Approved: 3-18-10
Date

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Pat Colloton at 1:30 p.m. on January 28, 2010, in Room 144-S of the Capitol.

All members were present.

Committee staff present:
Sean Ostrow, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jackie Lunn, Committee Assistant

Conferees appearing before the Committee:
State Representative Crum,
Helen Pedigo, Executive Director, Kansas Sentencing Commission
Commissioner Russ Jennings, Juvenile Justice Authority

Others attending:
See attached list.

State Representative Crum,
Helen Pedigo, Executive Director, Kansas Sentencing Commission
Commissioner Russ Jennings, Juvenile Justice Authority

Chairperson Colloton called the meeting to order and asked for bill introductions. She called on State Representative Crum to request a bill. He stated he would like to request a bill adding conspiracy and attempt to special sentencing required of presumptive imprisonment for second burglary offense.

Representative Patton moved to accept the bill request as a committee bill. Representative Moxley seconded. Motion carried.

Chairperson Colloton recognized Representative Bethell to request a bill. Representative Bethell moved a bill on behalf of the sub committee to leave sex offender who fail to register, at a level five with all others being downgraded to a level eight or nine. Representative Brookens seconded. Motion carried.

Chairperson Colloton stated that next Monday is the final day for a Committee bill request.

HB 2469 - Use of prior convictions in determining criminal history.

1/28 2010

Chairperson Colloton opened the hearing on **HB 2469** and introduced Helen Pedigo, Executive Director, Kansas Sentencing Commission, to explain the bill and give her testimony as a proponent of the bill. Ms. Pedigo presented written copy of her testimony. (Attachment 1) She stated the bill corrects a problem they discovered after the Kansas Court of Appeals issued an opinion in *State v. Luttig*. (2009) She stated it is regarding forgery convictions and explained the case that called their attention to the need to correct the statute.

With no others wishing to testify on **HB 2469**, Chairperson Colloton closed the hearing and introduced Commissioner J. Russ Jennings, Kansas Juvenile Justice Authority, to give the Committee an overview of the Juvenile Justice Authority. Commissioner Jennings presented written copy of his overview. (Attachment 2) He opened by stating during fiscal year 2009 and fiscal year 2010 the Kansas Juvenile Justice Authority (JJA) experienced significant budget reductions through both legislative action and allotment by the Governor. A number of steps were taken in order to meet the budget reductions including the closure of two state juvenile correctional facilities. In spite of these reductions, the juvenile justice system in Kansas remains relatively stable. Commissioner Jennings addressed questions from the Committee during his overview. He stated the state furnishes juvenile facilities where they allow placement of violent juvenile offenders in a secure location that provides for a term of incarceration which provides treatment and mental services

CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 1-28-10

NAME	REPRESENTING
Rick Fischli	Kansas Human Rights Commission
Helen Pedigo	Sentencing Commission
[illegible]	Intern for Rep. McCray-Miller
Jeremy Barclay	KDOC
Tim Madden	KDOC
C. David Rouner	Kearney & Assoc.
Travis R Lowe	Little Gov't Relations
Ed Klumpp	KACP/KPOA/KSA
[illegible]	

KANSAS SENTENCING COMMISSION

Honorable Ernest L. Johnson, Chairman
Honorable Richard M. Smith, Vice Chair
Helen Pedigo, Executive Director

MARK PARKINSON, GOVERNOR

HOUSE CORRECTIONS & JUVENILE JUSTICE COMMITTEE
Representative Patricia Colloton, Chair

TESTIMONY ON HOUSE BILL 2469
Criminal History
Helen Pedigo, Executive Director
January 28, 2010

Madam Chair and committee members, thank you for the opportunity to testify before you today in support of House Bill 2469, on behalf of the Kansas Sentencing Commission, a 17-member board comprised of criminal justice professionals, including local and state partners, members of all three branches of government, and the public.

This bill corrects a problem we discovered after the Kansas Court of Appeals issued an opinion in *State v. Luttig*, 40 Kan. App. 2d 1095 (2009). In that case, attached, the defendant was ordered to serve 45 days in jail as a condition of probation on a third forgery conviction. The offender had two prior convictions for forgery and another nonperson felony conviction in her criminal history. The district court counted the two forgeries as penalty enhancements in imposing a 45-day jail term as a condition of probation. Therefore, the court indicated that those prior forgeries could not be used towards calculation of the offender's criminal history, resulting in a reduction of the underlying prison sentence. This case was affirmed last week by the Kansas Supreme court in *State v. Gilley*, No 99,156, (Jan. 22, 2010), also attached.

We don't believe this was the intent of the Kansas Sentencing Guidelines drafters. This situation could create a similar problem with any crime that contains a specific mandatory penalty provision for multiple offenses. This bill would serve justice by providing a more accurate criminal history of the offender for presentence investigations and sentencing.

Thank you for your time, and I'd be happy to address questions.

Corrections and Juvenile Justice
Date: 1-28-10
Attachment # 1

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No. 100,290

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

Appellant,

v.

WANDA LUTTIG,

Appellee.

SYLLABUS BY THE COURT

1. Interpretation of a statute is a question of law, and an appellate court's standard of review is unlimited.

2. The fundamental rule of statutory construction, to which all other rules are subordinate, is that the intent of the legislature governs. An appellate court's first task is to ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning.

3. When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read the statute to add something not readily found therein. In such an instance, an appellate court need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that an appellate court must move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent.

4. Under the facts of this case in which the defendant was ordered to serve 45 days in jail as a condition of her probation on a third forgery conviction, and the district court used one of the defendant's prior forgery convictions in order to impose the 45-day jail term, the prior forgery conviction could not be counted in determining the defendant's criminal history score.

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed January 9, 2009. Affirmed in part, vacated in part, and remanded.

Benjamin J. Fisher, assistant district attorney, *Keith E. Schroeder*, district attorney, and *Stephen N. Six*, attorney general, for appellant.

Janine Cox, of Kansas Appellate Defender Office, for appellee.

Before GREENE, P.J., MALONE, J., and KNUDSON, S.J.

MALONE, J.: The State appeals the district court's determination of Wanda Luttig's criminal history

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score following her conviction of two counts of forgery. Luttig had two prior forgery convictions. Based on Luttig's third conviction of forgery, the district court ordered her to serve 45 days in jail as a condition of probation. The issue is whether the district court used Luttig's prior forgery convictions to enhance her applicable penalty in this case and, if so, to what extent. We affirm in part, vacate in part, and remand for further proceedings.

On February 15, 2008, Luttig pled guilty to two counts of forgery. Luttig's presentence investigation report listed her criminal history score as category E based on three prior nonperson felonies, two of which were forgeries. Luttig objected to the inclusion of the two prior forgeries in her criminal history score to the extent that the convictions were being used to enhance her penalty in the current case.

