

**Pattern  
Instructions for Kansas—**

**CRIMINAL 3d**

**(Cite as PIK 3d)**

**Prepared by:**

**KANSAS JUDICIAL COUNCIL  
ADVISORY COMMITTEE ON  
CRIMINAL JURY INSTRUCTIONS**

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## FOREWORD

The preparation and publication of *Pattern Instructions for Kansas-Criminal 3d (PIK 3d)* has been accomplished through the efforts of the Kansas Judicial Council's Advisory Committee on Criminal Jury Instructions. The Council directed its preparation because of two major pieces of legislation: sentencing guidelines (1992 S.B. 479) and recodification of the criminal code (1992 S.B. 358). Finishing touches had to await 1993 legislation to reconcile those two bills. Not until the veto session was the reconciliation bill (1993 S.B. 423) enacted. Further complicating the Committee's task have been asundry revisions based upon other 1993 legislation and ongoing case law. Nonetheless, the Committee has finished its assigned task on schedule.

*PIK 3d* covers statutes enacted through the 1993 legislative session, Kansas Supreme Court decisions through Vol. 252, No. 4 and Kansas Court of Appeals decisions through Vol. 18, No. 2.

The format of *PIK 3d* is comparable to that of its predecessors. The Committee did decide to use a slightly larger three-ring notebook to facilitate use.

Long hours, illuminating debate, and lots of elbow grease have produced these pattern instructions with appropriate notes and comments. The members of the Committee are: Professor Christine Arguello, Lawrence; Hon. Michael A. Barbara, Topeka; Hon. Robert L. Bishop, Winfield; Hon. J. Patrick Brazil, Topeka; Hon. David M. Kennedy, Wichita; Hon. David Prager, Topeka; Hon. M. Kay Royse, Topeka; Hon. Philip C. Vieux, Garden City; Hon. Herbert W. Walton, Olathe; Hon. John W. White, Iola; Hon. Frederick Wolesslagel, Lyons. Each of these individuals has served upon the Committee because of a belief in the Kansas judiciary and a desire that the men and women serving on the bench be provided with a quality product. Hopefully, we have succeeded and *PIK 3d* will take its place along side *PIK (1971)* and *PIK 2d (1982)* as a trusted and valued publication that stands the test of time.

The Committee is indebted to many others who have made it possible to prepare this publication. We are appreciative of those judges and lawyers who have made suggestions for revisions, many

of which we have adopted. We gratefully acknowledge the consistent support of the Kansas Judicial Council. To the staff of the Council that gave unflinchingly of their time and energies to insure a quality product, our special thanks. Its Research Director, Randy M. Hearrell, and Research Associate, Matthew B. Lynch, provided Committee members with not only technical assistance but valuable substantive contributions. Many long hours were spent getting the manuscript into final, publishable form by Janelle Williams and Lisa R. North.

With that, we rest our case.

David S. Knudson, Chair  
Kansas Judicial Council Advisory  
Committee on Criminal Jury Instructions  
July, 1993

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PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY  
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## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

The defendant is charged with the crime of \_\_\_\_\_ . The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

---

You may consider the testimony of witnesses, an article or document marked as an exhibit, or any other matter admitted in evidence such as an admission or stipulation. You should consider only testimony and exhibits admitted into evidence.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness testifies.

#### Notes on Use

The second paragraph of the above instruction relative to the elements of the crime must be supplemented by setting forth the elements in detail for the particular crime. These elements will be found by referring to that section of this book which deals with that crime.

Lesser included offenses should not be given in introductory instructions. A judge cannot be sure if any lesser included offenses are proper for jury consideration until the judge hears the evidence. Two factors suggest, however, the desirability of alerting the jury to the possibility of lesser offense consideration: (1) A judge's communication should be consistent from the start to the finish of the trial, and (2) it seems somewhat unfair for the jury to first learn at the end of the trial that there may be a number of crimes to consider in addition to the crime charged. Notice might be given in this way:

Depending upon what the evidence is, it may be required that you also consider one or more less serious crimes than the one I have defined. If this becomes necessary, I will tell you in my final instructions and I will give you specific definitions at that time.



## PATTERN INSTRUCTIONS FOR KANSAS 3d

If a judge wishes to give some instructions before the introduction of evidence, it is authorized by K.S.A. 22-3414(3), and we believe it is also within a judge's inherent authority.

### Comment

The Committee recommends that the above basic instructions be given to the jury before the introduction of evidence. It is believed that by so doing the jury will have a better understanding of its function and this should be helpful to the jury in evaluating the evidence.

In addition to the above instructions, some courts may desire to give PIK 3d 51.05, Rulings of the Court. It should not be objectionable to do this, but it is believed most judges would consider such an instruction out of place as an introductory instruction and, consequently, it is not included.

That part of the instruction relating to the right of a jury "to use common knowledge and experience" was inferentially approved in *State v. Fenton*, 228 Kan. 658, 666, 620 P.2d 813 (1980).

In *State v. Williams*, 234 Kan. 233, 238, 670 P.2d 1348 (1983), the defendant claimed error in that the trial judge allowed the State to admit serology testimony of its experts who showed some disagreements. As part of the opinion that this was not an abuse of discretion by the trial judge, the burden of proof instruction as given was set out. That instruction expanded PIK 2d 51.01 by including specific factors the jury might consider, those often mentioned in instructions that were common many years ago.

Although the instruction was neither approved nor disapproved, *Williams* could be considered as an approval of it simply because it was reproduced. We do not consider that to be so, and we adhere to the brevity of PIK 3d 51.01. If specific factors were appropriate for inclusion, it would seem they would be those not mentioned but related to the serology tests: methodology, quality control, condition of blood, etc. (State's contention, 234 Kan. at 237) All of which simply points out one of the negative aspects of attempts to expand PIK 3d 51.01.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**51.02 CONSIDERATION AND BINDING APPLICATION OF INSTRUCTIONS**

**It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.**

**Notes on Use**

For authority, see K.S.A. 22-3403(3).

**Comment**

The implication of *State v. McClanahan*, 212 Kan. 208, 510 P.2d 153 (1973) is that this instruction complies with the statutory directive and the law of Kansas relative to the province of a jury.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**51.03 CONSIDERATION AND GUIDING APPLICATION OF INSTRUCTIONS**

The instruction which originally appeared as PIK 51.03 is deleted because it was disapproved for use by *State v. McClanahan*, 212 Kan. 208, 213, 510 P.2d 153 (1973).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 51.04 CONSIDERATION OF EVIDENCE

**In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.**

#### Notes on Use

The giving of this instruction was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 51.05 RULINGS OF THE COURT

**At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.**

#### Notes on Use

This instruction should be given in ordinary cases. *State v. Boyd*, 222 Kan. 155, 159, 563 P.2d 446 (1977), would suggest that comment on the truth or the falsity of evidence would not be approved in Kansas. The questioned judicial action in *Boyd*, however, related to a judge's question to a witness rather than to comments on the evidence.

The giving of this instruction was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**51.06 STATEMENTS AND ARGUMENTS OF COUNSEL**

**Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.**

**Notes on Use**

The giving of this instruction was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 51.07 SYMPATHY OR PREJUDICE FOR OR AGAINST A PARTY

**You must consider this case without favoritism or sympathy for or against either party. Neither sympathy nor prejudice should influence you.**

#### Notes on Use

The Committee recommends that unless there are very unusual circumstances the above instruction should not be given. Ordinarily, PIK 3d 52.09, Credibility of Witnesses, should be a sufficient guide for the jury. Additionally, the above instruction is objectionable in that it tells the jury what not to do rather than what to do.

#### Comment

In *State v. Sully*, 219 Kan. 222, 547 P.2d 344 (1976), the Supreme Court approved not giving this precautionary instruction unless there are very unusual circumstances as being "the better practice." To give this instruction, however, "would not constitute error."

If a precautionary instruction of this type is to be given, it appears that one "in substantial accord" with this instruction will be approved. *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976).

In *State v. Reser*, 244 Kan. 306, 317, 767 P.2d 1277 (1989), the Court found no unusual circumstances existed which would support a claim of error for refusal to give this instruction.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 51.08 FORM OF PRONOUN - SINGULAR AND PLURAL

**The instruction which originally appeared as PIK 51.08 is deleted because the Committee believes the proper practice is for a judge to tailor his or her instructions to the parties by generally using their names. Where a pronoun is used, it should express both the sex and the number to which the pronoun refers.**



PATTERN INSTRUCTIONS FOR KANSAS 3d

**51.09 IF JURY RECEIVES INSTRUCTIONS BEFORE  
CLOSE OF CASE**

**The instruction which originally appeared as PIK 51.09 is deleted because the Committee now concludes it is unnecessary.**

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 51.10 PENALTY NOT TO BE CONSIDERED BY JURY

**Your only concern in this case is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is a matter for determination by the Court.**

#### Notes on Use

This instruction was approved in *State v. Osburn*, 211 Kan. 248, 254, 505 P.2d 742 (1973), when the words "guilt or innocence" were in the instruction. The Committee modified that language to comport with recent appellate court decisions. For those decisions, see PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Deletion of the second sentence of this instruction was approved when the jury was instructed on the defense of insanity in *State v. Alexander*, 240 Kan. 273, 286, 287, 729 P.2d 1126 (1986). See also, PIK 3d 54.10-A, Insanity - Commitment.

If, under K.S.A. 21-4624, the "Hard 40" sentence may be applied, the Committee recommends striking the second sentence and modifying the first sentence to read, "Your only concern, at this time, is determining if the defendant is guilty or not guilty."

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 51.11 CAMERAS IN THE COURTROOM

Under rules of the Supreme Court, the news media is permitted to bring cameras and recording equipment into the courtroom to photograph or record public proceedings in the district courts of Kansas. The reason for these rules is to increase the public knowledge of court proceedings and to make the court as open as possible.

These rules are very strict and are closely monitored. In general, what is permitted is photographs of the courtroom setting and the participants in the trial setting, including the attorneys, the judges, the court reporter and persons who might be in the audience. The rules do not permit photographing individual jurors and limit photographing where the jurors might appear in the background if individual jurors could be identified by such a photograph. The photographing of certain witnesses is also prohibited.

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I would like to introduce you to [insert person's name] who is a (photographer) (camera operator) from [insert name of station, newspaper, etc.]. [insert person's name] will be taking pictures during the course of the day. I do not expect any noise or disruption, but if you hear any noise or see movement of the equipment, please ignore it and continue with your duties as jurors.

#### Comment

See Supreme Court Order 86 SC 35 and its appendix (February 13, 1986).

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PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 52.00

EVIDENCE AND GUIDES FOR ITS  
CONSIDERATION

	PIK Number
Information - Indictment . . . . .	52.01
Burden of Proof, Presumption of Innocence, Reasonable Doubt . . . . .	52.02
Presumption of Innocence . . . . .	52.03
Reasonable Doubt . . . . .	52.04
Stipulations and Admissions . . . . .	52.05
Proof of Other Crime - Limited Admissibility of Evidence . . . . .	52.06
More Than One Defendant - Limited Admissibility of Evidence . . . . .	52.07
Affirmative Defenses - Burden of Proof . . . . .	52.08
Credibility of Witnesses . . . . .	52.09
Defendant As A Witness . . . . .	52.10
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## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 52.01 INFORMATION - INDICTMENT

**The Committee recommends that there be no separate instruction given.**

#### **Comment**

K.S.A. 22-3414(3) provides in part, ". . . and the judge may, in his discretion, *after the opening statements*, instruct the jury on such matters as in his opinion will assist the jury in considering the evidence as it is presented."

Instruction on the elements for the crime charged, the Burden of Proof, Presumption of Innocence, Reasonable Doubt (PIK 3d 52.02) and Credibility of Witnesses (PIK 3d 52.09) could be given following opening statements.

K.S.A. 22-3414 does not require that the instructions be in writing.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

The State has the burden to prove the defendant is guilty. The defendant is not required to prove (he)(she) is not guilty. You must presume that (he)(she) is not guilty until you are convinced from the evidence that (he)(she) is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.

#### Notes on Use

This instruction must be given in each criminal case and should follow the element instructions for the crime charged. See K.S.A. 21-3109 on presumption of innocence and reasonable doubt, and K.S.A. 60-401(d) on burden of proof.

This instruction does not need to be repeated for separate offenses. *State v. Peoples*, 227 Kan. 127, 135, 605 P.2d 135 (1980). The State's burden, however, should be mentioned when a rebuttable presumption is utilized. See *State v. Johnson*, 233 Kan. 981, 986, 666 P.2d 702 (1983); *State v. Marsh*, 9 Kan. App. 2d 608, 612, 684 P.2d 459 (1984).

No separate instruction should be given relating to presumption of innocence and reasonable doubt. (See Committee's recommendations under PIK 3d 52.03 and 52.04.)

#### Comment

This instruction has not been changed as to substance since first adopted. It was designed to eliminate verbose and meaningless instructions commonly given about "presumption of innocence" and about "reasonable doubt". The only issues that have arisen relate to the semantics of "innocent" as contrasted to "not guilty" and "should" as contrasted to "must".

## PATTERN INSTRUCTIONS FOR KANSAS 3d

The instruction complies with *State v. Keeler*, 238 Kan. 357, 710 P.2d 1279 (1985); and *State v. Maxwell*, 10 Kan. App. 2d 62, 69, 691 P.2d 1316, *rev. denied* 236 Kan. 876 (1984). See also, *State v. Dunn*, 249 Kan. 488, 492, 820 P.2d 412 (1991).



PATTERN INSTRUCTIONS FOR KANSAS 3d

**52.03 PRESUMPTION OF INNOCENCE**

**The Committee recommends that there be no separate instruction given defining presumption of innocence.**

**Notes on Use**

For authority, see K.S.A. 21-3109. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to presumption of innocence.

**Comment**

Failure to give a detailed instruction was approved in *State v. Taylor*, 212 Kan. 780, 784, 512 P.2d 449 (1973). See Comment to PIK 3d 52.02.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 52.04 REASONABLE DOUBT

**The Committee recommends that there be no separate instruction given defining reasonable doubt.**

#### Notes on Use

For authority, see K.S.A. 21-3109. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to reasonable doubt. See Notes on Use thereto.

