT BE SUBJECT TO SUCH A SENTENCE UNLESS HE IS FIRST GIVEN AN OPPORTUNITY TO WITHDRAW HIS PLEA WITHOUT PREJUDICE.

(c) THE PROCEDURE FOR REVOCATION OF A SENTENCE NOT INVOLVING CONFINEMENT AND FOR REVOCATION OF A SENTENCE INVOLVING PARTIAL CONFINEMENT SHOULD CONFORM AS NEARLY AS POSSIBLE TO THE PROCEDURE OUTLINED IN SUBSECTIONS (b) (i) through (b) (iv) OF THIS SECTION. STANDARDS DEALING WITH THE PROCEDURE FOR CHANGES IN THE CONDITIONS UNDER WHICH SUCH SENTENCES WILL CONTINUE IN EFFECT WILL BE SET FORTH IN A SEPARATE REPORT DEALING WITH PROBATION.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas partially complies with the Standard. Kansas case law requires that notice be given to the defendant of intent to seek an enhanced sentence under the habitual criminal act. (K.S.A. 1971 Supp. 21-4504).

ABA STANDARD

5.6 IMPOSITION OF SENTENCE.

IN ADDITION TO REACHING THE CONCLUSIONS REQUIRED AS A PREREQUISITE TO IMPOSITION OF THE SENTENCE SELECTED, WHEN SENTENCE IS IMPOSED THE COURT:

(i) SHOULD MAKE SPECIFIC FINDINGS ON ALL CONTROVERTED ISSUES OF FACT WHICH ARE DEEMED RELEVANT TO THE SENTENCING DECISION;

(ii) NORMALLY SHOULD STATE FOR THE RECORD IN THE PRESENCE OF THE DEFENDANT THE REASONS FOR SELECTING THE PARTICULAR SENTENCE TO BE IMPOSED. IN THE EXCEPTIONAL CASES WHERE THE COURT DEEMS IT IN THE BEST INTERESTS OF THE DEFENDANT NOT TO STATE FULLY IN HIS

PRESENCE THE REASONS FOR THE SENTENCE, THE COURT SHOULD PREPARE SUCH A STATEMENT FOR INCLUSION IN THE RECORD;

(iii) SHOULD ASSURE THAT THE RECORD ACCURATELY REFLECTS TIME ALREADY SPENT IN CUSTODY FOR WHICH CREDIT WILL BE GIVEN UNDER THE PROVISIONS OF SECTION 3.6; AND

(iv) SHOULD STATE WITH CARE THE PRECISE TERMS OF THE SENTENCE WHICH IS IMPOSED.

KANSAS CODE

(1) The judgment shall be rendered and sentence imposed in open court.

(2) If the verdict or finding is not guilty, judgment shall be rendered immediately and the defendant shall be discharged from custody and the obligation of his appearance bond.

(3) 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 pre-sentence investigation as the court may require.

(4) Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement on his own behalf and to present any evidence in mitigation of punishment.

(5) After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the costs of an appeal to appeal in forma pauperis. If the defendant so requests the clerk of the court should prepare and file forthwith a notice of appeal on behalf of the defendant. (K.S.A. 1971 Supp. 22-3424).

COMMENT

Kansas partially complies with the Standard in that the record must reflect accurately the time spent in confinement for which credit is to be given. (See K.S.A. 1971 Supp. 21-4614, at 3.6, supra).