Luttig was sentenced on March 28, 2008. The district court found that because the case was Luttig's third forgery conviction, the statute required her to serve at least 45 days in jail as a condition of probation. Thus, the district court determined that the two prior forgery convictions enhanced the applicable penalty and could not be counted in Luttig's criminal history. The district court stated:

"The court will find, since in the court's view and interpretation of a statute that criminal history does not include prior convictions which enhance the applicable penalties, that in fact because of the nature of the forgery and there is mandatory jail time on subsequent convictions, that in fact the prior convictions do enhance the penalty and therefore are not included in the criminal history. So the two prior forgeries will not be included which would change the criminal history from category E to category G."

The district court imposed a controlling sentence of 10 months' imprisonment and placed Luttig on probation for 18 months with the mandatory condition that she serve 45 days in jail. The State timely appeals.

The State claims the district court erred in determining Luttig's criminal history score. Specifically, the State argues that the mandatory 45 days' imprisonment as a condition of probation on a third forgery conviction does not enhance the applicable penalty. Thus, the State argues that Luttig's two prior forgery convictions should have been scored as part of her criminal history.

Resolution of this issue involves statutory interpretation. Interpretation of a statute is a question of law, and an appellate court's standard of review is unlimited. *State v. Ruiz-Reyes*, 285 Kan. 650, 653, 175 P.3d 849 (2008).

We must examine two separate statutes under the Kansas Criminal Code. First, K.S.A. 21-3710, the forgery statute, provides in part as follows:

"(b)(1) Forgery is a severity level 8, nonperson felony.

. . . .

(3) On a second conviction of a violation of this section, a person shall be required to serve at least 30 days' imprisonment as a condition of probation, and fined the lesser of the amount of the forged instrument or $1,000.

(4) *On a third or subsequent conviction of a violation of this section, a person shall be required to serve at least 45 days' imprisonment as a condition of probation*, and fined the lesser of the amount of the forged instrument or $2,500." (Emphasis added.)

Second, K.S.A. 21-4710(d)(11), found in the Kansas Sentencing Guidelines Act (KSGA), provides as

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follows:

"Prior convictions of any crime shall not be counted in determining the criminal history category if they *enhance the severity level or applicable penalties*, elevate the classification from misdemeanor to felony, or are elements of the present crime of conviction. Except as otherwise provided, all other prior convictions will be considered and scored." (Emphasis added.)

The fundamental rule of statutory construction, to which all other rules are subordinate, is that the intent of the legislature governs. *State v. McElroy*, 281 Kan. 256, 262, 130 P.3d 100 (2006). An appellate court's first task is to "ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning." *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 (2007).

When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read the statute to add something not readily found therein. In such an instance, an appellate court need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that an appellate court moves to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent. *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007).

When statutes are ambiguous or unclear, an appellate court will apply canons of construction to effect the legislative intent. When construing statutes to determine legislative intent, an appellate court must consider various provisions of an act in pari materia with a view of reconciling and bringing the provisions into workable harmony if possible. *State v. Breedlove*, 285 Kan. 1006, 1015, 179 P.3d 1115 (2008). A specific statute controls over a general statute. *In re K.M.H.*, 285 Kan. at 82. As a general rule, criminal statutes must be strictly construed in favor of the accused. Any reasonable doubt as to the meaning of the statute is decided in favor of the accused. Nevertheless, this rule of strict construction is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent. *State v. Paul*, 285 Kan. 658, 662, 175 P.3d 840 (2008).

Against this backdrop, the State argues that Luttig's 45-day prison term for her third forgery conviction mandated by K.S.A. 21-3710(b)(4) did not affect her sentence for forgery, but was merely an additional condition of probation. Because the district court always has discretion to include incarceration in a county jail for up to 60 days in felony cases as a condition of probation pursuant to K.S.A. 21-4602(c), the State argues that the mandatory 45-day term on a third or subsequent forgery conviction cannot be viewed as an enhancement of the penalty.

This argument fails under the plain language of K.S.A. 21-3710(b)(4), which *mandates* the 45-day imprisonment upon a third or subsequent forgery conviction. The fact that a district court otherwise has discretion to order a period of confinement as a condition of probation does not matter. K.S.A. 21-4710 (d)(11) provides that prior convictions cannot be counted in determining criminal history if they enhance the applicable *penalty* for the current crime of conviction. The fact that Luttig is required to serve 45 days in jail as a condition of her probation certainly enhances her *penalty* in this case, even if the requirement does not otherwise affect the length of her sentence.

The State's argument would have merit if K.S.A. 21-4710(d)(11) prescribed that prior convictions shall not be counted in determining criminal history if they enhance the applicable *sentence* for the present crime of conviction. As the State notes, the fact that Luttig was ordered to serve 45 days in jail as a condition of her probation does not otherwise affect the length of her *sentence*. However, the statute's use of the word "penalties" rather than "sentence" is significant. Here, because this was Luttig's third forgery conviction, and for this reason alone, the district court was required to impose a 45-day jail term as a condition of her probation. Under the plain language of K.S.A. 21-4710(d)(11), this enhanced her

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applicable penalty for forgery in the present case.

We do not interpret K.S.A. 21-4704(i) to require the inclusion of all prior forgery convictions in determining a defendant's criminal history regardless of whether probation is granted, as is argued by the dissent. K.S.A. 21-4704(i) does not address criminal history. This provision was added to the KSGA to address mandatory rules of imprisonment for driving under the influence of alcohol, domestic battery, forgery, and other specified crimes. We interpret K.S.A. 21-4704(i) to mean that if an offender is convicted of any of the specified crimes and is going to be placed on probation, the offender must serve the mandatory term of imprisonment or jail time required by statute, even if the offender is otherwise presumptive probation under the guidelines. If an offender is convicted of one of the specified crimes and is going to be imprisoned anyway, then the special rules for mandatory jail time do not apply.

We agree with the dissent that application of K.S.A. 21-3710(b) and K.S.A. 21-4710(d)(11) can lead to inequitable results in certain hypothetical situations. Nevertheless, we find the language of the statutes to be plain and unambiguous, requiring no further statutory construction. Even if the statutory language is somehow ambiguous or unclear, the criminal statutes must be strictly construed in favor of Luttig. We affirm the district court's judgment that, to the extent Luttig's prior forgery convictions were used to enhance her applicable penalty in the present case, the prior convictions cannot be construed in determining her criminal history score.