#### Comment

The Committee believes that the words "reasonable doubt" are so clear in their meaning that no explanation is necessary.

The Kansas Supreme Court approved this principle in *State v. Bridges*, 29 Kan. 138, 141 (1882), by stating: "It has often been said by courts of the highest standing that perhaps no definition or explanation can make any clearer what is meant by the phrase 'reasonable doubt' than that which is imparted by the words themselves."

*State v. Davis*, 48 Kan. 1, 10, 28 Pac. 1092 (1892), states: "It is to be presumed that the jury understood what the words 'reasonable doubt' meant. The idea intended to be expressed by these words can scarcely be expressed so truly or so clearly by any other words in the English language."

The position of the Committee opposing any separate instruction on reasonable doubt was approved in *State v. Mack*, 228 Kan. 83, 88, 612 P.2d 158 (1980).

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**52.05 STIPULATIONS AND ADMISSIONS**

The following facts have been agreed to by the parties and are to be considered by you as true:

- (1) \_\_\_\_\_.
- (2) \_\_\_\_\_.
- (3) \_\_\_\_\_.

**Comment**

K.S.A. 22-3217 provides for pretrial in criminal matters. The Committee suggests the use of pretrial the same as in civil cases to determine facts in controversy and questions of law which may arise during the trial. The statutory tools for disclosures and admissions in the criminal procedural code are as follows:

K.S.A. 22-3211, Depositions.

K.S.A. 22-3212, Discovery and inspection.

K.S.A. 22-3213, Production of statements and reports.

*State v. Trotter*, 245 Kan. 657, 667, 783 P.2d 1271 (1989), held it was not prejudicial error to fail to give this instruction after introduction of a stipulation since the stipulation was made during jury trial rather than at a pretrial.

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### 52.06 PROOF OF OTHER CRIME - LIMITED ADMISSIBILITY OF EVIDENCE

Evidence has been admitted tending to prove that the defendant committed (crimes) (a crime) other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's (motive) (opportunity) (intent) (preparation) (plan) (knowledge) (identity) (absence of mistake or accident).

#### Notes on Use

For authority, see K.S.A. 60-455.

Your attention is directed to K.S.A. 60-447(b), Character trait as proof of conduct, and K.S.A. 60-445, Discretion of judge to exclude admissible evidence.

For recent cases approving admission of evidence of earlier wrongful acts, see: *State v. Jones*, 247 Kan. 537, 546, 793 P.2d 748 (1990), relationship of the parties and continuing course of action; *State v. Hall*, 246 Kan. 728, 740, 793 P.2d 737 (1990), failure to give this instruction at the time of allowing introduction of such evidence was permissible at trial court discretion; *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990), general tests for admissibility of other-crimes evidence. Admissibility tests are examined in *State v. Jordan*, 250 Kan. 180, 825 P.2d 157 (1992).

#### Comment

The question of the admissibility of evidence of other crimes is one that has caused some confusion in the trial courts as well as differing interpretations among members of the appellate courts. For this reason, the Committee believes that a full examination of the issue is justified.

#### I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly that evidence purportedly admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977); *State v. Cross*, 216 Kan. 511, 517, 532 P.2d 1357 (1975); *State v. Bly*, 215 Kan. 168, 173, 523 P.2d 397 (1974). Although the same evidentiary question exists in civil actions, since the principal focus of most civil actions is not the plaintiff's or defendant's

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commission of, or propensity to commit, criminal acts, the inherently prejudicial impact of the admission of the party's criminal acts is arguably lessened. For that reason, the primary focus of this examination will be directed toward the admission of evidence in a criminal action.

The reluctance of the judiciary to allow the wholesale admission of other-crimes evidence is based upon a recognition that when evidence is introduced to show that a defendant committed a crime on a previous occasion, an inference arises that the defendant has a disposition to commit crime and, therefore, committed the crime with which he or she has been charged. Advisory Committee [on the Revised Code of Civil Procedure], *Kansas Judicial Council Bulletin*, Special Report, November 1961, pp.129-130. While the evidence of other crimes may have some probative value, the courts are properly reluctant to admit evidence that may incite undue prejudice and permit the introduction of pointless collateral issues. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan. L. Rev. 411, 416 (1972). The commentary in Vernon's Kansas Code of Civil Procedure § 60-455 (1965), which was noted by the Court in *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397 (1974), suggests that there are at least three types of prejudice that might result from the use of other crimes as evidence:

"First, a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed. Thus, in several ways the defendant is prejudiced by such evidence."

In recognition of the probable prejudice resulting from the admission of independent offenses, the Kansas Supreme Court has taken a very restrictive stance and has announced that the rule is to be strictly enforced and that evidence of other offenses is not to be admitted without a good and sound reason. *State v. Wasinger*, 220 Kan. 599, 602, 556 P.2d 189 (1976). Such evidence may *not* be admitted for the purpose of proving the defendant's inclination, tendency, attitude, propensity, or disposition to commit crime. *State v. Bly*, 215 Kan. at 175.

### II. ADMISSION UNDER K.S.A. 60-455

The starting point in any examination of the admissibility of other crimes or civil wrongs should be K.S.A. 60-455. The statute, which provides for the exclusion of any evidence tending to show the defendant's general disposition to

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commit crimes, reads as follows:

"Subject to K.S.A. 60-447, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove his or her disposition to commit a crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

Under the statute, evidence of other crimes may be admitted following a separate hearing if relevant to prove one of the eight factors specified in the statute and if the evidence meets the other criteria of admissibility set out below.

A. *Separate Hearing Required.* Admissibility of evidence of other crimes under K.S.A. 60-455 should be determined in advance of trial in the absence of the jury. See *State v. Wasinger*, 220 Kan. at 602-603; *State v. Moore*, 218 Kan. 450, 454, 543 P.2d 923 (1975); *State v. Gunselman*, 210 Kan. 481, 488, 502 P.2d 705 (1972). The issue might well be determined at a pretrial hearing or an informal conference. As noted by a distinguished commentator, the task of determining admissibility can best be performed in an organized and unhurried atmosphere in which the parties can fully explore the evidentiary pattern. Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 166 (1978). The hearing should be held prior to trial to avoid delaying the progression of the trial. The purpose of the hearing is to apply the three-part test set forth below.

B. *Test of Admissibility.* In accordance with the restrictive stance of the Court regarding admission of other crimes or civil wrongs, the trial court must employ a three-part test to determine whether such evidence may be admitted. Before admitting the evidence, the trial court must find that the other crime is: (1) *relevant to prove*; (2) *a material fact that is substantially in issue*; and (3) then *balance the probative value of the evidence against its prejudicial effect.*

(1) *Relevancy.* Initially, the trial court must determine whether the prior conviction is relevant to prove one of the eight factors specified in K.S.A. 60-455. The determination of relevancy must be based upon some knowledge of the facts, circumstances or nature of the prior offense. *State v. Cross*, 216 Kan. at 520. Relevancy is more a matter of logic and experience than of law. Evidence is relevant if it has any tendency to prove or disprove a material fact, or if it renders the desired inference more probable than it would be without the evidence. *State v. Faulkner*, 220 Kan. 153, 155, 551 P.2d 1247 (1976). If a particular factor, enumerated in the statute, is not an issue in the case, evidence of other crimes to prove that particular factor is irrelevant. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977).

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(2) *Substantial Issue*. Once the trial court has found the other-crimes evidence relevant to prove one of the eight statutory factors, it must then consider whether the factor to be proven is a substantial issue in the case. To be *substantial*, it must have *probative value* and *materiality*.

(a) *Materiality*. Materiality requires that the fact to be proved is significant under the substantive law of the case and properly at issue. *State v. Faulkner*, 220 Kan. at 156. To be material for purposes of K.S.A. 60-455, the fact must have a legitimate and effective bearing on the decision of the case and be in dispute. *State v. Faulkner*, 220 Kan. at 156.

(b) *Probative Value*. Probative value consists of more than logical relevancy. Evidence of other crimes has no real probative value if the fact it is supposed to prove is not substantially in issue. In other words, the factor or factors being considered (e.g., intent, motive, knowledge, identity, etc.) must be substantially in issue before a trial court should admit evidence of other crimes to prove such factors. *State v. Bly*, 215 Kan. at 176.

*For example*, where criminal intent is obviously proved by the mere doing of an act, the introduction of other-crimes evidence has no probative value to prove intent (i.e., where an armed robber extracts money from a store owner at gunpoint, his or her intent is not genuinely in dispute). Likewise, where a defendant admits committing the act and the defendant's presence at the scene of the crime is not disputed, a trial court should not admit other-crimes evidence for the purpose of proving identity. The obvious reason is that such evidence has no probative value if the fact it is supposed to prove is not substantially in issue. Such evidence serves no purpose to justify whatever prejudice it creates and must be excluded for that reason. *State v. Bly*, 215 Kan. at 176.

(3) *Balancing*. As the third step of the test, the trial court must weigh the probative value of the evidence for the limited purpose for which it is offered against the risk of undue prejudice. *State v. Marquez*, 222 Kan. at 445. If the potential for natural bias and prejudice overbalances the contribution to the rational development of the case, the evidence must be barred. *State v. Bly*, 215 Kan. at 175. The balancing process is discussed extensively in *State v. Davis*, 213 Kan. 54, 57-59, 515 P.2d 802 (1973).

C. *Eight Specific Factors*. Since evidence of other crimes and civil wrongs may be admitted under K.S.A. 60-455 only when relevant to prove one of the eight statutory factors, it is important to understand what evidence is material to prove each of the specified factors. As noted above, prior to admitting evidence to prove one of these factors, it is important to establish the nature, facts, and circumstances of the other crimes.

(1) *Motive*. Motive may be defined as the cause or reason which induces action. While evidence of other crimes or civil wrongs may occasionally prove

## PATTERN INSTRUCTIONS FOR KANSAS 3d

to be relevant to the issue of motive (*State v. Craig*, 215 Kan. 381, 382-383, 524 P.2d 679 [1974]), it is more often the case that the prior crime has no relevance to the issue. (See *State v. McCorgary*, 224 Kan. 677, 684-685, 585 P.2d 1024 [1978].) A prior crime would be relevant to the issue of motive where the defendant committed a subsequent crime to conceal a prior crime or to conceal or destroy evidence of a prior crime. It is not proper to introduce evidence of other crimes on the issue of motive merely to show similar yet unconnected crimes.

In *State v. Jordan*, 250 Kan. 180, 825 P.2d 157 (1992), "motive" is defined as the moving power that impels one to action for a definite result. Motive is that which incites or stimulates a person to do an action.

(2) *Opportunity*. Opportunity simply means that the defendant was at a certain place at a certain time and consequently had the opportunity to commit the offense charged. Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. 98, 112 (1977); *State v. Russell*, 117 Kan. 228, 230 Pac. 1053 (1924). Opportunity also includes the defendant's physical ability to commit the offense. Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 164 (1978). In order to introduce evidence of another crime to prove opportunity, the two crimes must be closely connected in time and place. *Example*: If a defendant is charged with burglary during which a larceny was committed, evidence showing that the defendant committed the larceny is admissible as tending to show that he or she also committed the burglary.

Where evidence of a separate crime that is not an element of the present crime is relevant to show opportunity, in order to avoid probable prejudice, it may be preferable to have the witness to the separate crime testify regarding his or her observations of the defendant, without testifying concerning the details of the other criminal activity.

(3) *Intent*. For crimes requiring only a general criminal intent, such as battery, larceny, or rape, the element of intent is proved by the mere doing of the act and evidence of other crimes on the issue of intent has no probative value and should not be admitted. For crimes requiring a specific criminal intent, such as premeditated murder or possession with intent to sell, prior convictions evidencing the requisite intent may be very probative. *State v. Faulkner*, 220 Kan. 153, 158, 551 P.2d 1247 (1976). Intent becomes a matter substantially in issue when the commission of an act is admitted by the defendant and the act may be susceptible of two interpretations, one innocent and the other criminal. In that instance, the intent with which the act is done is the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.



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Where criminal intent is obviously proved by the mere doing of an act, the introduction of other-crimes evidence has no real probative value to prove intent and it was error to admit. *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

*Examples:* Where the defendant broke a jewelry store window, took the items on display, and fled, it was clear that the crime was intentional and evidence of a prior crime should not have been admitted. *State v. Marquez*, 222 Kan. 441, 446, 565 P.2d 245 (1977). Intent is not at issue where there is clear evidence of malice and willfulness. *State v. Hensen*, 221 Kan. 635, 645, 562 P.2d 51 (1977). Intent was properly in issue where the charge of attempted burglary was supported by circumstantial evidence and the defense alleged that the defendant was on his way to see his girlfriend. *State v. Wasinger*, 220 Kan. at 602-603.

(4) *Preparation.* Preparation for an offense consists of devising or arranging means or measures necessary for its commission. *State v. Marquez*, 222 Kan. at 446 (citing Black's Law Dictionary). A series of acts that very logically convince the reasonable mind that the actor intended that prior activities culminate in the happening of the crime in issue may have strong probative value in showing preparation. *State v. Marquez*, 222 Kan. 446; Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 422.

(5) *Plan.* Plan refers to an antecedent mental condition that points to the doing of the offense or offenses planned. The purpose in showing a common scheme or plan is to establish, circumstantially, the commission of the act charged and the intent with which it was committed. Strictly speaking, *the exception is limited to evidence which shows some causal connection between the two offenses*, so that proof of the prior offense could be said to evidence a pre-existing design, scheme or plan directed toward the doing of the offense charged. Something more than the doing of similar acts is required to have probative value in showing plan because the object is not merely to negate an innocent intent or show identical offenses, but to prove the existence of a definite project directed toward the doing of the offense charged. *State v. Marquez*, 222 Kan. at 446-447; *State v. Gourley*, 224 Kan. 167, 170, 578 P.2d 713 (1978); *State v. McBarron*, 224 Kan. 710, 713, 585 P.2d 1041 (1978); *State v. Hall*, 246 Kan. 728, 740, 793 P.2d 737 (1990). The PIK Comment is cited in *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990); Slough articles, 20 Kan. L. Rev. at 419-420 and 26 Kan. L. Rev. at 163. In *State v. Fabian*, 204 Kan. 237, 461 P.2d 799 (1969), evidence of prior crimes was properly admitted to show a preconceived "creeping" plan to steal from a series of stores.