5.7 RECORD.

(a) AS IN THE CASE OF ALL OTHER PROCEEDINGS IN OPEN COURT, A RECORD OF THE SENTENCING PROCEEDING SHOULD BE MADE AND PRESERVED IN SUCH A MANNER THAT IT CAN BE TRANSCRIBED AS NEEDED. THE FOLLOWING ITEMS SHOULD BE AVAILABLE FOR INCLUSION IN A TRANSCRIPTION:

(i) A VERBATIM ACCOUNT OF THE ENTIRE SENTENCING PROCEEDING, INCLUDING A RECORD OF ANY STATEMENTS IN AGGRAVATION OR MITIGATION MADE BY THE DEFENDANT, THE DEFENSE ATTORNEY AND THE PROSECUTING ATTORNEY, TOGETHER WITH ANY TESTIMONY RECEIVED OF WITNESSES ON MATTERS RELEVANT TO THE SENTENCE AND ANY STATEMENTS BY THE COURT EXPLAINING THE SENTENCE;

(ii) A VERBATIM ACCOUNT OF SUCH PARTS OF THE TRIAL ON THE ISSUE OF GUILT, OR THE PROCEEDINGS LEADING TO THE ACCEPTANCE OF A PLEA, AS ARE RELEVANT TO THE SENTENCING DECISION;

(iii) COPIES OF THE PRESENTENCE REPORT AND ANY OTHER REPORTS OR DOCUMENTS AVAILABLE TO THE SENTENCING COURT AS AN AID IN PASSING SENTENCE. THE PART OF THE RECORD CONTAINING SUCH REPORTS OR DOCUMENTS SHOULD BE SUBJECT TO EXAMINATION BY THE PARTIES TO THE EXTENT PROVIDED IN SECTIONS 4.3 AND 4.4. THE RECORD SHOULD REVEAL WHAT PARTS OF SUCH REPORTS OR DOCUMENTS HAVE BEEN DISCLOSED TO THE PARTIES AND BY WHAT METHOD SUCH DISCLOSURE WAS MADE. IT SHOULD ALSO CONTAIN ANY RECORD OF A PRESENTENCE CONFERENCE HELD IN ACCORDANCE WITH SECTION 4.5 (b).

KANSAS CODE

It shall be the duty of the official reporter to attend upon the sessions of the court, or divisions thereof, of which, he is reporter, at each term, when required by the judge thereof, and to take full stenographic notes of the evidence and of oral proceedings in such cases tried before said court or division as the judge thereof shall direct. Said reporter shall file the original notes so taken, and all exhibits admitted in evidence in the office of the clerk of such court, and said notes shall thereafter at all times remain a part of the files in the office of such clerk. Upon the request of any person interested, and payment or tender of his fees therefor, as herein provided, said reporter shall furnish a transcript of all or any part of said testimony or oral proceedings so taken. No official reporter

shall appear or advise as attorney or counselor in any case pending in the court of which he is official reporter shall be furnished by the board of county commissioners of the county in which such court is in session with a suitable office in the courthouse and with such stationery, supplies and other equipment as shall be necessary in the proper discharge of his duties. (K.S.A. 20-902).

When judgment is rendered or sentence of imprisonment is imposed, upon a plea or verdict of guilty, a record thereof shall be made upon the journal of the court which record among other things shall contain a statement of the crime charged, and under what statute; the plea or verdict and the judgment rendered or sentence imposed, and under what statute, and a statement that the defendant was duly represented by counsel naming such counsel, or a statement that the defendant has stated in writing that he did not want counsel to represent him.

If the sentence is increased because defendant previously has been convicted of one or more felonies the record shall contain a statement of each of such previous convictions, showing the date, in what court, of what crime and a brief statement of the evidence relied upon by the court in finding such previous convictions. Defendant shall not be required to furnish such evidence.

It shall be the duty of the court personally to examine the journal entry and to sign the same. (K.S.A. 1971 Supp. 22-3426).

COMMENT

Kansas is in substantial compliance with the Standard.