However, we disagree that the district court was required to use both of Luttig's prior forgery convictions in order to impose the mandatory 45-day jail term as a condition of her probation. Luttig pled guilty to two counts of forgery in the present case. She was required to serve 45 days in jail as a condition of probation on a third or subsequent felony conviction. K.S.A. 21-4710(a) forbids the use of multiple convictions from the same information/complaint in determining criminal history, but the forgery statute's progressive penalty provisions contain no such analogous restrictions. K.S.A. 21-3710(b)(4) states in relevant part that "[o]n a third or subsequent conviction of a violation of this section, a person shall be required to serve at least 45 days' imprisonment as a condition of probation." The words "prior conviction" are not used. Furthermore, there is no timing requirement relative to the convictions; there is only the requirement that a third conviction exists.

Because Luttig pled guilty to two counts of forgery in the present case, the district court was only required to use one of her prior forgery convictions in order to impose the 45-day jail term. The district court should have counted Luttig's other prior forgery conviction, resulting in a criminal history of two prior nonperson felonies. Therefore, we vacate Luttig's sentence and remand with directions to resentence Luttig under criminal history category F.

Affirmed in part, vacated in part, and remanded.

KNUDSON, S.J., dissenting in part and concurring in part: I respectfully dissent from the majority's holding in Syl. ¶ 4 of the opinion. I would conclude counting Luttig's prior forgery convictions to determine criminal history does not run afoul of K.S.A 21-4710(d)(11) because the applicable penalty for forgery is 7 to 23 months. See K.S.A. 21-3710 and 21-4704; see also *State v. Boley,* 32 Kan. App. 2d 1192, 1197-98, 95 P.3d 1022 (2004) (noting that a severity level 1 penalty is the applicable penalty for commission of K.S.A. 65-4159[a]). Consequently, I would reverse the judgment of the district court and remand for resentencing of Luttig with a criminal history of 8-E.

One of the reasons Kansas went from indeterminate sentencing to a modified determinate sentencing scheme was to address and correct disparity in sentencing. And, to some degree, K.S.A. 21-4710(d)(11) addresses that problem by attempting to limit double counting of an offender's prior convictions. Here, however, no such problem exists and county jail time as a condition of probation does not enhance the

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applicable penalty provided by law for the crime of forgery. In fact, if probation is revoked at a later time, an offender is entitled to credit for time spent in jail. K.S.A. 21-4614.

I also find support in 21-4704(i) that requires inclusion of all prior forgery convictions to determine a defendant's criminal history. In other words, a defendant's criminal history and the applicable grid box under sentencing guidelines will be the same regardless of whether the defendant is given a presumptive sentence or there is a departure sentence.

K.S.A. 21-4704(i) states:

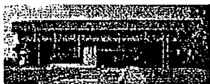
"The sentence for the violation of the felony provision of K.S.A. 8-1567, subsection (b)(3) of K.S.A. 21-3412a, subsections (b)(3) and (b)(4) of K.S.A. 21-3710, K.S.A. 21-4310 and K.S.A. 21-4318, and amendments thereto, shall be as provided by the specific mandatory sentencing requirements of that section and shall not be subject to the provisions of this section or K.S.A. 21-4707 and amendments thereto. *If because of the offender's criminal history classification the offender is subject to presumptive imprisonment or if the judge departs from a presumptive probation sentence and the offender is subject to imprisonment, the provisions of this section and K.S.A. 21-4707, and amendments thereto, shall apply and the offender shall not be subject to the mandatory sentence as provided in K.S.A. 21-3710, and amendments thereto.* Notwithstanding the provisions of any other section, the term of imprisonment imposed for the violation of the felony provision of K.S.A. 8-1567, subsection (b)(3) and (b)(4) of K.S.A. 21-3710, K.S.A. 21-4310 and K.S.A. 21-4318, and amendments thereto, shall not be served in a state facility in the custody of the secretary of corrections." (Emphasis added.)

While perhaps somewhat ponderous, the emphasized language certainly means an offender's criminal history must include all prior forgery convictions regardless of whether probation is granted. Any other construction would create a significant sentencing disparity between offenders with identical past forgery convictions depending on whether probation was granted or the sentencing court decided to depart and impose a prison sentence.

One short example of the problem. Joe and Tom have identical criminal records with two prior forgery convictions. Both pled guilty to another forgery. Joe is to receive a presumptive sentence of probation with 45 days in the county jail; consequently, his criminal history does not include the two prior forgeries. Tom, on the other hand, receives a departure sentence of imprisonment and his two prior forgeries are included in his criminal history. As a result, Tom receives a significantly longer sentence than Joe. Later Joe's probation is revoked, but his sentence to be served is less than Tom's because he received the criminal history windfall.

In summary, Joe and Tom should be treated equally in the eyes of the law. K.S.A. 21-4704(i) specifically addresses how that is to be accomplished. We should hold K.S.A. 21-4710(d)(11) does not apply and send this case back to the district court for resentencing.

END

 Kansas Opinions | Finding Aids: Case Name » Supreme Court or Court of Appeals | Docket Number | Release Date |

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Updated: January 09, 2009.
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1-6

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 99,156

STATE OF KANSAS,
Appellant,

v.

DEANNA GILLEY,
Appellee.

SYLLABUS BY THE COURT

1.

The interpretation of statutes is a question of law over which an appellate court exercises unlimited review. When courts are called upon to interpret statutes, the fundamental rule governing that interpretation is that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. For this reason, when the language of a statute is plain and unambiguous, courts need not resort to statutory construction. Instead, an appellate court is bound to implement the legislature's expressed intent. Only where the face of the statute leaves its construction uncertain may the court look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested.

2.

K.S.A. 21-3710(b)(4) mandates 45 days' imprisonment when a defendant is convicted of a third or subsequent forgery offense. By elevating the mandatory minimum sentence given in such cases, the legislature has enhanced the applicable penalties for the underlying forgery conviction.

3.

When a defendant's prior forgery convictions are used to increase the mandatory minimum sentence for the crime of conviction in the progressive sentencing scheme in K.S.A.

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21-3710(b)(4), enhancing the applicable penalty for the primary forgery offense, the plain language of K.S.A. 21-4710(d)(11) precludes those prior convictions from being used to calculate the defendant's criminal history score in the same case.

4.

K.S.A. 21-3710(b) references the number of forgery convictions of a particular defendant; the statute makes no reference to prior forgery convictions. Because K.S.A. 21-3710(b) does not limit progressive sentencing to prior forgery convictions but rather focuses on the number of forgery convictions committed by a defendant, any forgery conviction can be used to heighten the defendant's conditions of probation.

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 19, 2008. Appeal from Reno district court; TIMOTHY J. CHAMBERS, judge. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed. Opinion filed January 22, 2010.

Amanda D. Voth, assistant district attorney, argued the cause, and *Thomas R. Stanton*, deputy district attorney, *Keith E. Schroeder*, district attorney, and *Steve Six*, attorney general, were on the brief for appellant.