(6) *Knowledge.* Knowledge signifies an awareness of wrongdoing. Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 419; *State v. Faulkner*, 220 Kan. at 156. Knowledge is important as an element in crimes requiring

## PATTERN INSTRUCTIONS FOR KANSAS 3d

specific intent, such as receiving stolen property, forgery (*State v. Wright*, 194 Kan. 271, 275-276, 398 P.2d 339 [1965]), uttering forged instruments, making fraudulent entries, and possession of illegal drugs (*State v. Faulkner*, 220 Kan. at 156.) See *Slough*, 20 Kan. L. Rev. at 419.

(7) *Identity*. Where a similar offense is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both of the offenses. *State v. Bly*, 215 Kan. at 177. Similarity must be shown in order to establish relevancy. *State v. Henson*, 221 Kan. 635, 644, 562 P.2d 51 (1977). The quality of sameness is important when pondering the admission of other crimes to prove identity. *State v. Johnson*, 210 Kan. 288, 294, 502 P.2d 802 (1972) (citing *Slough*, 20 Kan. L. Rev. at 420). In general, see Note, *Evidence: Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial*, 14 Washburn L. J. 367 (1975). See also, *State v. Smith*, 245 Kan. 381, 389, 781 P.2d 666 (1989); *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990); *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1989).

For examples, see *State v. King*, 111 Kan. 140, 206 Pac. 883 (1922) (where the circumstances surrounding the deaths of three victims were very similar); *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973) (where the burglar followed a similar elaborate ritual in four separate burglaries); *State v. Johnson*, 210 Kan. 288, 502 P.2d 802 (1972) (where two prior homicides were accomplished in a manner almost identical to the offense charged) *State v. Williams*, 234 Kan. 233, 670 P.2d 1348 (1983) (where 12-year-old Idaho convictions held sufficiently similar).

(8) *Absence of Mistake or Accident*. Absence of mistake simply denotes an absence of honest error; evidence of prior acts illustrates that the doing of the criminal act in question was intentional. *State v. Faulkner*, 220 Kan. at 156-157; *Slough*, 20 Kan. L. Rev. at 422.

D. *Limiting Jury Instruction Required*. In every case where evidence of other crimes is admitted solely under the authority of K.S.A. 60-455, the trial court must give an instruction (PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence) limiting the purpose for which evidence of similar offenses is to be considered by the jury. *State v. Bly*, 215 Kan. at 176. The limiting instruction must not be in the form of a "shotgun" instruction that broadly covers all of the eight factors set forth in K.S.A. 60-455. An instruction concerning the purpose of evidence of other offenses should include only those factors of K.S.A. 60-455 that appear to be applicable under the facts and circumstances. Those factors that are inapplicable should not be instructed upon. *State v. Bly*, 215 Kan. at 176.

The Kansas Supreme Court has taken a firm stand concerning the need for a proper limiting instruction. Erroneous admission of evidence under one exception is not considered harmless merely because it *would* have been admissible under

## PATTERN INSTRUCTIONS FOR KANSAS 3d

another exception not instructed upon. *State v. McCorgary*, 224 Kan. at 686; *State v. Marquez*, 222 Kan. at 447-448. The giving of a "shotgun" instruction has been frequently criticized and has been held to be clearly erroneous in *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976), requiring reversal. Reversal may also be required where no limiting instruction is given, even though not requested by the defendant. *State v. Roth*, 220 Kan. 677, 680, 438 P.2d 58 (1968). When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984).

If evidence of another crime is admissible, independent of K.S.A. 60-455, no limiting instruction is appropriate. See Section III, Admission Independent of K.S.A. 60-455.

E. *Other Considerations*. There are several other considerations relating to the introduction of other-crimes evidence under K.S.A. 60-455 that should be considered by the trial court.

\* *Conviction Not Required*. To be admissible under K.S.A. 60-455, it is not necessary for the State to show that the defendant was actually convicted of the other offense. *State v. Henson*, 221 Kan. at 644; *State v. Powell*, 220 Kan. 168, 172, 551 P.2d 902 (1976). The statute specifically includes other crimes or *civil wrongs*. An acquittal of the defendant of a prior offense does not bar evidence thereof where otherwise admissible; the acquittal bears only upon the weight to be given to such evidence. *State v. Darling*, 197 Kan. 471, 419 P.2d 836 (1966).

\* *Acquittal as a Collateral Estoppel*. When an application is made to admit evidence of a prior offense of which the defendant has been acquitted, an additional consideration may present itself -- the possibility of collateral estoppel. When an issue of ultimate fact has once been determined by a valid and final verdict or judgment, that issue cannot again be litigated between the same parties in any future lawsuit under the rule of collateral estoppel. See *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1184 (1970). Thus, when a prior similar offense is offered as evidence on a particular issue of material fact and the defendant was previously tried and acquitted of the offense based on a determination of that issue, collateral estoppel nullifies the probative value of the evidence of the former offense. Then such evidence should not be admitted. *State v. Irons*, 230 Kan. 138, 630 P.2d 1116 (1981).

\* *Prior or Subsequent Crime*. Evidence of either prior or subsequent crimes may be introduced pursuant to K.S.A. 60-455 if the other requirements of admission are met. *State v. Carter*, 220 Kan. 16, 23, 551 P.2d 851 (1976); *State v. Bly*, 215 Kan. at 176-177; *State v. Morgan*, 207 Kan. 581, 582, 485 P.2d 1371 (1971).

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\* *Remoteness in Time.* Remoteness in time of a prior conviction, if otherwise admissible, affects the weight of the prior conviction rather than its admissibility. The probative value of a prior conviction progressively diminishes as the time interval between the prior crime and the present offense lengthens. *State v. Cross*, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski*, 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admission of 19-year-old conviction on collateral issue was reversible error). See also, *State v. Carter*, 220 Kan. 16, 20, 551 P.2d 851 (1976) (proper admission of 7-year-old conviction); *State v. Finley*, 208 Kan. 49, 490 P.2d 630 (1971) (proper admission of 11- and 16-year-old convictions); *State v. O'Neal*, 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson*, 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction); *State v. Fannan*, 167 Kan. 723, 207 P.2d 1176 (1949) (proper admission of 17-year-old conviction); *State v. Owen*, 162 Kan. 255, 176 P.2d 564 (1947) (28-year-old conviction excluded for lack of probative value).

\* *Admissibility as to One of Several Crimes.* Evidence of a prior offense need not be admissible as to every offense for which the defendant is being tried. *State v. McGee*, 224 Kan. 173, 177, 578 P.2d 269 (1978). In such instances, however, the trial court should instruct the jury as to the specific crime and element for which the evidence of a prior crime is being admitted.

\* *Admission in Civil Cases.* K.S.A. 60-455 applies to civil as well as criminal cases. The trial court is given a wider latitude in admitting evidence of other crimes in civil cases. See *Frame, Administrator v. Bauman*, 202 Kan. 461, 466, 449 P.2d 525 (1969).

\* *Sex Offenses.* The Court has apparently taken a more liberal view regarding admission of evidence in prosecutions for sex crimes. See *State v. Fisher*, 222 Kan. 76, 563 P.2d 1012 (1977); *State v. Gonzales*, 217 Kan. 159, 535 P.2d 988 (1975); *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974). For commentary, see Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. at 175-76; Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. at 119.

\* *Presentation of Other Crimes in Case-in-Chief.* Evidence of other crimes admitted pursuant to K.S.A. 60-455 should be introduced in the State's case-in-chief rather than by way of cross-examination of the defendant. *State v. Harris*, 215 Kan. 961, 509 P.2d 101 (1974); *State v. Roth*, 200 Kan. 677, 438 P.2d 58 (1968).

### III. ADMISSION INDEPENDENT OF K.S.A. 60-455

A. *Separate Hearing Required.* As with evidence admitted pursuant to K.S.A. 60-455, it is the better practice to determine the admissibility of evidence

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of other crimes to be admitted independently of that statute in advance of trial and in the absence of the jury. See discussion in Section II.A., Separate Hearing Required.

B. *Categories of Independent Admission.* There are several instances where evidence of prior crimes or civil wrongs may be introduced into evidence independently of K.S.A. 60-455, pursuant either to express statutory provisions or Kansas case law.

(1) *Rebuttal of Good Character Evidence.* Sections 60-446, 60-447 and 60-448 of the Kansas Code of Civil Procedure allow evidence to be introduced by the defendant regarding a trait of his or her character either as tending to prove conduct on a specified occasion or as tending to prove guilt or innocence of the offense charged. (See specifically, K.S.A. 60-447). *Only after the defendant has introduced evidence of good character may the State, in cross-examination or rebuttal, introduce evidence of prior convictions and bad conduct relevant to the specific character trait or the issue of guilt.*

(a) *Evidence of Specific Instances of Bad Conduct.* K.S.A. 60-447 allows evidence of specific instances of conduct to prove a trait to be bad only if the conduct resulted in a conviction.

(b) *Character Trait for Care or Skill.* Section 60-448 disallows the use of evidence of a character trait relating to care or skill to prove the degree of care or skill used by that person on a specified occasion.

See generally, *State v. Sullivan*, 224 Kan. 110, 124, 578 P.2d 1108 (1978); *State v. Bright*, 218 Kan. 476, 477-479, 543 P.2d 928 (1975); Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. at 105-108.

(2) *Proof of Habit to Show Specific Behavior.* Evidence of habit or custom normally admissible under K.S.A. 60-449 and 60-450 to prove specific behavior is *not* admissible when the evidence introduced to show habit or custom consists of a series of similar criminal acts or civil wrongs. The two sections are not among those specifically mentioned in K.S.A. 60-455 and may not support the introduction of evidence of other crimes or civil wrongs to prove a defendant's disposition to commit crimes or civil wrongs. It should be noted that such evidence may be admissible under the *identity* exception to K.S.A. 60-455 or independently under the *character* provisions discussed above. *Cf.*, Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 413.

(3) *Res Gestae.* Acts done or declarations made before, during, or after the happening of the principal fact may be admissible as part of the *res gestae* where the acts are so closely connected with it as to form in reality a part of the occurrence. *State v. Gilder*, 223 Kan. 220, 228, 574 P.2d 196 (1977); *State v. Ferris*, 222 Kan. 515, 516-517, 565 P.2d 275 (1977).

(4) *Relationship or Continuing Course of Conduct Between Defendant and the Victim.* Evidence of prior acts of a similar nature between the defendant and the victim is admissible independent of K.S.A. 60-455 if the evidence is

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not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged. *State v. Wood*, 230 Kan. 477, 638 P.2d 938 (1982); *State v. Crossman*, 229 Kan. 384, 624 P.2d 461 (1981); *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990).

(5) *Other Crime as Element of Crime Charged.* Evidence of a prior conviction is admissible independent of K.S.A. 60-455 if proof of the prior conviction is an *essential* element of the crime charged. *State v. Knowles*, 209 Kan. 676, 679, 498 P.2d 40 (1972). Where evidence of a prior conviction is admitted for this purpose, the trial court should give a limiting instruction as to its use by the jury. *Cf.*, *State v. Gander*, 220 Kan. 88, 90-91, 551 P.2d 797 (1976); *State v. Martin*, 208 Kan. 950, 951-953, 495 P.2d 89 (1972). If the defendant is charged with several crimes, the trial court should instruct the jury regarding its specific application to the particular crime. Where evidence of a prior offense is relevant *solely* for the purpose of enhancing the length of the sentence imposed upon the defendant, the prior conviction should not be introduced as evidence during the trial, but should be reserved until the sentencing of the defendant. See generally, Note, *Evidence: Prior Convictions - The Duty to Provide Limiting Instructions*, 12 Washburn L. J. 111 (1972).

(6) *Admissible Evidence of the Crime Charged which Discloses Other Crimes.* Evidence tending directly to establish the crime charged is not rendered inadmissible because it discloses the commission of another and separate offense. Testimony about other crimes may be admissible as a part of the background and circumstances present when the defendant made damaging admissions which connected him with the crime charged. *State v. Schlicher*, 230 Kan. 482, 639 P.2d 467 (1982); *State v. Holt*, 228 Kan. 16, 612 P.2d 570 (1980), reaffirming *State v. Solem*, 220 Kan. 471, 552 P.2d 951 (1976).

(7) *Rebuttal of Credibility Evidence.* Once the defendant has introduced evidence at trial for the purpose of supporting his or her credibility, the trial court may allow the admission of evidence of prior crimes for the purpose of impairing the defendant's credibility. K.S.A. 60-420, 60-421, and 60-422. The impeachment evidence must be limited to evidence of a conviction of a crime involving *dishonesty or false statement*. The crimes of larceny, theft, and receiving stolen property involve dishonesty and are admissible on the issue of credibility. *Trucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime" includes both felonies and misdemeanors. *Trucker v. Lower*, 200 Kan. at 5. See also, *State v. Burnett*, 221 Kan. 40, 558 P.2d 1087 (1976); *State v. Werkowski*, 220 Kan. 648, 556 P.2d 420 (1976).

(8) *Other Crimes of a Witness Other Than a Defendant.* K.S.A. 60-455 does not apply to a witness in a criminal case other than the accused, and

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evidence that such a witness may have committed a crime or civil wrong may not be introduced thereunder. Evidence of prior criminal convictions of a witness is subject to the restrictions found in K.S.A. 60-421 where the credibility of a witness can only be impeached by crimes involving dishonesty unless that witness has introduced evidence solely for the purpose of supporting his or her credibility. *State v. Bryant*, 228 Kan. 239, 613 P.2d 1348 (1980).