ABA STANDARD

(b) ADEQUATE RESOURCES SHOULD BE PROVIDED TO THE COURT SO AS TO PERMIT THE TRANSMISSION OF RELEVANT SENTENCING INFORMATION TO THE PRISON AUTHORITIES IN THE EVENT OF A COMMITMENT. IF THE DEFENDANT IS SENTENCED

TO IMPRISONMENT FOR A MAXIMUM TERM IN EXCESS OF ONE YEAR, THE COURT SHOULD BE REQUIRED TO FORWARD TO THE PRISON AUTHORITIES A COPY OF THE ITEMS DESCRIBED IN SECTION 5.7 (a) (iii) AND A VERBATIM TRANSCRIPT OF THE PROCEEDING DESCRIBED IN SECTION 5.6. THE COURT SHOULD ALSO BE AUTHORIZED AND ENCOURAGED TO FORWARD ANY OTHER PART OF THE RECORD WHICH IS DEEMED RELEVANT TO THE DEFENDANT'S CLASSIFICATION AND TREATMENT.

KANSAS CODE

See K.S.A. 1971 Supp. 21-4604, at 4.1 (a), supra.

It shall be the duty of the county attorney of the county in which a person has been convicted of a felony and sentenced to imprisonment to furnish to the state board of probation and parole information pertaining to the facts and circumstances surrounding the commission of the offense, including any aggravating or mitigating circumstances, and such other information which has come to the attention of the county attorney which might have a bearing in determining the possibility of the prisoner thereafter becoming a useful citizen. This information shall be set forth on forms provided by the board and shall be submitted at the time the prisoner is committed. (K.S.A. 1971 Supp. 22-3432).

COMMENT

Kansas partially complies with the Standard. While the Kansas code provides for the forwarding of the presentence investigation and other relevant information to the institution, it does not require a forwarding of a transcript of the sentencing proceeding.

ABA STANDARD

5.8 PROCEDURE FOR AWARDING CREDIT.

THE CREDIT REQUIRED BY SECTION 3.6 SHOULD BE AWARDED IN THE FOLLOWING MANNER:

(i) IT IS GOOD PRACTICE FOR THE PARTIES TO COMMUNICATE TO THE COURT AT THE TIME OF SENTENCING THE FACTS UPON WHICH CREDIT FOR TIME SERVED PRIOR TO SENTENCING WILL BE BASED;

(ii) IT IS GOOD PRACTICE FOR THE COURT TO INFORM THE DEFENDANT AT THE TIME OF SENTENCING OF HIS STATUS ON THE ISSUE OF CREDIT FOR TIME PREVIOUSLY SERVED;

(iii) THE COURT SHOULD ASSURE THAT THE RECORD ACCURATELY REFLECTS THE FACTS UPON WHICH CREDIT FOR TIME SERVED PRIOR TO SENTENCING WILL BE COMPUTED;

(iv) THE CUSTODIAN SHOULD COMMUNICATE TO THE PRISON AUTHORITIES AT THE TIME THE DEFENDANT IS DELIVERED FOR COMMITMENT THE AMOUNT OF TIME SPENT IN CUSTODY SINCE THE IMPOSITION OF SENTENCE;

(v) THE CREDIT TO BE AWARDED AGAINST THE SENTENCE SHOULD BE COMPUTED BY THE PRISON AUTHORITIES AS SOON AS PRACTICABLE AND AUTOMATICALLY AWARDED;

(vi) THE PRISON AUTHORITIES SHOULD INFORM THE DEFENDANT OF HIS STATUS AS SOON AS PRACTICABLE;

(vii) THE DEFENDANT SHOULD BE AFFORDED AN AVENUE OF POST-CONVICTION REVIEW FOR THE PROMPT DISPOSITION OF QUESTIONS WHICH MAY ARISE AS TO THE AMOUNT OF CREDIT WHICH SHOULD HAVE BEEN AWARDED.

KANSAS CODE

See K.S.A. 1971 Supp. 21-4614 at 3.6 (a), supra.

COMMENT

Kansas practice complies with the suggestions. Standard 5.8 relates to judicial and administrative practice which are not properly the subject of code provision. K.S.A. 1971 Supp. 21-4614 requires the sentencing court to indicate in the journal entry of conviction the date that sentence is to begin, taking into account such credits for time spent in jail prior to conviction as may be allowed by the court. However, the allowance for pre-conviction and detention is awarded in the discretion of the court and may not exceed ninety days.