Janine Cox, of Kansas Appellate Defender Office, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

DAVIS, C.J.: Deanna Gilley was convicted of three counts for forgery. Relying on two prior forgery convictions, the district court sentenced her for a third forgery conviction under the progressive sentencing scheme set forth in K.S.A. 21-3710(b)(4), which requires 45 days' imprisonment as a condition of probation and a fine that is the lesser of the amount of the forged instrument or $2,500. The defendant successfully objected to a criminal history being category E. The court modified her criminal history to category G based upon the provisions of K.S.A. 21-4710(d)(11), stating that "[p]rior convictions of any crime shall not be counted . . . if they enhance the . . . applicable penalties." The Court of Appeals vacated her sentence and remanded the case for imposition of sentence with a criminal history of E. We granted defendant's petition

for review, reverse the decision of the Court of Appeals, and affirm the judgment of the district court.

FACTS

Upon complaint filed in Reno County in case No. 07 CR 297, Gilley was charged with three counts of forgery under the provisions of K.S.A. 21-3710(a)(1). Pursuant to a plea agreement and on June 28, 2007, defendant entered a plea of no contest to Counts 1, 2, and 3. There is no mention in the charging document of K.S.A. 21-3710(b), which sets forth the progressive sentencing scheme for a first forgery conviction, a second forgery conviction, and a third or subsequent forgery conviction. The record establishes that defendant did not object to the charges in the complaint. Nor has the defendant raised any concern with the charging document, and we therefore do not address any issue dealing with the complaint filed.

It is apparent from the record that the State, the defendant, and the district court treated each of the three counts in the complaint as a third forgery conviction, requiring the defendant "to serve at least 45 days' imprisonment as a condition of probation, and a fine the lesser of the amount of the forged instrument or $2,500." K.S.A. 21-3710(b)(4). The presentence investigation report reflects this fact, as well as the journal entry of sentence for the three counts of forgery. In addition, the transcript of the sentencing hearing specifies that each count was considered as a third forgery conviction. The sentence for each count was imposed to run concurrently.

The defendant had three prior forgery convictions in case No. 06 CR 678 on December 1, 2006. Based upon her current forgery convictions and her three prior felony forgery convictions, the presentence investigation report identified her criminal history as category E based upon counting four nonperson felony forgery convictions. The defendant objected, claiming that two of her 2006 forgery convictions were used to elevate Count 1 in her present case to a third forgery conviction under K.S.A. 21-3710(b)(4). Thus, according to her argument, these two prior forgery convictions could not be counted in her criminal history under K.S.A. 21-

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4710(d)(11) because the two prior convictions served to enhance the penalty under Count 1 by requiring a mandatory 45 days in jail as a condition of her probation.

The district court agreed and modified her criminal history from category E (three or more nonperson felonies) to category G (one nonperson felony). The trial court rejected the State's argument that the mandatory 45 days in jail as a condition of probation did not enhance the penalty under Count 1 and also rejected the argument that her present three forgery convictions could serve as a justification for treating her convictions in the present case as third or subsequent convictions.

On the State's appeal, the Court of Appeals determined that Gilley's three forgery convictions were sufficient to warrant the district court sentencing her as a person with a third forgery conviction, thereby making all three of her prior forgery convictions in case No. 06 CR 678 available for use in computing her criminal history:

> "Here, a third conviction existed at the time Gilley was sentenced in No. 07CR297 simply due to the three counts of forgery contained therein, to which Gilley pled guilty. The district court, by virtue of those three convictions, was required to sentence Gilley to the 45-day imprisonment term as a condition of her probation. Gilley's criminal history at the time of sentencing on No. 07CR297 should have included the three prior forgeries because none of those convictions were used to impose the mandatory jail term." *Gilley*, slip op. at 4.

Thus, the Court of Appeals vacated her sentence and remanded the case with directions that defendant be resentenced with a criminal history of E (three or more nonperson felonies). *Gilley*, slip op. at 4-5. Because the Court of Appeals reversed on this issue, it found it unnecessary to consider the State's argument that the 45-day term of imprisonment as a condition of Gilley's probation did not constitute an enhancement of the penalty under K.S.A. 21-4710(d)(11). *Gilley*, slip op. at 5.

We granted Gilley's petition for review wherein she claims that the trial court properly determined her criminal history was category G. Her claim incorporates three questions: (1)

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Did Gilley's three current forgery convictions in case No. 07 CR 297 provide a basis for treating her forgery conviction in Count 1 as a third conviction; (2) did the use of a conviction for both the purposes of the progressive sentencing scheme under K.S.A. 21-3710(b) and the calculation of a defendant's criminal history violate K.S.A. 21-4710(d)(11); and (3) did the trial court err in setting defendant's criminal history as category G? Gilley's case was heard concurrently with *State v. Arnett*, (No. 99,508, this day decided), because both cases raise the same questions for our review.

(1) DID DEFENDANT'S THREE CURRENT FORGERY CONVICTIONS IN CASE NO. 07 CR 297 PROVIDE A BASIS FOR TREATING HER FORGERY CONVICTION IN COUNT 1 AS A THIRD CONVICTION?

The defendant was charged with three counts of forgery under K.S.A. 21-3710(a). As noted above, there was no indication in the complaint whether the three counts were charged as third offenses under the progressive sentencing scheme set forth in K.S.A. 21-3710(b)(4). However, we are able to determine from the record as a whole that Count 1 in the complaint was treated as a third conviction based upon defendant's plea to the charge. While not crystal clear, it appears that all three of the charges were treated as third convictions upon defendant's plea to all charges in the complaint.

It is clear from the record that when the defendant entered her plea to Count 1 of the complaint, the two remaining counts were criminal charges, not criminal forgery convictions. Thus, the remaining two charges could not serve as a basis for making defendant's plea to Count 1 a third conviction under K.S.A. 21-3710(b)(4). We conclude that defendant's three forgery convictions in the present complaint under the facts of this case could not serve as a basis for her plea to Count 1 being a third conviction under K.SA. 21-3710(b)(4).

(2) DID THE USE OF A CONVICTION FOR BOTH THE PURPOSES OF THE PROGRESSIVE SENTENCING SCHEME UNDER K.S.A. 21-3710(b) AND THE CALCULATION OF A DEFENDANT'S CRIMINAL HISTORY VIOLATE K.S.A. 21-4710(d)(11)?

Based upon our resolution above, there existed three prior forgery convictions of the defendant that the court could use to sentence her for a third conviction under Count 1 in case

/-//

No. 07 CR 297 for a third forgery conviction under the provisions of K.S.A. 21-3710(b)(4). The record clearly establishes that the trial court utilized two of her prior forgery convictions for the purpose of establishing that defendant's plea to Count 1 resulted in a third conviction under K.S.A. 21-3710(b)(4). The question arises whether the two prior forgery convictions enhance the penalty for the defendant's conviction of Count 1 under K.S.A. 21-4710(d)(11) and therefore could not be included in defendant's criminal history.