(9) *Rebuttal of Entrapment Defense*. If the defendant introduces evidence to establish the defense of entrapment (K.S.A. 21-3210), the State may introduce relevant evidence of the defendant's prior disposition to commit such crimes. *State v. Amodei*, 222 Kan. 140, 142-143, 563 P.2d 440 (1977); *State v. Reichenberger*, 209 Kan. 210, 495 P.2d 919 (1972). See also, Note, *Criminal Law: Kansas' Statutory Entrapment Defense in Narcotic Sales Cases*, 12 Washburn L. J. 231 (1973); Note, *The Entrapment Defense in Kansas: Subjectivity Versus an Objective Standard*, 12 Washburn L. J. 64 (1972).

(10) *Rebuttal of Specific Statement*. The State may introduce evidence of other crimes to specifically rebut the incorrect testimony of a witness tending to establish a defense. *State v. Burnett*, 221 Kan. 40, 42-43, 558 P.2d 1087 (1976); *State v. Faulkner*, 220 Kan. at 158-159. The use and extent of rebuttal rests in the sound discretion of the trial court. *State v. Burnett*, 221 Kan. at 43.

### IV. CONCLUSIONS AND RECOMMENDATIONS

The trial court should use great caution in admitting evidence of other crimes. There will be a great temptation by prosecutors to introduce prior-crimes evidence to secure convictions. The trial court must be aware of the high degree of prejudice inherent in any evidence of other crimes. This prejudice must be weighed against the probative value of the evidence. Where the evidence is offered pursuant to K.S.A. 60-455, the other parts of the three-part test must be applied. In addition, other-crimes evidence should not be admitted where the other evidence of guilt is overwhelming and the prior-crimes evidence would serve only as an overkill mechanism.

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**52.07 MORE THAN ONE DEFENDANT - LIMITED  
ADMISSIBILITY OF EVIDENCE**

**You should give separate consideration to each defendant. Each is entitled to have (his)(her) case decided on the evidence and the law which is applicable to (him)(her).**

**Any evidence which was limited to ( name specific defendant ) should not be considered by you as to any other defendant.**

**Notes on Use**

This instruction should be given only when there is more than one defendant. See K.S.A. 22-3204, Joinder of defendants; separate trials.

**Comment**

In *State v. Cameron & Bentley*, 216 Kan. 644, 533 P.2d 1255 (1975), this instruction was approved as appropriate to give in a case of multiple defendants charged in the same information.



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### 52.08 AFFIRMATIVE DEFENSES - BURDEN OF PROOF

The defendant claims as a defense that (here describe the defense claimed). Evidence in support of this claim should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant. If the defense asserted causes you to have a reasonable doubt as to the defendant's guilt, you should find the defendant not guilty.

#### Notes On Use

This instruction should be given in connection with the instruction defining the applicable defense. See *e.g.*,

- 54.03 Ignorance or Mistake of Fact
- 54.04 Ignorance or Mistake of Law - Reasonable Belief
- 54.11 Intoxication - Involuntary
- 54.13 Compulsion
- 54.14 Entrapment
- 54.17 Use of Force in Defense of a Person
- 54.18 Use of Force in Defense of a Dwelling
- 54.19 Use of Force in Defense of Property Other Than a Dwelling
- 55.04 Conspiracy - Withdrawal as a Defense
- 55.10 Criminal Solicitation - Defense
- 56.34 Defense to Disclosing Information Obtained in Preparing Tax Returns
- 56.38 Affirmative Defense to Mistreatment of a Dependent Adult
- 57.01-A Rape - Defense of Marriage
- 57.05-B Affirmative Defense to Indecent Liberties With a Child
- 57.06-A Affirmative Defense to Aggravated Indecent Liberties With a Child
- 57.07-A Affirmative Defense to Criminal Sodomy
- 57.08-C Affirmative Defense to Aggravated Criminal Sodomy
- 58.02 Affirmative Defense to Bigamy
- 58.10-A Affirmative Defense to Endangering a Child
- 58.12-C Furnishing Alcoholic Liquor to a Minor - Defense
- 58.12-D Furnishing Cereal Malt Beverage to a Minor - Defense
- 59.07 Worthless Check - Defense
- 59.33-B Criminal Hunting - Defense
- 59.59 Piracy of Recordings - Defenses
- 59.64-A Computer Crime - Defense

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- 61.04 Compensation for Past Official Acts - Defense
- 62.02 Eavesdropping - Defense of Public Utility Employee
- 62.07 Criminal Defamation - Truth as a Defense
- 62.12 Unlawful Smoking - Defense of Smoking in Designated Smoking Area
- 64.02-B Criminal Discharge of a Firearm - Affirmative Defense
- 64.04 Criminal Use of Weapons - Affirmative Defense
- 64.11-B Criminal Possession of Explosives - Defense
- 65.05 Promoting Obscenity - Affirmative Defenses
- 65.05-A Promoting Obscenity to a Minor - Affirmative Defenses
- 65.10-A Dealing in Gambling Devices - Defense
- 65.12-A Possession of a Gambling Device - Defense
- 65.16 Cruelty to Animals - Defense

*State v. Wilson*, 240 Kan. 607, 610, 731 P.2d 306 (1987), held it was error to delete from this instruction the sentence, "The State's burden of proof does not shift to the defendant." See also, *State v. Kershner*, 15 Kan. App. 2d 17, 18, 801 P.2d 68 (1990).

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### 52.09 CREDIBILITY OF WITNESSES

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

#### Notes on Use

This instruction should be given in every criminal case. See K.S.A. 22-3415, Laws applicable to witnesses. See K.S.A. 60-417, Disqualification of witness; interpreters. See also, K.S.A. 60-419, 420, 421 and 422 covering necessity of knowledge or experience on the part of a witness, evidence relating to credibility, limitation on evidence of conviction of crimes, and other limitations on admissibility of evidence affecting credibility.

Expanding this instruction was not approved, but held not to be clearly erroneous when the expansion was not objected to in *State v. Clements*, 241 Kan. 77, 81-82, 734 P.2d 1096 (1987), *State v. Bodtke*, 241 Kan. 96, 100, 734 P.2d 1109 (1987). Where objection to expanding the instruction was made in *State v. DeVries*, 13 Kan. App. 2d 609, 617-19, 780 P.2d 1118 (1989), the expansion was held to be reversible error. See also, *State v. Hartfield*, 245 Kan. 431, 449, 781 P.2d 1050 (1989), where objection was made to expanding this instruction by adding the "false in one thing, false in all" concept. While such expansion was noted as less preferable than using the instruction we provide, it was held not to be reversible error because of the particular circumstances existing in the case.

#### Comment

This instruction was impliedly approved in *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976); and in *State v. Mack*, 228 Kan. 83, 89, 612 P.2d 158 (1980).

See also, *State v. Pioletti*, 246 Kan. 49, 58, 785 P.2d 963 (1990), *State v. Land*, 14 Kan. App. 2d 515, 519, 794 P.2d 668 (1990).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 52.10 DEFENDANT AS A WITNESS

**The Committee recommends that there be no separate instruction given as to the defendant as a witness.**

#### **Comment**

If the defendant testifies, his or her testimony, like that of any other witness, should be considered as set forth in PIK 3d 52.09, Credibility of Witnesses.

See PIK 3d 52.13, Defendant's Failure to Testify.

See PIK 3d 52.09, Credibility of Witnesses, Notes on Use.

The Supreme Court has noted "the trend to eliminate instructions which focus on the credibility of certain testimony" and the belief of this Committee that such instructions are not justified. *State v. Willis*, 240 Kan. 580, 587, 731 P.2d 287 (1987). See also, *State v. DeVries*, 13 Kan. App. 2d 609, 618, 780 P.2d 1118 (1989); *State v. Land*, 14 Kan. App. 2d 515, 518, 794 P.2d 668 (1990).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 52.11 NUMBER OF WITNESSES

**The Committee recommends that there be no separate instruction given as to the number of witnesses.**

#### **Comment**

An instruction as to number of witnesses calls attention to a fact you are telling the jury not to consider.

If the Court determines that such an instruction should be given because of special circumstances, the Committee suggests PIK 2d 2.21, Weighing Evidence - Number of Witnesses.

See Comment to PIK 3d 52.10, Defendant as a Witness.

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**52.12 TESTIMONY TAKEN BEFORE TRIAL**

**During this trial, evidence was presented by the reading of testimony of a witness taken under oath at another time and place. It is to be weighed by the same standards as other testimony.**

**Notes on Use**

It is recommended that a similar instruction be given before any recorded testimony is read.

For authority relating to the taking and use of depositions, see K.S.A. 22-3211 which provides that civil rules apply in taking depositions.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 52.13 DEFENDANT'S FAILURE TO TESTIFY

**You should not consider the fact that the defendant did not testify in arriving at your verdict.**

#### Notes on Use

For authority, see K.S.A. 60-439. This instruction should not be given unless there is a specific request by the defendant.

#### Comment

This instruction was held to be adequate in *State v. Quinn*, 219 Kan. 831, 549 P.2d 1000 (1976).

In *State v. Perry*, 223 Kan. 230, 573 P.2d 989 (1977), the Court held it was to be preferred that a trial court not give this instruction unless it was requested by the defendant. Giving the instruction, however, was considered not prejudicial and not reversible error.

The United States Supreme Court held the giving of the following instruction over the defendant's objections is constitutionally permissible:

Under the laws in this State, a defendant has the option to take the stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant and this must not be considered by you in determining the question of guilt or innocence. *Lakeside v. Oregon*, 435 U.S. 333, 55 L.Ed. 2d 319, 98 S.Ct. 1091 (1978).

The holding in *Perry* is in accordance with *Lakeside*. That does not, however, in any way alter the recommendation of the Committee: Do not give one unless requested by the defendant.

See *State v. Owens*, 248 Kan. 273 Syl. ¶ 8, 807 P.2d 101 (1991), relative to the acceptability of the term "should not" when compared to the term "must not".

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**52.14 EXPERT WITNESS**

**The Committee recommends that there be no separate instruction given as to the expert as a witness.**

**Comment**

See PIK 2d 2.50, Expert Witness, Notes on Use. The Committee believes that an expert should be considered as any other witness as set forth in PIK 3d 52.09, Credibility of Witnesses.

See also, Comment to PIK 3d 52.10, Defendant as a Witness.



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**52.15 IMPEACHMENT**

**The Committee recommends that there be no separate instruction given as to impeachment.**

**Comment**

The Committee believes that the standard instruction in PIK 3d 52.09, Credibility of Witnesses, provides adequate jury guides.

See PIK 2d 2.30, Impeachment.

See also, Comment to PIK 3d 52.10, Defendant as a Witness.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 52.16 CIRCUMSTANTIAL EVIDENCE

**The Committee recommends that there be no separate instruction given as to circumstantial evidence.**

#### Comment

In *State v. Wilkins*, 215 Kan. 145, 156, 523 P.2d 728 (1974), the Supreme Court stated: "This Court now feels it is time to discard our former rule requiring a circumstantial evidence instruction to be given."

To give this type of instruction, however, was held to not constitute reversible error in *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

In *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981), the Supreme Court affirmed defendant's conviction although he requested this type instruction and the request was refused. The opinion notes the recommendation of the Committee. See also, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).

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### 52.17 CONFESSION

**The Committee recommends that there be no separate instruction given as to confession.**

#### Comment

*State v. Stephenson*, 217 Kan. 169, 535 P.2d 940 (1975); *State v. Hardwick*, 220 Kan. 572, 552 P.2d 987 (1976), held that it was not necessary to give an instruction relating to a confession. The Committee's recommendation is noted with apparent approval in *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981), and with specific approval in *State v. Mason*, 238 Kan. 129, 133, 708 P.2d 963 (1985).

See also, Comment to PIK 3d 52.10, Defendant as a Witness.

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### 52.18 TESTIMONY OF AN ACCOMPLICE

**An accomplice witness is one who testifies that (he)(she) was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice.**

#### Comment

It has been held that the uncorroborated testimony of an accomplice is sufficient to convict, and that there was no duty to instruct where an instruction was not requested. When requested, the Court stated in *State v. Patterson*, 52 Kan. 335, 34 Pac. 784 (1893), the instruction must be given.

For complete discussion, see *State v. Wood*, 196 Kan. 599, 604, 413 P.2d 90 (1966); *State v. McLaughlin*, 207 Kan. 594, 485 P.2d 1360 (1971); and *State v. Shepherd*, 213 Kan. 498, 515 P.2d 945 (1973).

For discussion of corroborated testimony of an accomplice witness, see *State v. Parrish*, 205 Kan. 178, 468 P.2d 143 (1970).

If accomplice testimony is corroborated only in part and the defendant requests a cautionary instruction, it is error to not give the instruction. This error, however, may not be reversible. *State v. Moody*, 223 Kan. 699, 576 P.2d 637 (1978). *Moody* is followed in *State v. Bryant*, 227 Kan. 385, 388, 607 P.2d 66 (1980); and in *State v. Ferguson, Washington & Tucker*, 228 Kan. 522, 525, 618 P.2d 1186 (1980).

In *State v. Moore*, 229 Kan. 73, 622 P.2d 631 (1981), earlier cases were reviewed and the Supreme Court concluded: "When an accomplice testifies, and whether that testimony is corroborated or not, the better practice is for the trial court to give a cautionary instruction. If the instruction is requested and is not given, the result may be in error. Whether that error is prejudicial and reversible, however, must be determined upon the facts of the individual case." 229 Kan. at 80. In *State v. Warren*, 230 Kan. 385, 400, 635 P.2d 1236 (1981), the Court held that it was error to fail to give an accomplice instruction when accomplice testimony was supported in part by only questionably reliable eyewitness testimony.

An instruction based upon PIK 2d 52.18 was approved in *State v. Schlicher*, 230 Kan. 482, 494, 639 P.2d 467 (1982).

See also, *State v. Anthony*, 242 Kan. 493, 502, 749 P.2d 37 (1988), which held this instruction is proper even if the accomplice testimony is favorable to the defendant.

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**52.18-A TESTIMONY OF AN INFORMANT - FOR  
BENEFITS**

**You should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence.**

**Notes on Use**

In *State v. Fuller*, 15 Kan. App. 2d 34, 41, 802 P.2d 599 (1990), it was held error to deny the defendant's request for a cautionary instruction where his conviction was "based solely on the testimony of a paid informant."