ABA STANDARD

PART VI. FURTHER JUDICIAL ACTION

6.1 AUTHORITY TO REDUCE: GENERAL.

(a) IT MAY BE APPROPRIATE TO AUTHORIZE THE SENTENCING COURT TO REDUCE OR MODIFY A SENTENCE WITHIN A REASONABLE TIME AFTER ITS IMPOSITION IF NEW FACTORS BEARING ON THE SENTENCE ARE MADE KNOWN. IT IS INAPPROPRIATE FOR DEFENSE COUNSEL OR OTHERS ON THE DEFENDANT'S BEHALF TO APPROACH THE JUDGE EXCEPT BY WRITTEN MOTION OR IN OPEN COURT. IT IS LIKEWISE INAPPROPRIATE FOR A JUDGE TO REDUCE OR MODIFY A SENTENCE BY ANY PROCEEDING WHICH DOES NOT OCCUR IN OPEN COURT.

KANSAS CODE

Any time within one hundred twenty (120) days after a sentence is imposed or within one hundred twenty (120) days after probation has been revoked, the court may modify such sentence or revocation of probation by directing that a less severe penalty be imposed in lieu of that originally adjudged within statutory limits. If an appeal is taken and determined adversely to the defendant, such sentence may be modified within one hundred twenty (120) days after the receipt by the clerk of the district court of the mandate from the supreme court. The court may reduce the minimum term of confinement at any time before the expiration thereof when such reduction is recommended by the secretary of corrections and the court is satisfied that the best interests of the public will not be jeopardized and that the welfare of the inmate will be served by such reduction. The power here conferred upon the court includes the power to reduce such minimum below the statutory limit on the minimum term prescribed for the crime of which the inmate has been convicted. The recommendation of the secretary of corrections and the order of reduction shall be made in open court.

Dispositions which do not involve commitment to the custody of the secretary of corrections and commitments which are revoked within one hundred twenty (120) days shall not entail the loss of the defendant of any civil rights. (K.S.A. 21-4603 (1974)).

COMMENT

Kansas complies with the Standard. The suggestions of the Standard with respect to the appropriateness of proceedings are not spelled out in the Kansas code but are generally adhered to.

ABA STANDARD

(b) UNDER NO CIRCUMSTANCES SHOULD THE SENTENCING COURT BE AUTHORIZED TO INCREASE A TERM OF IMPRISONMENT ONCE IT HAS BEEN IMPOSED.

KANSAS CODE

See K.S.A. 21-4603 (1974) at 6.1 (a), supra.

COMMENT

Kansas complies with the Standard. In State v. Frye, 209 Kan. 520, 496 P.2d 1403 (1972), it is held that the district court is without power to increase a sentence imposed against a defendant after the sentence has commenced to run.

ABA STANDARD

6.2 AUTHORITY TO REDUCE: MINIMUM TERM.

THE SENTENCING COURT SHOULD BE AUTHORIZED TO REDUCE AN IMPOSED MINIMUM TERM (SECTION 3.2) TO TIME SERVED UPON MOTION OF THE CORRECTIONS OR RELEASING AUTHORITIES MADE AT ANY TIME.

KANSAS CODE

See K.S.A. 21-4603 (1974) at 6.1, supra.

COMMENT

Kansas complies with the standard. The sentencing court may, upon recommendation of the state board of probation and parole, reduce the minimum term of imprisonment at any time before the expiration thereof. Presumably, this would include the power to reduce to time already served.