This case calls on us to interpret two statutes: K.S.A. 21-3710(b) and K.S.A. 21-4710(d)(11). K.S.A. 21-3710 defines the crime of forgery under Kansas law. K.S.A. 21-3710(b)(1) states that "[f]orgery is a severity level 8, nonperson felony." K.S.A. 21-3710(b)(2) through (b)(5) define a progressive sentencing scheme based on the number of forgery convictions that a particular person may have incurred. Those sections provide:

> "(2) On a first conviction of a violation of this section, in addition to any other sentence imposed, a person shall be fined the lesser of the amount of the forged instrument or $500.
>
> "(3) On a second conviction of a violation of this section, a person shall be required to serve at least 30 days' imprisonment as a condition of probation, and fined the lesser of the amount of the forged instrument or $1,000.
>
> "(4) On a third or subsequent conviction of a violation of this section, a person shall be required to serve at least 45 days' imprisonment as a condition of probation, and fined the lesser of the amount of the forged instrument or $2,500.
>
> "(5) The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the mandatory sentence as provided herein." K.S.A. 21-3710(b)(2)-(5).

Gilley was sentenced under K.S.A. 21-3710(b)(4), which requires as a condition of probation a minimum of 45 days in prison and a fine in the lesser amount of either the forged instrument or $2,500.

K.S.A. 21-4710, which defines a defendant's criminal history for purposes of the Kansas sentencing grid, provides in relevant part:

> "Prior convictions of any crime shall not be counted in determining the criminal history category *if they enhance the severity level or applicable penalties* .... Except as otherwise provided, all other prior convictions will be considered and scored." (Emphasis added.) K.S.A. 21-4710(d)(11).

K.S.A. 21-4710(a) defines "prior convictions" as

> "any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203 and amendments thereto, which occurred prior to sentencing in the current case regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case."

See *State v. Ruiz-Reyes*, 285 Kan. 650, 655-56, 175 P.3d 849 (2008) (discussing this provision and noting that it explicitly states that previous convictions finalized after a crime is committed but before sentencing for that crime may be used to determine criminal history).

It is clear from these provisions that in both of the cases now subject to review, the three forgery convictions obtained in each of those cases cannot be used to calculate criminal history since they all constitute other "count[s] in the current case . . . brought in the same information or complaint." K.S.A. 21-4710(a). Likewise, K.S.A. 21-3710(b)(1) states that no matter how many forgeries a person commits, the crime of forgery is always a severity level 8 nonperson felony. Thus, the question before us today is whether the progressive sentencing scheme in K.S.A. 21-3710(b) enhances the "applicable penalties" for the underlying forgery offense. K.S.A. 21-4710(d)(11).

Standard of Review

The question before us turns on our interpretation of statutes—a question of law over which an appellate court exercises unlimited review. *State v. Walker*, 280 Kan. 513, 515, 124

P.3d 39 (2005). When courts are called upon to interpret statutes, the fundamental rule governing that interpretation is that "the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted." *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378, 22 P.3d 124 (2001). For this reason, when the language of a statute is plain and unambiguous, courts "need not resort to statutory construction." *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007), *cert. denied* 172 L. Ed. 2d 239 (2008). Instead, "an appellate court is bound to implement the [legislature's] expressed intent." *State v. Manbeck*, 277 Kan. 224, Syl. ¶ 3, 83 P.3d 190 (2004). Only where "the face of the statute leaves its construction uncertain, [may] the court . . . look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. [Citation omitted.]" *Robinett v. The Haskell Co.*, 270 Kan. 95, 100-01, 12 P.3d 411 (2000).

Analysis

According to Gilley, the plain language of K.S.A. 21-4710(d)(11) requires this court to interpret the 45-day period of imprisonment required in the case of a third or subsequent felony by K.S.A. 21-3710(b)(4) as an enhancement of the applicable penalties for the forgery offense because it raises the minimum penalties that shall be given from no period of imprisonment to a 45-day prison term.

The State argues that the same conviction may be used to define a sentence under K.S.A. 21-3710(b) and to calculate a defendant's criminal history score because the progressive sentences in K.S.A. 21-3710(b)(2)-(4) do not enhance applicable penalties. In particular, the State argues that the 45-day period of imprisonment in K.S.A. 21-3710(b)(4) falls well within the range of probation conditions defined in K.S.A. 21-4602(c) and thus cannot enhance applicable penalties.

K.S.A. 21-3710(b)(4) states that defendants convicted of a third or subsequent forgery violation "shall be required to serve at least 45 days' imprisonment as a condition of probation"

could be used to calculate her criminal history. The Court of Appeals came to this conclusion in its decision in this case. *Gilley*, slip op. at 4.

The progressive sentencing scheme for forgery convictions does not make any reference to "prior convictions." Compare K.S.A. 21-3710(b) (referencing a "first conviction," "second conviction," and "third or subsequent conviction") with K.S.A. 21-4710(a) (defining "prior conviction" as any conviction other than that included in the same information or complaint or joined for trial). Instead, K.S.A. 21-3710(b) simply references the *number* of forgery convictions of a particular defendant.

Because K.S.A. 21-3710(b) does not limit progressive sentencing to prior forgery convictions but rather focuses on the number of forgery convictions incurred by a defendant, any forgery conviction can be used to heighten the defendant's conditions of probation. Had the district court treated Gilley's Count 1 as a first conviction, Count 2 as a second conviction, and Count 3 as a third conviction under the provisions of K.S.A. 21-3710(b), all three prior forgery convictions would have been available to be counted for criminal history purposes.

Instead, as the record clearly establishes, Gilley's plea to Count 1 was treated as a third forgery conviction under K.S.A. 21-3710(b)(4). At the time she entered her plea to Count 1, she was charged with two additional counts of forgery in the same complaint, but these charges were not convictions. Thus, the district court could not rely upon such charges but only upon prior forgery convictions to establish a third conviction for Count 1 in the present case. The district court properly relied upon two of Gilley's 2006 forgery convictions. The plain language of K.S.A. 21-4710(d)(11) precludes those prior convictions from being used to calculate the defendant's criminal history score. There was no error by the district court.

The judgment of the Court of Appeals reversing the district court is reversed. The judgment of the Reno County District Court is affirmed.

and "fined the lesser of the amount of the forged instrument or $2,500." K.S.A. 21-4602(c) explains that "[i]n felony cases, the court may include confinement in a county jail not to exceed 60 days, which need not be served consecutively, as a condition of an original probation sentence." The State argues that because K.S.A. 21-4602(c) gives district courts discretion to include up to 60 days in jail as a condition of probation in any felony case and because forgery (as a severity level 8 nonperson felony) always involves presumptive probation, it cannot be said that K.S.A. 21-3710(b)(4)—which makes mandatory 45 days' imprisonment as a condition of probation—enhances the applicable penalties for the crime of forgery.