Ordinarily, it is error to refuse to give a cautionary instruction on the testimony of a paid informant or agent where such testimony is substantially uncorroborated and is the main basis for defendant's conviction. Where, however, no such instruction is requested nor objection made to the court's instruction, and such testimony is substantially corroborated, the absence of a cautionary instruction is not error and is not grounds for reversal of the conviction. *State v. Novotny*, 252 Kan. 753, 851 P.2d 365 (1993).

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### 52.19 ALIBI

**The Committee recommends that there be no separate instruction given as to alibi.**

#### Notes on Use

For authority relating to notice provisions for the introduction of alibi evidence, see K.S.A. 22-3218.

#### Comment

The Committee's recommendation is approved in *State v. Skinner*, 210 Kan. 354, 359, 503 P.2d 168 (1972); and *State v. Murray*, 210 Kan. 748, 749, 504 P.2d 247 (1972).

In *State v. Peters*, 232 Kan. 519, 656 P.2d 768 (1983), the Court held that it was not reversible error to give an alibi instruction. It stated, however, that one should not be given.

See Comment to PIK 3d 52.10, Defendant as a Witness.

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### 52.20 EYEWITNESS IDENTIFICATION

The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove (he)(she) has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you first should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;
2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;
3. Whether the witness had observed the defendant(s) on earlier occasions;
4. Whether a significant amount of time elapsed between the crime charged and any later identification;
5. Whether the witness ever failed to identify the defendant(s) or made any inconsistent identification;
6. The degree of certainty demonstrated by the witness at the time of any identification of the accused; and
7. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification.

#### Notes on Use

This instruction should be given whenever the trial judge believes there is any serious question about the reliability of eyewitness identification testimony. The judge should omit from the instruction any factors that clearly do not relate to evidence introduced at trial.

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This instruction was approved in *State v. Willis*, 240 Kan. 580, Syl. ¶ 2, 731 P.2d 287 (1987).

### Comment

The appropriateness of this type of instruction was indicated by our Supreme Court in *Haines v. Goodlander*, 73 Kan. 183, 84 Pac. 986 (1906). In *Haines*, the Court stated that to comment by way of indicating to a jury the weight to give particular evidence would not be allowable, but "[Y]et there is no reason why the court should not in some cases refer to particular parts of the evidence and advise the jury as to the rules of law applicable to such facts." 73 Kan. at 190-191.

*State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981), sets forth "rules of law applicable to" facts attending eyewitness identifications. If "eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of the eyewitness identification testimony." 230 Kan. at 397.



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### 52.21 CHILD'S HEARSAY EVIDENCE

It is for you to determine what weight or credit to give to the evidence of a statement claimed to have been made by \_\_\_\_\_ . You should consider (his)(her) age and maturity, the nature of the statement, the circumstances existing when it was claimed to have been made, any possible threats or promises that may have been made to (him) (her) to obtain the statement, and any other relevant factors.

#### Notes on Use

For authority, see K.S.A. 60-460(dd). The statute provides for admissibility of this type of evidence in (a) criminal proceedings, and (b) proceedings to determine if a child is deprived or in need of care.

Before admitting this type of evidence, the judge must hold a hearing and determine that (a) the child is disqualified or unavailable as a witness, (b) the statement is apparently reliable, and (c) the child was not induced to make the statement(s) falsely by use of threats or promises.

#### Comment

In some cases, this type of evidence may be admissible without use of this statute. An example would be a "contemporaneous statement" under K.S.A. 60-460(d). See *State v. Rodriguez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983).

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# PATTERN INSTRUCTIONS FOR KANSAS 3d

## CHAPTER 53.00

### DEFINITIONS AND EXPLANATIONS OF TERMS

#### INTRODUCTION

The definitions and explanations in this chapter are in alphabetical order. A cross reference is provided to statutes and some instructions.

There are many terms which are defined and explained in the Kansas statutes. These statutory definitions have not been repeated here but ready reference is made to the particular statute where a definition or explanation of the term may be found.

In presenting them to the jury, it is suggested that the following prefatory language be used:

"As used in these instructions, the term \_\_\_\_\_ (means) (includes)

---

*Accessory*: See PIK 3d 54.05, Responsibility for Crimes of Another. The term "accessory" is not used in the Criminal Code.

*Accost*: To approach and speak to.

*Act*: K.S.A. 21-3110 (1).

*Agent of a Corporation*: K.S.A. 21-3206(2).

*Aggravated Juvenile Delinquency*: K.S.A. 21-3611.

*Another*: K.S.A. 21-3110 (2).

*Attempt*: See K.S.A. 21-3301; PIK 3d 55.01, Attempt.

*Believes*: See Reasonable Belief.

*Bet*: K.S.A. 21-4302 (1).

*Breach of Peace*: A disturbance which alarms, angers or disturbs the peace and quiet of others. See PIK 3d 63.01, Disorderly Conduct.

*Charge*: A written statement presented to a court accusing a person of the commission of a crime and includes a complaint, information or indictment.

K.S.A. 22-2202 (7); *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973).

*Child Abuse*: K.S.A. 21-3609; K.S.A. 38-1502 (b); PIK 3d 58.11, Abuse of a Child.

*Child Neglect*: K.S.A. 21-3604 and 3605; K.S.A. 38-1502 (b); PIK 3d 58.06, Nonsupport of a Child.

*Compulsion*: K.S.A. 21-3209; PIK 3d 54.13, Compulsion; *State v. Dunn*, 243 Kan. 414, 421, 758 P.2d 718 (1988).

*Conduct*: K.S.A. 21-3110 (3).

*Conduct, Intentional*: K.S.A. 21-3201 (b).

*Conduct, Reckless*: K.S.A. 21-3201 (c).

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- Consideration*: K.S.A. 21-4302 (3); PIK 3d 65.07, Gambling - Definitions.
- Conspiracy*: K.S.A. 21-3302; PIK 3d 55.05, Conspiracy - Defined.
- Contraband*: K.S.A. 21-3826 pertaining to contraband in a correctional institution. PIK 3d 60.27, Traffic in Contraband in a Correctional Institution.
- Conviction*: K.S.A. 21-3110 (4). See also, K.S.A. 8-285 (b).
- Copulation*: See *State v. Switzer*, 244 Kan. 449, 769 P.2d 645 (1989).
- Committed Person*: K.S.A. 21-3423.
- Crime*: K.S.A. 21-3105.
- Criminal Intent*: K.S.A. 21-3201; exclusion 21-3202.
- Criminal Purpose*: A general intent or purpose to commit a crime when an opportunity or facility is afforded for the commission thereof. *State v. Houpt*, 210 Kan. 778, 782, 504 P.2d 570 (1972); *State v. Bagemehl*, 213 Kan. 210, 515 P.2d 1104 (1973), as the term is used in K.S.A. 21-3201.
- Criminal Solicitation*: K.S.A. 21-3303; PIK 3d 55.09, Criminal Solicitation.
- Culpable Negligence*: K.S.A. 21-3201 (c).
- Deadly Weapon*: *State v. Bowers*, 239 Kan. 417, 721 P.2d 268 (1986).
- Death*: K.S.A. 77-205.
- Deception*: K.S.A. 21-3110 (5).
- Deprive Permanently*: K.S.A. 21-3110 (6).
- Dwelling*: K.S.A. 21-3110 (7).
- Emergency*: K.S.A. 21-4211 (2)(b).
- Entrapment*: K.S.A. 21-3210.
- Escape*: K.S.A. 21-3809(b)(2); PIK 3d 60.10, Escape from Custody.
- Feloniously*: The doing of the act with a deliberate intent to commit a crime which crime is of the grade or quality of a felony. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).
- Felony*: K.S.A. 21-3105 (1). See also, *State v. Kershner*, 15 Kan. App. 2d 17, 801 P.2d 68 (1990).
- Forcible Felony*: K.S.A. 21-3110 (8).
- Gambling*: K.S.A. 21-4303.
- Gambling Device*: K.S.A. 21-4302 (4); PIK 3d 65.07, Gambling - Definitions.
- Gambling Place*: K.S.A. 21-4302 (5); PIK 3d 65.07, Gambling - Definitions; *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).
- Gross Negligence*: K.S.A. 21-3201 (e).
- Hearing Officer*: K.S.A. 21-3110 (19) (d).
- Heat of Passion*: Any intense or vehement emotional excitement which was spontaneously provoked from the circumstances. *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); PIK 3d 56.04 (e), Homicide Definitions; *State v. Jackson*, 226 Kan. 302, 597 P.2d 255 (1979). Such emotional state of mind must be of such a degree as would cause an ordinary person to act on impulse

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- without reflection. *State v. Guebara*, 236 Kan. 791, 696 P.2d 381 (1985).
- Hypnosis*: K.S.A. 21-4007 (2).
- Inherently Dangerous Felony*: K.S.A. 21-3436.
- Intent to Defraud*: K.S.A. 21-3110 (9).
- Intentional Conduct*: K.S.A. 21-3201(b).
- Intoxication or Intoxicated*: K.S.A. 21-3208.
- Jeopardy*: K.S.A. 21-3108 (1) (c).
- Judicial Officer*: K.S.A. 21-3110(19)(c).
- Knowing or Knowingly*: K.S.A. 21-3201 (b).
- Law Enforcement Officer*: K.S.A. 21-3110 (10).
- Lewd Fondling or Touching*: In a prosecution for indecent liberties with a child (K.S.A. 21-3503), *lewd fondling or touching* may be defined as a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or satisfy the sexual desires of either the child or the offender or both. *State v. Wells*, 223 Kan. 94, 98, 573 P.2d 580 (1977).
- Lottery*: K.S.A. 21-4302 (2).
- Material*: K.S.A. 21-4301 (c) (2) (for obscenity).
- Merchandise*: K.S.A. 21-4403 (b) (1) (for deceptive commercial practice).
- Misdemeanor*: K.S.A. 21-3105.
- Obscene Material*: K.S.A. 21-4301 (c); K.S.A. 21-4301a(a); PIK 3d 65.03, Promoting Obscenity - Definitions.
- Obtain*: K.S.A. 21-3110 (11).
- Obtains or Exerts Control*: K.S.A. 21-3110 (12); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974).
- Offense*: A violation of any penal statute of this State.
- Overt Act*: An act which constitutes a substantial step toward the completion of the crime. *State v. McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924). See also, *State v. Sullivan & Sullivan*, 224 Kan. 110, 122, 578 P.2d 1108 (1978); PIK 3d 55.01, Attempt.
- Owner*: K.S.A. 21-3110 (13); *State v. Parsons*, 11 Kan. App. 2d 220, 720 P.2d 671 (1986).
- Party Line*: K.S.A. 21-4211 (2) (a).
- Passenger Vehicle*: K.S.A. 21-3744; K.S.A. 8-126(x).
- Peace Officer*: See Law Enforcement Officer.
- Penal Institution*: A penitentiary, state farm, reformatory, prison, jail, house of correction, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses. *State, ex rel., v. Owens*, 197 Kan. 212, 416 P.2d 259 (1966) See also, K.S.A. 21-3826 (traffic in contraband in a correctional institution).
- Performance*: K.S.A. 21-4301(c)(4) (for obscenity).

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**Person:** K.S.A. 21-3110 (14).

**Personal Property:** K.S.A. 21-3110 (15).

**Possession:** Having control over a place or thing with knowledge of and the intent to have such control. *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920); *City of Hutchinson v. Weems*, 173 Kan. 152, 249 P.2d 633 (1952). Definition approved in *State v. Adams*, 223 Kan. 254, 256, 573 P.2d 604 (1977) (citing earlier approval in *State v. Neal*, 215 Kan. 737, 529 P.2d 114 [1974]). See also, *State v. Flinchpaugh*, 232 Kan. 831, 833, 659 P.2d 208 (1983). See Comment to PIK 3d 64.06, Criminal Possession of a Firearm - Felony.

**Premeditation:** See PIK 3d 56.04, Homicide Definitions.

**Presumption, Evidentiary:** An assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action. K.S.A. 60-413. But see *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983). (The jury must be clearly instructed as to the nature and extent of presumptions and that such does not shift the burden of proof to the defendant.)

**Private Place:** K.S.A. 21-4001 (b).

**Probable Cause:** Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the matter being sought to be proved. *State v. Starks*, 249 Kan. 516, 820 P.2d 1243 (1992).

**Property:** K.S.A. 21-3110 (16).

**Prosecution:** K.S.A. 21-3110 (17).

**Public Employee:** K.S.A. 21-3110 (18).

**Public Officer:** K.S.A. 21-3110 (19). A list of public officers is included under this section.

**Purposeful:** K.S.A. 21-3201 (b).

**Real Property or Real Estate:** K.S.A. 21-3110 (20).

**Reasonable Belief:** A belief based on circumstances that would lead a reasonable person to that belief. *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). See *Probable Cause*, above.

**Reasonable Doubt:** See PIK 3d 52.04, Reasonable Doubt.

**Reckless Conduct:** K.S.A. 21-3201 (c).

**Retailer:** See K.S.A. 21-4404(b)(1) pertaining to tie-in magazine sales.

**Sale:** K.S.A. 21-4403 (b) (3), as it relates to deceptive commercial practices. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.

**Scope of Authority:** The performance of services for which an employee has been employed or which are reasonably incidental to his or her employment. See PIK Civil 2d 7.04, Agent - Issue as to Scope of Authority.

**Security Agreement:** K.S.A. 84-9-105 (l).

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*Security Interest:* K.S.A. 84-1-201(37).

*Sell:* K.S.A. 21-4404 (b) (3) for tie-in magazine sales. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.

*Services:* K.S.A. 21-3704 (b).

*Sexual Intercourse:* K.S.A. 21-3501 (1).

*Solicit or Solicitation:* K.S.A. 21-3110 (21).

*Sports Contest, Participant and Official:* K.S.A. 21-4406.

*State:* K.S.A. 21-3110 (22).

*Stolen Property:* K.S.A. 21-3110 (23).

*Temporarily Deprive:* To take from the owner the possession, use, or benefit of his or her property with intent to deprive the owner of the temporary use thereof. See PIK 3d 59.04, Criminal Deprivation of Property.