ABA STANDARD

6.3 AUTHORITY TO TERMINATE: USE OF SPECIAL FACILITIES.

IN THE EVENT THAT COMMITMENT TO A SPECIAL TYPE OF FACILITY IS AUTHORIZED FOR A PERIOD BEYOND THE MAXIMUM SENTENCE NORMALLY APPLICABLE TO THE OFFENSE (SECTION 2.6 [b]), THE SENTENCING COURT SHOULD BE AUTHORIZED TO TERMINATE THE COMMITMENT OR ANY SUPERVISION AT ANY TIME. THE CUSTODIAL OR SUPERVISORY AUTHORITIES SHOULD BE REQUIRED ANNUALLY TO REVIEW THE PROGRESS OF THE DEFENDANT AND TO MAKE A SHOWING TO THE COURT TO THE EFFECT THAT CONTEMPLATED TREATMENT IS ACTUALLY BEING ADMINISTERED TO THE DEFENDANT AND OUTLINING THE PROGRESS WHICH THE DEFENDANT HAS MADE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

The Kansas code does not authorize commitment to a special type of facility for a period beyond the maximum sentence normally applied to the offense. Hence, the Standard is not applicable to Kansas.

ABA STANDARD

6.4 MODIFICATION OF SENTENCE: SENTENCE NOT INVOLVING CONFINEMENT OR SENTENCE TO PARTIAL CONFINEMENT.

(a) THE SENTENCING COURT SHOULD BE AUTHORIZED TO TERMINATE AT ANY TIME CONTINUED SUPERVISION OR THE POWER TO REVOKE EITHER A SENTENCE NOT INVOLVING CONFINEMENT OR A SENTENCE INVOLVING PARTIAL CONFINEMENT THE COURT SHOULD ALSO BE AUTHORIZED TO LESSEN THE CONDITIONS ON WHICH SUCH SENTENCES WERE IMPOSED AT ANY TIME, AND SIMILARLY TO SHORTEN THE TIME DURING WHICH THE POWER TO REVOKE WILL EXIST.

KANSAS CODE

See K.S.A. 1971 Supp. 21-4610 at 2.3 (a), supra.

(2) Upon such arrest and detention, the probation officer shall immediately notify the court and shall submit in writing a report showing in what manner the defendant has violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charged. The hearing shall be in open court and the state shall have the burden of establishing the violation. The defendant shall have the right to be represented by counsel and he shall be informed by the judge that if he is financially unable to obtain counsl, an attorney will be appointed to represent him. The defendant shall have the right to present the testimony of witnesses and other evidence on his behalf. Relevant written statements made under oath may be admitted and considered by the court along with other evidence presented at the hearing. If the violation is established,

the court may continue or revoke the probation or suspension of sentence, and may require the defendant to serve the sentence imposed, or any lesser sentence, and if imposition of sentence was suspended, may impose any sentence which might originally have been imposed. (K.S.A. 1971 Supp. 22-3716).

Probation or suspension of sentence may be terminated by the court at any time and upon such termination or upon termination by expiration of the term of probation or suspension of sentence, an order to this effect shall be entered by the court. (K.S.A. 1971 Supp. 21-4611).

COMMENT

Kansas partially complies with the Standard. The Kansas code does not expressly authorize partial confinement. However, to the extent that partial confinement may be included in probation or suspension of sentence, Kansas complies with the Standard.

ABA STANDARD

(b) THE COURT SHOULD BE AUTHORIZED TO REVOKE A SENTENCE NOT INVOLVING CONFINEMENT OR A SENTENCE TO PARTIAL CONFINEMENT UPON THE VIOLATION OF SPECIFIED CONDITIONS OR TO INCREASE THE CONDITIONS UNDER WHICH SUCH A SENTENCE WILL BE PERMITTED TO CONTINUE IN EFFECT. THE SENTENCING ALTERNATIVES WHICH SHOULD BE AVAILABLE UPON A REVOCATION SHOULD BE THE SAME AS WERE AVAILABLE AT THE TIME OF INITIAL SENTENCING. SPECIFICALLY, SUCH ALTERNATIVES SHOULD INCLUDE THE IMPOSITION OF A FINE OR THE IMPOSITION OF A SENTENCE TO PARTIAL OR TOTAL CONFINEMENT.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3716 and 21-4611 at 6.4 (a), supra.