We disagree. While a district court has discretion to require up to 60 days in jail as a condition of a defendant's probation, K.S.A. 21-3710(b)(4) mandates 45 days' imprisonment when a defendant is convicted of a third or subsequent forgery offense. By elevating the mandatory minimum sentence given in such cases, the legislature has enhanced the applicable penalties for the underlying forgery conviction. See *State v. Luttig*, 40 Kan. App. 2d 1095, 1098-99, 199 P.3d 793 (2009); *cf. United States v. Booker*, 543 U.S. 220, 267, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005) (Breyer, J., writing for majority in a bifurcated opinion) (mandatory minimum sentences based on criminal history with no provision for durational departure elevate sentences beyond that authorized by a jury verdict).

We hold that when a defendant's prior forgery convictions are used to increase the mandatory minimum sentence for the crime of conviction in the progressive sentencing scheme in K.S.A. 21-3710(b)(4), enhancing the applicable penalty for the primary forgery offense, the plain language of K.S.A. 21-4710(d)(11) precludes those prior convictions from being used to calculate the defendant's criminal history score in the same case.

(3) DID THE TRIAL COURT ERR IN SETTING DEFENDANT'S CRIMINAL HISTORY AS CATEGORY G?

In the case before us, Gilley was convicted of three counts of forgery based on the same complaint or information, and she had been convicted of forgery three previous times. If Gilley's three *current* forgery convictions triggered the 45 days of imprisonment as a condition of her probation (as required by K.S.A. 21-3710[b][4]), then all of her *previous* forgery convictions

1-16

TESTIMONY ON JUVENILE JUSTICE AUTHORITY OVERVIEW

TO THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

BY COMMISSIONER J. RUSSELL JENNINGS

KANSAS JUVENILE JUSTICE AUTHORITY

JANUARY 28, 2010

J. Russell Jennings
Commissioner
785-296-0042
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Corrections and Juvenile Justice
Date: 1-28-10
Attachment # 2

Juvenile Justice Authority
Agency Overview

During fiscal year 2009 and fiscal year 2010 the Kansas Juvenile Justice Authority (JJA) experienced significant budget reductions through both legislative action and allotment by the Governor. A number of extraordinary steps were taken in order to meet the budget reductions including the closure of two state juvenile correctional facilities. In spite of these reductions, the juvenile justice system in Kansas remains relatively stable. Continued reductions will further erode the ability of the juvenile justice system to sustain the progress made in recent years and will create an environment where the ability to provide for public safety will be compromised.

Data reveal a substantial reduction in the number of youth placed in state custody and in juvenile correctional facilities during recent years. These reductions are as a direct result of improved effectiveness of the juvenile justice system through implementation of evidence-based practices and adequate financial support to juvenile community corrections organizations to meet the supervision and program demands of the youth they supervise.

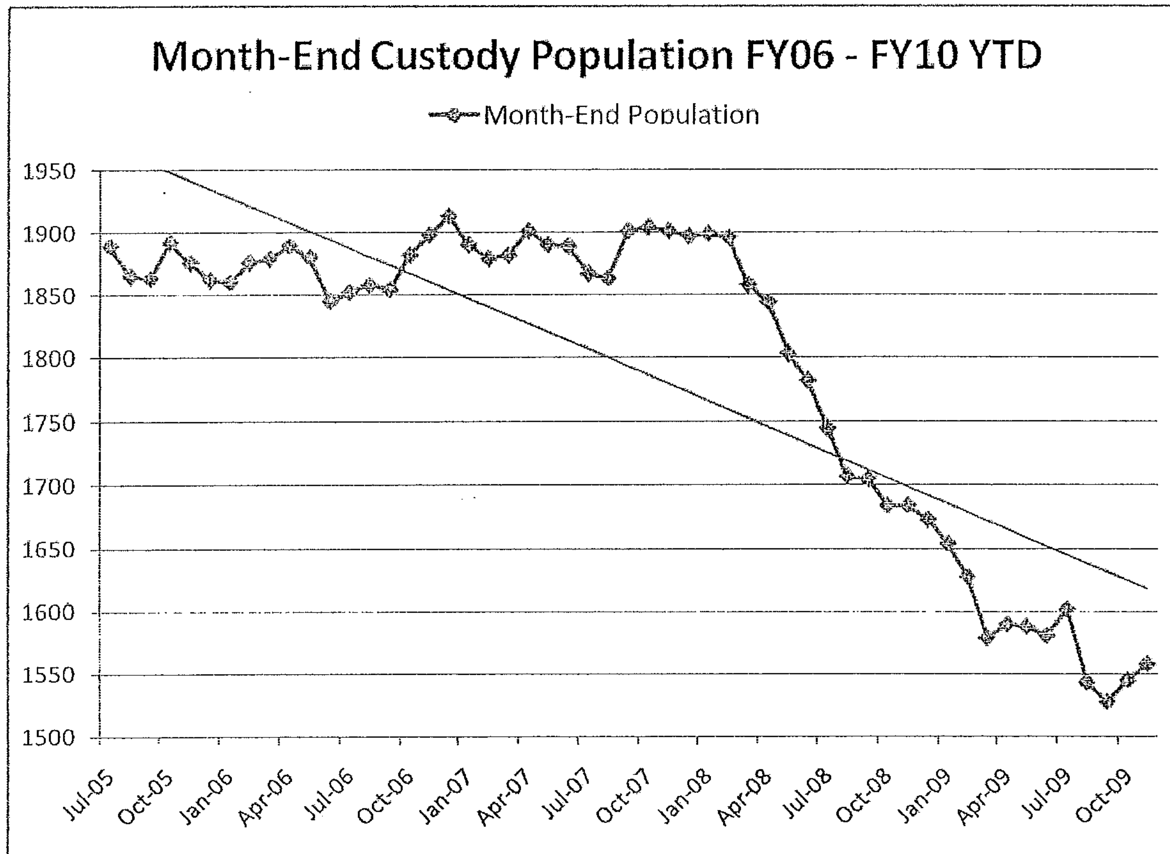

Chart 1

Chart 1 represents the number of youth placed in the custody of the Commissioner of Juvenile Justice from July 2005 – November 2009. The decline in the number of youth in state custody represents an 18% reduction over the period.