*Terror and Terrorize:* The word "terror" means an extreme fear or fear that agitates body and mind; and "terrorize" means to reduce to terror by violence or threats. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

*Threat:* K.S.A. 21-3110 (24).

*Unlawful Sexual Act:* K.S.A. 21-3501 (4).

*Wanton or Wantonness:* K.S.A. 21-3201 (c).

*Wanton Negligence:* K.S.A. 21-3201 (c).

*Wholesaler:* K.S.A. 21-4404 (b)(2) for tie-in magazine sales.

*Willful or Willfully:* K.S.A. 21-3201 (b).

*Written Instrument:* K.S.A. 21-3110 (25).

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CHAPTER 54.00

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## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 54.01 PRESUMPTION OF INTENT

**Ordinarily, a person intends all of the usual consequences of (his)(her) voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.**

#### Notes on Use

For authority, see *State v. Acheson*, 3 Kan. App. 2d 705, 601 P.2d 375 (1979).

This instruction must not be confused with PIK 3d 54.01-A, General Criminal Intent. The above instruction is a rule of evidence and does not deal with the required element of criminal intent necessary for conviction in those cases where criminal intent is a necessary element of the offense. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

The instruction should not be given when no intent is required for the crime; that is, where the doing of the act prohibited is itself sufficient to constitute the crime, as provided by K.S.A. 21-3204. In that situation, the recitals in the elements instruction provide all necessary information as to the offense and proof needed.

#### Comment

In *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed. 2d 39, 99 S.Ct. 2450 (1979), the Court held that from an instruction like the first sentence of prior PIK 54.01, standing alone, a jury could infer that it was incumbent upon the defendant to prove his lack of intent by some quantum of proof.

*Sandstrom* was not inconsistent with earlier Kansas cases holding that PIK 54.01, read as a whole, did not shift the burden to the defendant on the issue of intent. See *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973); *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), wherein the Court held PIK 54.01 valid where the jury is informed that the burden to prove criminal intent is on the prosecution beyond a reasonable doubt and that the presumption does not dispense with this burden nor nullify the presumption of innocence; and *State v. Woods*, 222 Kan. 179, 563 P.2d 1061 (1977), reaffirming *Lassley*. Nevertheless, the present instruction is designed to make it crystal clear that the "presumption" is only a permissive inference, leaving the trier of fact free to consider or reject it.

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This instruction has been approved in *State v. McDaniel & Owens*, 228 Kan. 172, 180, 612 P.2d 1231 (1980); *State v. Costa*, 228 Kan. 308, 320, 613 P.2d 1359 (1980); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 306, 624 P.2d 964 (1981); *State v. Beebe*, 244 Kan. 48, 58, 766 P.2d 158 (1988). It also has been thoroughly discussed in *State v. Mason*, 238 Kan. 129, 708 P.2d 963 (1985); and in *State v. Ransom*, 239 Kan. 594, 605, 722 P.2d 540 (1986).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 54.01-A GENERAL CRIMINAL INTENT

**In order for the defendant to be guilty of the crime charged, the State must prove that (his)(her) conduct was intentional. Intentional means willful and purposeful and not accidental.**

**Intent or lack of intent is to be determined or inferred from all of the evidence in the case.**

#### Notes on Use

For authority, see K.S.A. 21-3201(a) and (b). This instruction is not recommended for general use. The PIK instruction defining the crime should cover either specific or general criminal intent as an element of the crime. This instruction should be used only where the crime requires only a general criminal intent and the state of mind of the defendant is a substantial issue in the case. See *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

The above instruction should not be given where intentional conduct is not a necessary element of the offense, as set out in K.S.A. 21-3201(c), reckless conduct; 21-3204, absolute liability for misdemeanor or traffic infraction; and 21-3405, vehicular homicide.

This instruction must not be confused with PIK 3d 54.01, Presumption of Intent, which is a rule of evidence and does not purport to charge the jury to find criminal intent necessary for conviction.

#### Comment

As to those offenses of guilt without criminal intent, in *State v. Merrifield*, 180 Kan. 267, 303 P.2d 155 (1956), it is said: "The doing of an inhibited [sic] act constitutes the crime, and the moral turpitude or purity of motive by which it is prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." See also, *State v. Cruitt*, 200 Kan. 372, 436 P.2d 870 (1968), in which the Court said: "And where an act is made a crime by statute, without any express reference to intent, this court has held that it is not necessary to allege such intent, or any intent, but simply to allege the commission of the act in the language of the statute, and the intent will be presumed."

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**54.01-B STATUTORY PRESUMPTION OF INTENT TO DEPRIVE**

There is a presumption that a person has an intent to permanently deprive the owner of the possession, use or benefit of the property, where:

- (a) That person gives false identification or a fictitious name, address or place of employment at the time of obtaining control over property;  
or
- (b) That person fails to return personal property within seven days after receiving a (registered) (certified) letter giving notice that the property had not been returned within 10 days of the time required by the lease or rental agreement;  
or
- (c) That person fails to return the book(s) or other material borrowed from a library within 30 days after receiving a (registered) (certified) letter from the library requesting its return.

This presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

(Notice will be presumed to have been given three days following deposit of the notice as registered or certified matter in the U.S. mail, addressed to the person who has [leased or rented the property] [borrowed the book(s) or other material from a library] as the address appears in the information supplied by the person at the time of the [leasing or renting] [borrowing] or at [his][her] last known address.)

**Notes on Use**

For authority, see K.S.A. 21-3702(1)(a) on false identification; (1)(b) on failure to return property; and (2) failure to return book(s) or other material from a

## PATTERN INSTRUCTIONS FOR KANSAS 3d

library. "Notice" is defined in subsection (3). See PIK 3d Chapter 59.00, Crimes Against Property, for the use of this instruction. Paragraph (c) of the instruction is to be used only for prosecution of a misdemeanor under K.S.A. 21-3701, and amendments thereto.

### Comment

*State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), upheld the constitutionality of a statutory presumption where it is rebuttable and governs only the burden of going forward with the evidence, not the ultimate burden of proof. The Court stated: ". . . the use of a presumption to establish prima facie evidence does not destroy a defendant's presumption of innocence, nor does it invade the province of the jury as fact finders." It does require the defendant to go forward with evidence to rebut the presumption. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976). See Comment to PIK 3d 54.01, Presumption of Intent, on the matter of shifting the burden on the defendant to produce evidence.

*State v. Johnson*, 233 Kan. 981, 986, 666 P.2d 706 (1983), again affirms that this instruction protects the defendant's rights when there exists a statutory presumption of intent to deprive.

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**54.02 CRIMINAL INTENT - IGNORANCE OF STATUTE  
OR AGE OF MINOR IS NOT A DEFENSE**

**It is not a defense that the accused did not have knowledge of (the existence or constitutionality of or the scope or meaning of the terms used in the statute under which the accused is prosecuted) (the age of a minor, even though age is a material element of the crime with which [he][she] is charged).**

**Notes on Use**

For authority, see K.S.A. 21-3202.



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**54.03 IGNORANCE OR MISTAKE OF FACT**

**It is a defense in this case if by reason of ignorance or mistake the defendant did not have at the time the mental state which the statute requires as an element of the crime. (The defendant may be convicted of a lesser offense if the facts were as [he][she] believed them to be and the other evidence in the case establishes such lesser offense.)**

**Notes on Use**

For authority, see K.S.A. 21-3203 (1). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

**Comment**

The parenthetical material should only be given in cases where a lesser offense is included in the greater offense committed.

As provided by the authorizing statute (K.S.A. 21-3203), this should not be given in cases where there are exclusions of requirement of proof of criminal intent. See K.S.A. 21-3202 and PIK 3d 54.02, Criminal Intent - Ignorance of Statute or Age of Minor Is Not a Defense.

Likewise, this instruction has no application to and should not be given in circumstances involving statutes providing for guilt without criminal intent. See Comment to PIK 3d 54.01-A, General Criminal Intent.

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**54.04 IGNORANCE OR MISTAKE OF LAW -  
REASONABLE BELIEF**

**It is a defense to the charge made against the defendant if the defendant reasonably believed that (his)(her) conduct did not constitute a crime and:**

**(the crime was defined by an administrative regulation or order which was not known to the defendant and had not been published, as provided by law, and the defendant could not have acquired such knowledge by the exercise of ordinary care.)**

**(the defendant acted in reliance upon a statute which later was determined to be invalid.)**

**(the defendant acted in reliance upon an order or opinion [of the Supreme Court of Kansas] or [a United States appellate court] later overruled or reversed.)**

**(the defendant acted in reliance upon an official interpretation of the [statute] [regulation] or [order] defining the crime made by a [public officer] or [agency] legally authorized to interpret such statute.)**

**Notes on Use**

For authority, see K.S.A. 21-3203(2). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

**Comment**

Whether there has been a publication of the administrative regulations, a determination of the invalidity of statute, an overruling of court decisions or official interpretations by officer or agency legally authorized, are all matters of judicial notice and the existence of which can and should be determined and instructed on as a matter of law. The defendant's act in reliance thereon and the other provisions are questions of fact to be determined by the jury.

This defense is not applicable when reliance is based on decisions of the various district, county or other lower courts of the State. The term "public officer" in subparagraph (d) of K.S.A. 21-3203(2) does not include judges and magistrates. *State v. V.F.W. Post No. 3722*, 215 Kan. 693, 527 P.2d 1020 (1974).

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### 54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER

**A person who, either before or during its commission, intentionally (aids) (abets) (advises) (hires) (counsels) (procures) another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the defendant's participation, if any, in the actual commission of the crime.**

#### Notes on Use

For authority, see K.S.A. 21-3205(1). For a crime not intended, see PIK 3d 54.06, Responsibility for Crimes of Another - Crime Not Intended.

#### Comment

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner*, 193 Kan. 189, 196, 392 P.2d 863 (1964); *State v. Jackson*, 201 Kan. 795, 799, 443 P.2d 279 (1968).

One who watches at a distance to prevent surprise while others commit a crime is deemed in law to be a principal and punishable as such. *State v. Neil*, 203 Kan. 473, 474, 454 P.2d 136 (1969).

Mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. *State v. Green*, 237 Kan. 146, 697 P.2d 1305 (1985). This language from *Green*, however, may properly be refused as an additional instruction by the trial judge, since PIK 54.05 clearly informs the jury that intentional acts by a defendant are necessary to sustain a conviction for aiding and abetting. *State v. Hunter*, 241 Kan. 629, 639, 740 P.2d 559 (1987); *State v. Scott*, 250 Kan. 350, 361, 827 P.2d 733 (1992).

See *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974), wherein it was held "to be guilty of aiding and abetting in the commission of a crime the defendant must wilfully and knowingly associate himself with the unlawful venture and wilfully participate in it as he would in something he wishes to bring about or to make succeed."

In *State v. Edwards*, 250 Kan. 320, 331, 826 P.2d 1355 (1992), the Supreme Court examined the elements of aiding and abetting and solicitation and determined that, under the facts of that case, those offenses did not merge and were not multiplicitous.

### PATTERN INSTRUCTIONS FOR KANSAS 3d

Where evidence indicates defendant could only be found guilty as an aider or abettor, specific intent is an issue, and voluntary intoxication may indicate absence of required intent or state of mind and be a defense. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980). See also, *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.06 RESPONSIBILITY FOR CRIMES OF ANOTHER -  
CRIME NOT INTENDED**

**A person who intentionally (aids) (abets) (advises) (hires) (counsels) (procures) another to commit a crime is also responsible for any other crime committed in carrying out or attempting to carry out the intended crime, if the other crime was reasonably foreseeable.**

**Notes on Use**

For authority, see K.S.A. 21-3205(2).

**Comment**

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner*, 193 Kan. 189, 195, 392 P.2d 863 (1964); *State v. Payton*, 229 Kan. 106, 622 P.2d 651 (1981). The other crime must be reasonably foreseeable. *State v. Davis*, 4 Kan. App. 2d 210, 604 P.2d 68 (1979). See Comment to PIK 3d 54.05, Responsibility for Crimes of Another.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.07 RESPONSIBILITY FOR CRIME OF ANOTHER -  
ACTOR NOT PROSECUTED**

**It is not a defense that (another) (others) who participated in the commission of the wrongful act constituting the crime (lacked criminal capacity) (has or has not been convicted of the crime or any lesser degree) (has been acquitted).**

**Notes On Use**

For authority, see K.S.A. 21-3205(3). PIK 3d 54.05, Responsibility for Crimes of Another and PIK 3d 54.06, Responsibility for Crimes of Another - Crime Not Intended, should be used where applicable to the particular case. This instruction makes clear that a contrary rule which prevailed at common law is not the law in the State of Kansas.

**Comment**

An accessory before the fact may be convicted after the trial and conviction of the principal of a higher degree of offense than the principal was convicted of. *State v. Gray*, 55 Kan. 135, 144, 145, 39 Pac. 1050 (1895).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.08 CORPORATIONS - CRIMINAL RESPONSIBILITY  
FOR ACTS OF AGENTS**

**A corporation is responsible for acts committed by any person who is authorized to act on behalf of the corporation when acting within the scope of (his)(her) authority.**

**Notes on Use**

For authority, see K.S.A. 21-3206(1) and (2).

Use PIK Civil 2d 7.04, Agent - Issue as to Scope of Authority, where scope of authority is an issue.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.09 INDIVIDUAL RESPONSIBILITY FOR  
CORPORATION CRIME**

**An individual who performs criminal acts, or causes criminal acts to be performed, in the name of or on behalf of a corporation, is responsible to the same extent as if such acts were performed in (his)(her) own name or on (his)(her) own behalf.**

**Notes on Use**

For authority, see K.S.A. 21-3207(1).



PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.10 INSANITY - MENTAL ILLNESS OR DEFECT**

The defendant has denied criminal responsibility because of lack of mental capacity at the time the offense was committed. In law, this is called insanity. The defendant is not criminally responsible for (his)(her) acts if because of mental illness or defect the defendant lacked the capacity either:

- (a) to understand the nature of (his)(her) acts, or
- (b) to understand that what (he)(she) was doing was prohibited by law.