COMMENT

Kansas substantially complies with the Standard. Probation is usually granted only after sentence has been imposed. In such cases the sentence imposed upon a revocation of probation cannot exceed in severity the original sentence. If imposition of sentence was originally suspended, the Court may impose any sentence upon revocation which could have been originally imposed.

ABA STANDARD

(c) THE COURT SHOULD NOT IMPOSE A SENTENCE OF TOTAL CONFINEMENT UPON REVOCATION UNLESS:

(i) THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER CRIME. THE SENTENCE IN SUCH A CASE SHOULD RESPECT THE LIMITATIONS ON CONSECUTIVE SENTENCES EXPRESSED IN SECTION 3.4; OR

(ii) THE DEFENDANT'S CONDUCT INDICATES THAT IT IS LIKELY THAT HE WILL COMMIT ANOTHER CRIME IF HE IS NOT IMPRISONED; OR

(iii) SUCH A SENTENCE IS ESSENTIAL TO VINDICATE THE AUTHORITY OF THE COURT.

IF THE REVOCATION OF A SENTENCE TO PARTIAL CONFINEMENT RESULTS IN A SENTENCE TO TOTAL CONFINEMENT, CREDIT SHOULD BE GIVEN FOR ALL TIME SPENT IN CUSTODY DURING THE SENTENCE TO PARTIAL CONFINEMENT.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

The Kansas code does not require compliance with the Standard. However, it appears that in the exercise of its discretion, the sentencing court may implement parts (i) (ii), and (iii) of the Standard. On the other hand, since partial confinement could be accomplished only through the fixing of the conditions of probation, it is unlikely that credit could be given for time spent in custody during partial confinement.

ABA STANDARD

6.5 MODIFICATION OF SENTENCE: FINES; NONPAYMENT.

(a) THE SENTENCING COURT SHOULD HAVE THE POWER TO ANY TIME TO REVOKE OR REMIT A FINE OR ANY UNPAID PORTION, OR TO MODIFY THE TERMS AND CONDITIONS OF PAYMENT. WHEN FAILURE TO PAY A FINE IS EXCUSABLE, SUCH AUTHORITY SHOULD BE EXERCISED.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas does not comply with the Standard.

ABA STANDARD

(b) INCARCERATION SHOULD NOT AUTOMATICALLY FOLLOW THE NONPAYMENT OF A FINE. INCARCERATION SHOULD BE EMPLOYED ONLY AFTER THE COURT HAS EXAMINED THE REASONS FOR NONPAYMENT. IT IS UNSOUND FOR THE LENGTH OF A JAIL SENTENCE IMPOSED FOR NONPAYMENT TO BE INFLEXIBLY TIED, BY PRACTICE OR BY STATUTORY FORMULA, TO A SPECIFIED DOLLAR EQUATION. THE COURT SHOULD BE AUTHORIZED TO IMPOSE A JAIL TERM OR A SENTENCE TO PARTIAL CONFINEMENT (SECTION 2.3) FOR NONPAYMENT, HOWEVER, WITHIN A RANGE FIXED BY THE LEGISLATURE FOR THE AMOUNT INVOLVED, BUT IN NO EVENT TO EXCEED ONE YEAR. SERVICE OF SUCH A TERM SHOULD DISCHARGE THE OBLIGATION TO PAY THE FINE, AND PAYMENT AT ANY TIME DURING ITS SERVICE SHOULD RESULT IN THE RELEASE OF THE OFFENDER.

KANSAS CODE

(1) When a defendant is adjudged to pay a fine and costs, the court may order him to be committed to the county jail until such fine and costs are paid or may make an order providing for the payment of such fines and costs in installments.