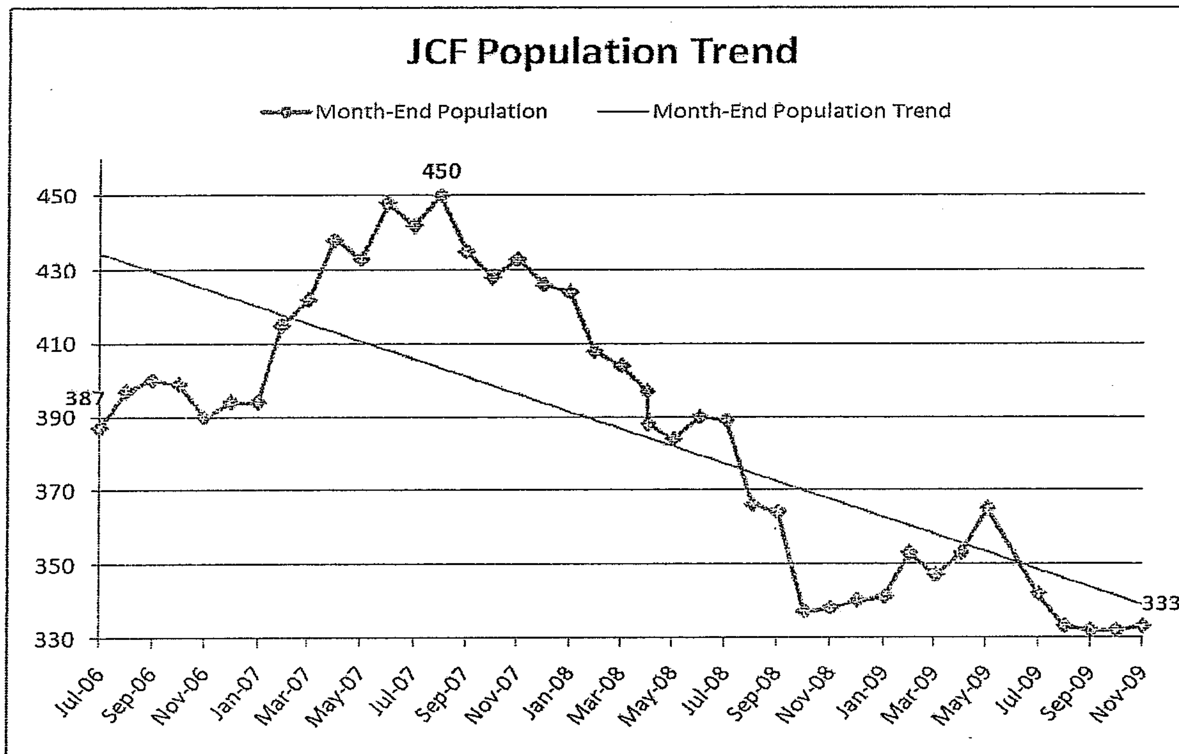

Chart 2

Chart 2 represents the last day of the month census of all juvenile correctional facilities from July 2006 – November 2009. During this period, the peak count was in August 2007 at 450 youth. From August 2007 through November 2009, a 26% decrease in the total number of youth placed in juvenile correctional facilities was experienced.

In July 2006, there were four operating juvenile correctional facilities. Three of the facilities, Atchison, Larned and Topeka were male facilities and Beloit served as the state facility for females. The FY09 approved budget for juvenile correctional facilities was $33.3 million. In December 2008, operations at the Atchison Juvenile Correctional Facility were suspended in order to meet required reductions in agency budget. In July 2009, the Governor's allotment resulted in operations at the Beloit Juvenile Correctional Facility being suspended, with the female offenders being moved to the renovated campus of the Topeka Facility. All youth committed to a juvenile correctional facility are now confined on one of two campuses, Larned and Topeka. The FY10 adjusted budget for juvenile correctional facility operations now stands at $25.8 million, a $7.5 million reduction or 22.4% below the FY09 approved budget. Additional reductions in the FY11 Governor's proposed budget will lead to a total reduction of $7.78 million or 23.3% over the two-year period.

Operations at the Beloit Juvenile Correctional Facility ceased on August 18, 2009. The 22 girls in residence were moved to the west campus of the Kansas Juvenile Correctional Complex in Topeka. One maintenance employee remains at the Beloit facility to operate the high-pressure boiler system. SB 357 and HB 2450 were introduced this session to transfer the Beloit property to the City of Beloit. The City

of Beloit and Mitchell County have worked over the past months to develop a community use for the property. The property was originally given by the City of Beloit to the Sate for purpose of building the Girl's Industrial School in the late 1800's. JJA sees no future state agency use for the property and encourages the transfer in order to avoid ongoing expenses for utility and maintenance.

The Governor's allotment order in November required JJA to reduce the per diem rate for Medicaid and non-Medicaid covered services by 10%. Approximately 100 different contract service providers have felt the 10% reduction, which was implemented on January 1, 2010. The reduction in rate resulted in the YRCII contractor at the former Atchison Juvenile Correctional Facility, G4S, to ask that the contract with JJA be terminated. Youth residents at the Atchison Youth Residential Center were removed from the facility and were placed in other residential placements. December 18th, 2009 was the final day of YRCII operations at Atchison. JJA sees no future use for the facility and feels continued utility and maintenance expenses are not prudent, given there is not a foreseeable state use for the property.

Table 1

Change from FY 09 to FY 11, SGF Only

	FY 2009 Approved	FY 2011 Request	FY 11 Gov Adjustments	FY 11 Gov Rec	Inc/(Dec) FY 09 to FY 11	% Change
Operations	3,924,996	3,683,033	-	3,683,033	(241,963)	-6.16%
MIS	1,166,542	1,158,092	(50,000)	1,108,092	(58,450)	-5.01%
Grad. Sanc.	16,721,809	16,202,355	(1,793,716)	14,408,639	(2,313,170)	-13.83%
Incentive*	1,000,000	627,311	(627,311)	-	(1,000,000)	-100.00%
AYRC	-	396,142	(396,142)	-	-	N/A
Total CO	**22,813,347**	**22,066,933**	**(2,867,169)**	**19,199,764**	**(3,613,583)**	**-15.84%**
KJCC	15,257,019	17,037,443	(181,089)	16,856,354	1,599,335	10.48%
AJCF	5,549,957		-	-	(5,549,957)	-100.00%
BJCF	4,005,685		-	-	(4,005,685)	-100.00%
LJCF	8,546,491	8,990,783	(271,198)	8,719,585	173,094	2.03%
Total JCFs	**33,359,152**	**26,028,226**	**(452,287)**	**25,575,939**	**(7,783,213)**	**-23.33%**
Total	**56,172,499**		**(3,319,456)**	**44,775,703**	**(11,396,796)**	**-20.29%**

Table 1 illustrates budget reductions for JJA since the FY09 approved budget through the Governor's FY11 budget recommendation. Table 1 represents all agency budgeted expenses except for consensus caseload and community prevention grant funding. The JJA caseload budget pays for all residential placements other than detention services. Community prevention grants are supported by the Children's Initiative Fund (CIF).