If you have a reasonable doubt as to the defendant's capacity to understand either, then you should find the defendant not guilty because of insanity.

If you have no reasonable doubt that the defendant had the mental capacity at the time of the alleged offense to understand both what (he)(she) was doing and that it was prohibited by law, then you should find the defendant was not insane.

**Notes on Use**

This instruction should be given where the defense of insanity is asserted under K.S.A. 22-3219 and evidence has been introduced in support of such claim.

See K.S.A. 22-3219 for plea of insanity and notice and procedure required.

**Comment**

For authority, see *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960), in which the M'Naghten rule is discussed and applied. In *State v. Smith*, 223 Kan. 203, 574 P.2d 548 (1977), the Court reaffirmed the M'Naghten test, saying ". . . no other test better protects society as well as serves its needs." (p. 211)

A proposed change to the American Law Institute test was not adopted in the Kansas Criminal Code. See *Kansas Judicial Council Bulletin*, April 1968, p.35. For a most informative analysis of the American Law Institute test, see the dissent in *Smith*, supra, (pp.211-219).

In *State v. Boan*, 235 Kan. 800, 686 P.2d 160 (1984), the Court emphasized that "wrong" under the "right or wrong" half of the M'Naghten test means prohibited by law and not morally or socially wrong.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

Even an adjudged lunatic is criminally responsible for acts committed during a lucid interval. *Fisher v. Fraser*, 171 Kan. 472, 233 P.2d 1066 (1951). The question of defendant's insanity at the time of the alleged crime is one of fact to be tried by the jury. *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960); *State v. Coltharp*, 199 Kan. 598, 433 P.2d 418 (1967).

Nonexpert witnesses who are shown to have had special opportunities to observe the defendant may give opinion evidence as to sanity. *State v. Shultz*, 225 Kan. 135, 587 P.2d 901 (1978).

In *State v. James*, 223 Kan. 107, 574 P.2d 181 (1977), the Court held that "an instruction on the effect of voluntary intoxication and an instruction on the defense of insanity may both be given when there has been evidence of intoxication which bears upon the issue of a required specific intent and when the defense of insanity is relied on by the defendant."

An insane person cannot be required to plead to a criminal charge and cannot be tried. *State v. English*, 198 Kan. 196, 424 P.2d 601 (1967). The test of responsibility for crime differs from that of mental competency to stand trial. These tests are stated and distinguished in *Van Dusen v. State*, 197 Kan. 718, 421 P.2d 197 (1966). See also, *Nall v. State*, 204 Kan. 636, 465 P.2d 957 (1970). For procedure, see K.S.A. 22-3302. For verdict form, see PIK 3d 68.06, Not Guilty Because of Insanity.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.10-A INSANITY - COMMITMENT**

**A person found not guilty because of insanity is committed to the State Security Hospital for safe-keeping and treatment until discharged according to law.**

**Notes on Use**

For authority, see K.S.A. 22-3428.

This instruction must be given in any case where there is reliance on the defense of insanity.

**Comment**

See *State v. Hamilton*, 216 Kan. 559, 534 P.2d 226 (1975).

This instruction was approved in *State v. Wright*, 219 Kan. 808, 814, 549 P.2d 958 (1976).

In *State v. Alexander*, 240 Kan. 273, 287, 729 P.2d 1126 (1986), the Court reasoned that people in general were aware of the meanings of verdicts of guilty and not guilty. A verdict of not guilty by reason of insanity has no such commonly understood meaning. Hence, the purpose of this instruction is not to force the jury into considering disposition, but to educate them regarding the insanity defense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.11 INTOXICATION - INVOLUNTARY**

**Intoxication involuntarily produced is a defense if it renders the accused substantially incapable of knowing or understanding the wrongfulness of (his)(her) conduct and of conforming (his)(her) conduct to the requirements of law.**

**Notes on Use**

For authority, see K.S.A. 21-3208(1). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

**Comment**

Before a defendant's intoxication may be said to be involuntary, he must show something more than a strong urge or compulsion to drink. *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 54.12 VOLUNTARY INTOXICATION - GENERAL INTENT CRIME

Voluntary intoxication is not a defense to a charge of (set out general intent crime).

(Voluntary intoxication, however, may be a defense where the evidence indicates that a defendant acted only as an aider or abettor, and may be considered in determining whether such defendant was capable of forming the required intent to aid or abet the commission of [general intent crime charged].)

#### Notes on Use

For authority, see K.S.A. 21-3208(2). The second paragraph should be included if there is an issue of fact as to whether a defendant may have acted only as an aider or abettor. PIK 3d 54.05, Responsibility for Crimes of Another, or PIK 3d 54.06, Responsibility for Crimes of Another - Crime Not Intended, should also be given in such circumstances.

#### Comment

Mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense, is no excuse for the offense, or a defense to the charge.

However, "where evidence of intoxication tends to show that the defendant was incapable of forming the particular intent to injure which is a necessary ingredient of the crime of aggravated battery he is entitled to an instruction on the lesser included offense of ordinary battery." *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973).

The fact of intoxication as affecting intent or state of mind is a jury question. *State v. Miles*, 213 Kan. 245, 246, 515 P.2d 742 (1973).

Where no particular intent or state of mind is a necessary element of the crime (e.g., assault with a deadly weapon), no instruction on voluntary intoxication is required. *State v. Farris*, 218 Kan. 136, 143, 542 P.2d 725 (1975).

"An instruction on the effect of voluntary intoxication and an instruction on the defense of insanity may both be given when there has been evidence of intoxication which bears upon the issue of a required specific intent and when the defense of insanity is relied on by the defendant." *State v. James*, 223 Kan. 107, 574 P.2d 181 (1977).

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"To be guilty of aiding and abetting in the commission of a crime the defendant must wilfully and knowingly associate himself with the unlawful venture and wilfully participate in it as he would in something he wishes to bring about or to make succeed." *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).

Where evidence indicates defendant could only be found guilty as an aider or abettor, specific intent is an issue, and voluntary intoxication may indicate absence of required intent or state of mind and be a defense. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980). See also, *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.12-A VOLUNTARY INTOXICATION - SPECIFIC  
INTENT CRIME

Voluntary intoxication may be a defense to the charge of (specific intent crime charged), where the evidence indicates that such intoxication impaired a defendant's mental faculties to the extent that (he)(she) was incapable of forming the necessary intent (set out specific intent element of the crime).

Notes on Use

For authority, see K.S.A. 21-3208(2).

Comment

"Where the crime charged requires a specific intent, voluntary intoxication may be a defense and an instruction thereon is required where there is evidence to support that defense." *State v. Sterling*, 235 Kan. 526, Syl. ¶ 2, 680 P.2d 301 (1984). See also, *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987); *State v. Gadelkarim*, 247 Kan. 505, 508, 802 P.2d 507 (1990).

"When the defense of voluntary intoxication is asserted in a criminal trial, the issue concerning the level of the defendant's intoxication is a question of fact for the jury." *State v. Falke*, 237 Kan. 668, Syl. ¶ 10, 703 P.2d 1362 (1985).

"A defendant in a criminal case may rely upon evidence of voluntary intoxication to show a lack of specific intent even though he also relies upon other defenses inconsistent therewith." *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987). "To require the giving of an instruction on voluntary intoxication there must be some evidence of intoxication upon which a jury might find that a defendant's mental faculties were impaired to the extent that he was incapable of forming the necessary specific intent required to commit the crime." *Id.*

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### 54.12-B DIMINISHED MENTAL CAPACITY

**Diminished mental capacity [not amounting to insanity] may be considered in determining whether the defendant was capable of forming the necessary intent (set out specific element of the crime).**

#### Notes on Use

This instruction may be used when there is some evidence of diminished mental capacity. The clause in brackets should be included when the defense of insanity has also been raised.

#### Comment

In *State v. Jackson*, 238 Kan. 793, 714 P.2d 1368 (1986), the Supreme Court expressly recognized the doctrine of diminished capacity. The Court cautioned that evidence of diminished capacity is "admissible only for the limited purpose of negating specific intent and is not a substitute for a plea of insanity." 238 Kan. at 798.

While a trial court is not required to instruct on diminished capacity, the "better practice" is to instruct on diminished capacity where necessary to inform the jury of the effect of defendant's diminished capacity on the specific intent required for the crime charged. *State v. Maas*, 242 Kan. 44, 52, 744 P.2d 1222 (1987). *State v. Pioletti*, 246 Kan. 49, 59, 785 P.2d 963 (1990), reiterated that the decision whether or not to give an instruction on diminished capacity is a matter of judicial discretion. See also, *State v. Cady*, 248 Kan. 743, 748, 811 P.2d 1130 (1991).

The complete defense of insanity does not have to be asserted in order to claim diminished capacity. Moreover, mere personality characteristics, such as poor impulse control, a short temper, frustration, feelings of dependency, "snapping", lack of concern for the rights of other people, etc., do not constitute a mental disease or defect bringing the doctrine of diminished capacity into play. *State v. Wilburn*, 249 Kan. 678, 686, 822 P.2d 609 (1991).

Whether notice of a defense of diminished mental capacity is required under K.S.A. 22-3219 has not been determined in any published decision. As amended in 1989, that statute requires notice of intent to assert the defense of insanity "or other defense involving the presence of mental disease or defect."



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### 54.13 COMPULSION

Compulsion is a defense if the defendant acted under the compulsion or threat of imminent infliction of death or great bodily harm, and (he)(she) reasonably believed that death or great bodily harm would have been inflicted upon (him)(her) or upon (his)(her) [(parent) (spouse) (child) (brother) (sister)] had (he)(she) not acted as (he)(she) did.

(Such a defense is not available to one who willfully or wantonly placed [himself][herself] in a situation in which it was probable that [he][she] would have been subjected to compulsion or threat.)

#### Notes on Use

For authority, see K.S.A. 21-3209. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

This instruction is not to be used in cases of murder or voluntary manslaughter. K.S.A. 21-3209.

The second paragraph should be used only when there is some evidence indicating that the defendant willfully or wantonly placed himself or herself in the situation indicated.

#### Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17, Use of Force in Defense of a Person, in the use of "immediate" in lieu of the statutory "imminent". The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate."

The Committee is of the opinion that the same rationale the Court applied in *Hundley* applies in compulsion cases.

In *State v. Hunter*, 241 Kan. 629, 642, 740 P.2d 559 (1987), the Court considered the statutory prohibition on use of the compulsion defense to charges of murder and manslaughter. The Court held that compulsion may be used as a

## PATTERN INSTRUCTIONS FOR KANSAS 3d

defense to felony murder when compulsion is a defense to the underlying felony.

A person charged with escape from lawful custody may not claim the defense of compulsion unless the following conditions exist: (1) The prisoner is faced with a threat of imminent infliction of death or great bodily harm; (2) there is no time for complaint to the authorities or there exists a history of futile complaints which makes any result from such complaints illusory; (3) there is not time or opportunity to resort to the courts; (4) there is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and (5) the prisoner immediately reports to the proper authorities when he or she has attained a position of safety from the imminent threat. *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992). The Court noted that the fifth condition should refer to "imminent threat", rather than "immediate threat", to conform to the statutory language. 250 Kan. at 309.

The defense of compulsion is applicable to absolute liability traffic defenses. *State v. Riedl*, 15 Kan. App. 2d 326, 329, 807 P.2d 697 (1991).

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**54.14 ENTRAPMENT**

Entrapment is a defense if the defendant is (induced) (persuaded) to commit a crime which the defendant had no previous (disposition) (intention) (plan) (purpose) to commit. It is not a defense if the defendant (originated) (began) (conceived) the plan to commit the crime or when (he)(she) had shown (a predisposition) (a plan) (an intention) (a purpose) for committing the crime and was merely afforded (an)(the) opportunity to (consummate) (carry out [his][her] intention to complete) (complete [his][her] plan to commit) the crime and was assisted by law enforcement officers.

The defendant cannot rely on the defense of entrapment if you find that in the course of defendant's usual activities the sale of \_\_\_\_\_ was likely to occur and the law enforcement officer or (his)(her) agent did not mislead the defendant into believing (his)(her) conduct to be lawful.

A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the \_\_\_\_\_ by the defendant, solicitation by defendant to make (his)(her) sale, prior sales by defendant, or ease of access to the \_\_\_\_\_ by defendant.

**Notes on Use**

For authority, see K.S.A. 21-3210. Insert the name of the article or substance sold in the blank spaces. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

**Comment**

In discussing when the defense of entrapment is available, the Supreme Court in *State v. Jordan*, 220 Kan. 110, 112, 551 P.2d 773 (1976), stated: "The defense of entrapment arises when a law enforcement officer, or someone acting in his behalf, generates in the mind of a person who is innocent of any criminal purpose the original intent or idea to commit a crime which he had not contemplated and

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would not have committed but for the inducement of the law officer." *State v. Hamrick*, 206 Kan. 543, 479 P.2d 854 (1971). A defendant can rely on the defense of entrapment when he is induced to commit a crime which he had no previous intention of committing, but he cannot rely on the defense or obtain an instruction on entrapment when the evidence establishes he had a previous intention of committing the crime and was merely afforded an opportunity by a law officer to complete it. *State v. Wheat*, 205 Kan. 439, 469 P.2d 338 (1970).

For other cases discussing the availability of the defense of entrapment, see *State v. Amodei*, 222 Kan. 140, 145, 563 P.2d 440 (1977); *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974); *State v. Smith*, 229 Kan. 533, 625 P.2d 1139 (1981); *State v. Nelson*, 249 Kan. 689, 697, 822 P.2d 53 (1991).

See *United States v. Russell*, 411 U.S. 423, 36 L.Ed. 2d 366, 93 S.Ct. 1637 (1973).

In *State v. Farmer*, 212 Kan. 163, 510 P.2d 180 (1973), it was held: "The defense of entrapment is generally not available to a defendant who denies that he has committed the offense charged." See K.S.A. 21-3210.

See also, *State v. Rogers*, 234 Kan. 629, 675 P.2d 71 (1984).