(2) Any person confined in the county jail for failure to pay a fine or costs may be released by the court which imposed sentence upon satisfactory proof that such person is unable to pay such fine and costs. A release under this section shall not discharge a person from his liability to pay the fine and costs adjudged against him, but they may thereafter be collected by execution as on judgments in civil cases. (K.S.A. 1971 Supp. 22-3425).

COMMENT

Kansas partially complies with the Standard. The Kansas statute does not authorize the imposition of a fixed term of total or partial confinement in event of nonpayment of the fine. The sentencing court has power to commit the defendant to jail until such fines and costs are paid. However, this power would necessarily be limited by the decision of the Supreme Court of the United States in Williams v. Illinois, 399 U. S. 235 (1970) which holds that imprisonment for involuntary nonpayment of a fine or court cost may not exceed the maximum term of imprisonment fixed by statute for the offense.

ABA STANDARD

(c) THE METHODS AVAILABLE FOR COLLECTION OF A CIVIL JUDGMENT FOR MONEY SHOULD ALSO BE AVAILABLE FOR THE COLLECTION OF A FINE, AND SHOULD BE EMPLOYED IN CASES WHERE THE COURT SO SPECIFIED.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3425 at 6.5 (b), supra.

When a defendant has been convicted and costs have been taxed against him, the payment of of such costs by the county shall not relieve the defendant of his liability for payment. The costs taxed against the defendant shall be and remain a judgment against him which may be enforced as judgments for payment of money in civil cases. It shall be the duty of the clerk of the court to issue execution for unpaid fines and costs at least once each year. (K.S.A. 1971 Supp. 22-3801 (2)).

COMMENT

Kansas complies with the Standard.

ABA STANDARD

(d) IN THE EVENT OF NONPAYMENT OF A FINE BY A CORPORATION, THE COURT SHOULD BE AUTHORIZED TO PROCEED AGAINST SPECIFIED CORPORATE OFFICERS UNDER SUBSECTION (b) OR AGAINST THE ASSETS OF THE CORPORATION UNDER SUBSECTION (c).

KANSAS CODE

See K.S.A. 1971 Supp. 22-3425 and 22-3801 (2) at 6.5 (c), supra.

COMMENT

Kansas complies with the Standard to the extent that proceedings may be had against the assets of the corporation.

ABA STANDARD

PART VII. DEVELOPMENT OF SENTENCING CRITERIA

7.1 SENTENCING COUNCIL

IN ALL COURTS WHERE MORE THAN ONE JUDGE SITS REGULARLY AT THE SAME PLACE, AND WHEREVER ELSE IT IS FEASIBLE, IT IS DESIRABLE THAT MEETINGS OF SENTENCING JUDGES BE HELD PRIOR TO THE IMPOSITION OF SENTENCE IN AS MANY CASES AS IS PRACTICAL. THE MEETING SHOULD BE PRECEDED BY DISTRIBUTION OF THE PRESENTENCE REPORT AND ANY OTHER DOCUMENTARY INFORMATION ABOUT THE DEFENDANT TO EACH OF THE JUDGES WHO WILL PARTICIPATE. THE PURPOSE OF THE MEETING SHOULD BE TO DISCUSS THE APPROPRIATE DISPOSITION OF THE DEFENDANTS WHO ARE THEN AWAITING SENTENCE AND TO ASSIST THE JUDGE WHO WILL IMPOSE THE SENTENCE IN REACHING A DECISION. CHOICE OF THE SENTENCE SHOULD NEVERTHELESS REMAIN THE RESPONSIBILITY OF THE JUDGE WHO WILL ACTUALLY IMPOSE IT.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

There is no code provision requiring the establishment of sentencing councils. However, such procedures can and may be implemented by local rule.