The caseload budget for JJA was reduced by 10% through allotment in November. The remainder of the juvenile justice system budget reductions over the past eighteen months represents a 16.74% reduction from the approved FY09 budget to the present level of the FY10 budget. JJA received

American Recovery Act - Byrne - Justice Assistance Grant (JAG) in the total amount of $1,757,770. One-half of the grant amount is budgeted for use in FY10 and FY11. $500,000 is being used to support juvenile community corrections programs. $378,885 is being used to support juvenile correctional facility operations. In each case, the funds are being used to avoid staff reductions. With the aid of the JAG funds, the net effect of budget reductions amount to 15.14% from FY09 approved to FY10 to date.

The FY11 budget recommendation of the Governor seeks to restore the caseload reductions imposed through allotment in November, eliminates incentive grant funding, provides no funding for Atchison or Beloit in anticipation of disposition of those properties, eliminates one IT position in JJA Central Office through a $50,000 reduction in the agency IT budget, reduces prevention program funding by $1.7 million and makes additional reductions to juvenile correctional facility budgets of $450,000. The $1.7 million of CIF will be shifted to core programs for juvenile community corrections to replace the state general fund reduction. Community prevention program grants will be reduced by $1.7 million. Juvenile community corrections funding will then remain stable with no reduction to core programs of intake and assessment, juvenile intensive supervision and community case management.

JJA is currently working on three initiatives that we believe will strengthen the juvenile justice system and will lead to greater efficiencies and better youth outcomes in the long term.

YLS/CMI - JJA is working cooperatively with the Kansas Supreme Court in developing a plan for statewide use of the Youth Level of Service/Case Management Inventory (YLS/CMI) risk/needs assessment for juvenile offenders prior to their disposition hearing. Currently the YLS/CMI is administered to all youth placed on intensive supervision probation or placed in the custody of the Commissioner. The YLS/CMI is an evidence-based assessment tool that provides insight into the relative risk a youth presents with respect to reoffending behavior. The YLS/CMI identifies elevated risks and identifies needs of youth. Assessment results are used to guide case managers in developing an individualized supervision and rehabilitation plan. Administration of the YLS/CMI following adjudication and prior to sentencing will provide judges with additional information regarding youth to consider when imposing a sentence. There are currently four judicial districts involved in a pilot of the YLS/CMI assessment prior to sentencing. Each of the pilot districts developed their own plan for implementation through collaboration with the court, court services and juvenile community corrections organizations. The pilot projects have been successful in achieving the desired outcome of providing relevant risk/needs data to judges before a decision is made regarding sentence.

CbS – Community-based Standards (CbS) is a research-based evaluation process developed by the Council of Juvenile Corrections Administrators (CJCA) for assessment and evaluation of residential placements for youth. Youth Residential Centers II (YRCII's) are in essence group home settings for the non-secure rehabilitative care of juvenile offenders. YRCII's are licensed by the Kansas Department of Health and Environment (KDHE). JJA contracts with 26 different YRCII's for this service. Approximately 400 youth in state custody reside within a YRC on any given day. The YRC population represents approximately one-quarter of all youth in the custody of the Commissioner. CbS will provide a higher level of oversight as well as serve as a management tool for YRC operators. CbS involves surveys of youth residents, their parents and facility staff two times each year. The process also involves extracting particular data from the records of all youth who resided within the facility during the six-month evaluation period. The data from all sources is compiled into a comprehensive report that illustrates conditions within the facility relating to safety in operations and best practices in programming and case management. CJCA assigns a "coach" to work with each facility in reviewing

outcome data. The facility develops a facility improvement plan with the assistance of the coach. The coach monitors improvement plan implementation and progress, provides technical assistance and provides critical feedback to the facility. Data from all participating YRCII's are presented in easy to read tables and charts in a manner whereby the state average outcome can be compared to the individual facility outcome. JJA contemplates making participation in the CbS evaluation process mandatory for all YRCII contractors. CbS will cost $5,000 annually for each site. JJA has identified funds within current resources to contract for this service. JJA contemplates use of uncommitted Title IV-E administrative reimbursements for the project.

YRCII Practices - JJA is working with YRCII contractors to strengthen YRCII services. Several actions are anticipated in order to improve YRCII services. JJA contemplates requiring YRCII providers to formulate policy and procedure for multiple occupancy room assignment processes to assure thoughtful processes are in place for the assignment of youth to multiple occupancy rooms. A number of factors should routinely be considered when making such assignments. JJA will require such policy development through YRCII standards. JJA is also working with providers to develop a placement matrix process that takes into account the risk and needs of youth who are placed in YRCII's. It is important that youth who are low-risk of reoffending are not mixed in placements with youth who are of high-risk. Separation of various risk level youth can be accomplished through placement alternatives and through facility population management. A model will be developed for implementation. Full implementation may be delayed as the level of programming necessary to effectively intervene with moderate and high-risk youth will have cost implications for providers. Recent rate cuts have impacted the ability to require a higher level of service without adequate funds to deliver such services.

The juvenile justice system is at a critical point. Financially, the juvenile justice system is delicately balanced at this point. Further budget reductions in any particular area of service will not be without significant ramifications that will be felt throughout the system. In the end, reductions to community supervision or residential placements will lead to greater numbers of youth being placed in juvenile correctional facilities. Juvenile correctional facilities are operating at minimum financial levels to meet the needs of the youth and provide for a safe environment at current population levels. Further reductions in funding for juvenile correctional facilities will lead to reduced or eliminated programming, which is required in juvenile facilities. The only means by which juvenile correctional facilities will be able to absorb additional funding reductions will be through a reduced census. Reduced census can only be achieved through statutory change resulting in fewer youth being placed in juvenile correctional facilities or being placed for shorter periods of time. Further reductions in juvenile correctional facility budgets or increases in the daily census of the facilities without funding to support a greater number of youth will result in the facilities becoming less safe with diminished programs and treatment capacity. Unsafe conditions and diminished program capacity could lead to review of the facilities by the United States Department of Justice. The Civil Rights of Institutionalized Persons Act (CRIPA) applies to juvenile correctional facilities. A number of states have been subjected to CRIPA proceedings as a result of a failure to adequately fund operations that leads to lack of adequate staff and programs. States where CRIPA proceedings are commenced experience significant fiscal consequence. CRIPA involvement in Kansas is avoidable as long as adequate funds are available to meet minimum standards. JJA believes we have arrived at the point of minimally adequate funding for juvenile correctional facility operations to sustain a constitutional level of operations.