ABA STANDARD

7.2 SENTENCING INSTITUTES.

PROVISION SHOULD BE MADE IN EVERY STATE FOR THE CONVENING OF SENTENCING JUDGES FROM TIME TO TIME FOR THE PURPOSE OF HOLDING INSTITUTES OR SEMINARS

TO DISCUSS PROBLEMS RELATED TO SENTENCING. THE PARTICULAR GOAL OF SUCH PROCEEDINGS SHOULD BE TO DEVELOP CRITERIA FOR THE IMPOSITION OF SENTENCES, TO PROVIDE A FORUM IN WHICH NEWER JUDGES CAN BE EXPOSED TO MORE EXPERIENCED JUDGES, AND TO EXPOSE ALL SENTENCING JUDGES TO NEW DEVELOPMENTS AND TECHNIQUES. PROSECUTORS, MEMBERS OF THE DEFENSE BAR, APPELLATE JUDGES, AND CORRECTIONS AND RELEASING AUTHORITIES SHOULD BE ENCOURAGED TO PARTICIPATE IN SUCH PROCEEDINGS IN ORDER TO DEVELOP A BETTER UNDERSTANDING OF THEIR ROLES IN THE SENTENCING PROCESS.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Although no provision is made in the Kansas code for sentencing institutes, programs of this kind are occasionally sponsored by the Kansas Judicial Conference.

ABA STANDARD

7.3 ORIENTATION OF NEW JUDGES.

IN ADDITION TO REGULAR SENTENCING INSTITUTES, A PROGRAM SHOULD BE DEVELOPED FOR THE FORMAL ORIENTATION OF NEW JUDGES. THIS SHOULD INCLUDE FAMILIARIZATION WITH SENTENCING ALTERNATIVES, WITH THE SERVICES AVAILABLE TO THE SENTENCING JUDGE, WITH THE PURPOSES OF SENTENCING AND SENTENCE PROCED'RES, WITH THE NATURE OF NON-CUSTODIAL FACILITIES WHICH CAN BE UTILIZED IN SENTENCING, AND WITH THE NATURE OF THE FACILITIES TO WHICH A SENTENCES OFFENDER MAY BE COMMITTED.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas has no regular program for the orientation of new judges. However, programs of this nature have been sponsored by the Kansas Judicial Conference.

ABA STANDARD

7.4 REGULAR VISITATION OF FACILITIES.

PROVISION SHOULD BE MADE FOR REGULAR VISITS BY EVERY SENTENCING JUDGE TO EACH OF THE CUSTODIAL AND NON-CUSTODIAL FACILITIES WHICH CAN BE UTILIZED IN FRAMING A SENTENCE. IN CASES WHERE THE JUDGE CHOOSES INCARCERATION BUT DOES NOT SELECT THE INSTITUTION OF COMMITMENT, SUCH VISITS SHOULD INCLUDE FAMILIARIZATION WITH THE PROCESS BY WHICH AN OFFENDER IS ASSIGNED TO AN INSTITUTION.

KANSAS CODE

> There shall be established and kept at every county seat, by authority of the board of county commissioners, at the expense of the county, a jail for the safekeeping of prisoners lawfully committed. (K.S.A. 19-1901).

COMMENT

Kansas partially complies with the Standard. The quoted law refers only to the county jail. The Kansas Judicial Conference has sponsored visitations by the District Judges to state correctional institutions.

ABA STANDARD

7.5 INFORMATION ON SENTENCED OFFENDERS.

IN ORDER THAT JUDGES MAY BE IN A POSITION TO APPRAISE THE EFFECTS OF THEIR SENTENCING PRACTICES, THEY SHOULD BE REGULARLY INFORMED OF THE STATUS OF OFFENDERS WHOM THEY HAVE SENTENCED, AS WELL AS PROVIDED WITH BROADER STATISTICAL INFORMATION CONCERNING ALL OFFENDERS SENTENCED IN THE SAME STATE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

Kansas partially complies with the Standard. The information is available to the sentencing court upon request to the correctional institution where a person is confined. Probation and parole reports are regularily received by the court from the parole or probation officer.