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**54.14-A PROCURING AGENT**

The defendant is not guilty of a sale of \_\_\_\_\_ if the defendant acted only as a procuring agent for the purchaser. A procuring agent for the purchaser is a person who, by agreement with the purchaser, buys or procures an article or a substance from a third party at the request of and for the purchaser. The agreement may be written, oral or implied by the behavior of the parties.

The defendant is not a procuring agent if the defendant acted as a seller or as an agent for a seller.

**Notes on Use**

Insert the name of the article or substance sold in the blank space. In 1990, the Legislature eliminated this defense to certain charges involving controlled substances. See K.S.A. 65-4127a(e) and K.S.A. 65-4127b(e).

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### 54.15 CONDONATION

**It is not a defense that the (injured party) (victim) has (excused) (forgiven) (compromised and settled) (ratified) the offense committed.**

#### Notes on Use

Use for this instruction will not ordinarily arise as evidence to support it is generally not admissible. The pretrial conference will normally provide opportunity to settle the question in advance of trial.

#### Comment

For authority, see *State v. Newcomer*, 59 Kan. 668, 54 Pac. 685 (1898), a statutory rape case in which the victim married the defendant; *State v. Craig*, 124 Kan. 340, 259 Pac. 802 (1927), in which a mother, owner of an undivided interest, subsequently ratified the act of arson; *State v. Dye*, 148 Kan. 421, 83 P.2d 113 (1938), in which it was held that evidence offered to show a compromise, settlement or ratification will not constitute a bar to conviction and punishment of a crime.

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**54.16 RESTITUTION**

**It is not a defense that the defendant at the time of the trial (has restored) (intends to restore) any property taken or its value to the owner.**

**Comment**

Our case law has principally involved cases of embezzlement. See *State v. Taylor*, 140 Kan. 663, 38 P.2d 680 (1934); *State v. Robinson*, 125 Kan. 365, 263 Pac. 1081 (1928). In the latter case, the Court said: "When one embezzles money or property, the fact that he intends to restore it, or its value, to its owner is not a defense."

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### 54.17 USE OF FORCE IN DEFENSE OF A PERSON

The defendant has claimed (his)(her) conduct was justified as (self-defense) (the defense of another person).

A person is justified in the use of force against an aggressor when and to the extent it appears to (him)(her) and (he)(she) reasonably believes that such conduct is necessary to defend (himself)(herself)(another) against such aggressor's imminent use of unlawful force. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

#### Notes on Use

For authority, see K.S.A. 21-3211 and *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). The instruction is not required if the force used by defendant in the claimed self-defense is excessive as a matter of law. *State v. Marks*, 226 Kan. 704, 712-13, 602 P.2d 1344 (1979). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

#### Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17 in the use of "immediate" in lieu of the statutory "imminent". The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate." See also, *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986).

The existence of the battered woman syndrome in and of itself does not operate as a defense to murder. In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. *State v. Stewart*, 243 Kan. 639, 763 P.2d 572 (1988).

In *State v. Scobee*, 242 Kan. 421, 428, 748 P.2d 862 (1988), the Court held that Kansas does not impose a duty to retreat on a person acting in self-defense,



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under proper circumstances the instruction should be modified to so provide.

PIK 2d 54.17 properly instructs the jury on both the subjective and objective standards by which to gauge the justification of use of force. *State v. Wiggins*, 248 Kan. 526, 808 P.2d 1383 (1991).

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**54.18 USE OF FORCE IN DEFENSE OF A DWELLING**

The defendant has claimed (his)(her) conduct was justified as a lawful defense of (his)(her) dwelling.

A person is justified in the use of force to the extent it appears to the person and the person reasonably believes that such conduct is necessary to prevent another from unlawfully (entering into) (remaining in) (damaging) that person's dwelling. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

**Notes on Use**

For authority, see K.S.A. 21-3212. The applicable parenthetical phrase or phrases should be selected. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

**Comment**

See *State v. Countryman*, 57 Kan. 815, 827, 48 Pac. 137 (1897); *State v. Farley*, 225 Kan. 127, 133-34, 587 P.2d 337 (1978). See also, Comment to PIK 3d 54.17, Use of Force in Defense of a Person, and cases cited.

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**54.19 USE OF FORCE IN DEFENSE OF PROPERTY  
OTHER THAN A DWELLING**

**A person lawfully in possession of property, other than a dwelling, is justified in (threatening to use) (using) such force to stop an unlawful interference with such property as would appear necessary to a reasonable man under the circumstances then existing.**

**Notes on Use**

For authority, see K.S.A. 21-3213. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

**Comment**

K.S.A. 21-3213 is the only section of the crimes statute which specifically makes the "reasonable man" the standard to be used with respect to the amount of permissible force. The concept is implicit, however, in K.S.A. 21-3211 (self-defense) and 21-3212 (defense of a dwelling). See *State v. Marks*, 226 Kan. 704, 712, 602 P.2d 1344 (1979); *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). See also, Comment to PIK 3d 54.17, Use of Force in Defense of a Person.

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**54.20 FORCIBLE FELON NOT ENTITLED TO USE  
FORCE**

A person is not justified in using force in defense of (himself)(herself)(another) ([his][her] dwelling) if (he)(she) is (attempting to commit) (committing) (escaping after the commission of) \_\_\_\_\_, a forcible felony.

**Notes on Use**

For authority, see K.S.A. 21-3214(1). Insert in the blank space the particular forcible felony applicable to the particular case.

This instruction was cited with approval in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989).

**Comment**

In *State v. Sullivan & Sullivan*, 224 Kan. 110, 578 P.2d 1108 (1978), the Supreme Court held that, because a jury question remained as to whether the defendants committed the overt act required for an attempted burglary, the trial court erred in instructing the jury that the defendants could not claim self-defense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION**

**A person is not permitted to provoke an attack on (himself)(herself)(another person) with the specific intention to use such attack as a justification for inflicting bodily harm upon the person (he)(she) provoked and then claim self-defense as a justification for inflicting bodily harm upon the person (he)(she) provoked.**

**Notes on Use**

For authority, see K.S.A. 21-3214(2). The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 584, 552 P.2d 900 (1976); and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989). This instruction should not be confused with PIK 3d 54.22, Initial Aggressor's Use of Force. This instruction should be used with caution and limitations.

**Comment**

One who provokes an attack as an excuse to inflict bodily harm upon another cannot thereafter resist with force even though his own death or serious injury is imminent. *State v. Meyers*, 245 Kan. 471, 781 P.2d 700 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.22 INITIAL AGGRESSOR'S USE OF FORCE**

**A person who initially provokes the use of force against (himself)(herself)(another) is not justified in the use of force to defend (himself)(herself)(another) unless:**

- 1. The person has reasonable ground to believe that (he)(she) is in present danger of death or great bodily harm, and (he)(she) has used every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the other person;  
or**
- 2. The person has in good faith withdrawn and indicates clearly to the other person that (he)(she) desires to withdraw and stop the use of force, but the other person continues or resumes the use of force.**

**Notes on Use**

For authority, see K.S.A. 21-3214(3)(a) and (b).

**Comment**

The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976); and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.23 LAW ENFORCEMENT OFFICER OR PRIVATE PERSON SUMMONED TO ASSIST - USE OF FORCE IN MAKING ARREST**

A (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist [him][her]) need not retreat or desist from the efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He)(She) is justified in the use of any force which (he)(she) reasonably believes (to be necessary to effect the arrest) (to be necessary to defend [himself][herself][another] from bodily harm while making the arrest).

However, (he)(she) is justified in using force likely to cause death or great bodily harm only when (he)(she) reasonably believes that such force:

(is necessary to prevent death or great bodily harm to [himself][herself][another]).

or

(is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit \_\_\_\_\_, a felony that involves great bodily harm or [is attempting to escape by use of a deadly weapon] [otherwise indicates (he)(she) will endanger human life or inflict great bodily harm unless arrested without delay]).

(A law enforcement officer making an arrest pursuant to an invalid warrant is justified in the use of any force which (he)(she) would be justified in using if the warrant were valid, unless (he)(she) knows that the warrant is invalid).

(A private person who is [summoned] [directed] by a law enforcement officer to assist in making an arrest which is unlawful is justified in the use of any force which (he)(she) would be justified in using if the arrest were lawful).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Notes on Use

For authority, see K.S.A. 21-3215.

The second paragraph should be used only if there is some evidence that the force was likely to cause death or great bodily harm.

The third paragraph should be used only where an invalid warrant is involved.

The fourth paragraph should be used only where an officer has requested assistance in making an arrest which proves to be unlawful. For authority, see K.S.A. 21-3216(2).



PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.24 PRIVATE PERSON'S USE OF FORCE  
IN MAKING ARREST - NOT SUMMONED  
BY LAW ENFORCEMENT OFFICER**

A private person who (makes) (assists another private person in making) a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He)(She) is justified in the use of any force which (he)(she) reasonably believes to be necessary to effect the arrest and of any force which (he)(she) reasonably believes to be necessary to defend (himself)(herself)(another) from bodily harm while making the arrest.

(However, [he][she] is justified in using force likely to cause death or great bodily harm only when [he][she] reasonably believes that such force is necessary to prevent death or great bodily harm to [himself][herself][another]).

**Notes on Use**

For authority, see K.S.A. 21-3216(1). See also, PIK 3d 54.23, Law Enforcement Officer or Private Person Summoned to Assist - Use of Force in Making Arrest.

**Comment**

Whether the degree of force employed in making a citizen's arrest is "reasonable" is a jury question. *State v. Johnson*, 6 Kan. App. 2d 750, 752-53, 634 P.2d 1137 (1981), *rev. denied* 230 Kan. 819 (1981).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.25 USE OF FORCE IN RESISTING ARREST**

**A person is not authorized to use force to resist an arrest which (he)(she) knows is being made by a (law enforcement officer) (private person summoned and directed by a law enforcement officer to make the arrest) even if the person believes that the arrest is unlawful and the arrest is, in fact, unlawful.**

**Notes on Use**

For authority, see K.S.A. 21-3217.

**Comment**

See 1968 Judicial Council comment following K.S.A. 21-3217.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 55.00

ANTICIPATORY CRIMES

	PIK Number
Attempt . . . . .	55.01
Attempt - Impossibility Of Committing Offense - No Defense . . . . .	55.02
Conspiracy . . . . .	55.03
Conspiracy - Withdrawal As A Defense . . . . .	55.04
Conspiracy - Defined . . . . .	55.05
Conspiracy - Overt Act Defined . . . . .	55.06
Conspiracy - Declarations . . . . .	55.07
Conspiracy - Subsequent Entry . . . . .	55.08
Criminal Solicitation . . . . .	55.09
Criminal Solicitation - Defense . . . . .	55.10

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.01 ATTEMPT

A. (The defendant is charged with the crime of an attempt to commit \_\_\_\_\_. The defendant pleads not guilty.)

OR

B. (If you find the defendant is not guilty of \_\_\_\_\_, you shall consider if [he][she] is guilty of an attempt to commit the crime of \_\_\_\_\_.)

To establish this charge, each of the following claims must be proved:

1. That the defendant performed an act toward the commission of the crime of \_\_\_\_\_;
2. That the defendant did so with the intent to commit the crime of \_\_\_\_\_;
3. That the defendant failed to complete commission of the crime of \_\_\_\_\_; and
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The elements of \_\_\_\_\_ are (set forth in Instruction No. \_\_\_\_\_) (as follows: \_\_\_\_\_).

Notes on Use

For authority, see K.S.A. 21-3301. K.S.A. 21-3301(c) provides that an attempt to commit an off-grid felony (murder in the first degree, treason) is a nondrug severity level 1 crime. An attempt to commit any other nondrug felony is ranked at two crime severity levels below the severity level for the completed crime. The lowest level for an attempt to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3301(d) provides that conviction for an attempt to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months.

If the information charges an attempted crime, omit paragraph B. However, if the attempted crime is submitted as a lesser included offense, omit

## PATTERN INSTRUCTIONS FOR KANSAS 3d

paragraph A.

If the attempted crime is submitted as a lesser offense, PIK 3d 68.09, Lesser Included Offenses, should be given.

The elements of the applicable substantive crime should be referred to or set forth in the concluding portion of the instruction.

### Comment

Under K.S.A. 21-3301, an attempt to commit a crime consists of three essential elements: (1) the intent to commit the crime, (2) an overt act toward the perpetration of the crime, and (3) a failure to consummate it. *State v. Cory*, 211 Kan. 528, 532, 506 P.2d 1115 (1973); *State v. Gobin*, 216 Kan. 278, 280, 281, 531 P.2d 16 (1975).

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. On the one hand, mere acts of preparation are insufficient while, on the other, if the accused has performed the final act necessary for the completion of the crime, he or she could be prosecuted for the crime intended and not for an attempt. The overt act lies somewhere between these two extremes and each case must depend upon its own particular facts. For cases involving this subject, see *State v. Carr*, 230 Kan. 322, 327, 634 P.2d 1104 (1981); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 305, 624 P.2d 964 (1981); *State v. Sullivan & Sullivan*, 224 Kan. 110, 122, 578 P.2d 1108 (1978); *State v. Gobin*, 216 Kan. at 280-281; *State v. Awad*, 214 Kan. 499, 520 P.2d 1281 (1974); *State v. Cory*, 211 Kan. at 532; *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959); *State v. Bereman*, 177 Kan. 141, 276 P.2d 364 (1954).

The Committee comment was quoted in *State v. Gobin*, supra, 216 Kan. at 281; and in *State v. Sullivan & Sullivan*, 224 Kan. at 122.

The general principals for determining whether charges are multiplicitous were reviewed in *State v. Garnes*, 229 Kan. 368, 372, 373, 624 P.2d 448 (1981). For other anticipatory crimes involving the subject of duplicitous charges, see *State v. Knowles*, 209 Kan. 676, 498 P.2d 40 (1972); *State v. Cory*, supra; *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973); *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978).

The crime of aggravated battery is not a lesser included offense of attempted murder. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977).

Where the crime charged is completed, there is no basis for an instruction on an attempted crime. *State v. Grauerholz*, 232 Kan. 221, 230, 654 P.2d 395 (1982).

K.S.A. 21-4618 as amended by L. 1992, ch. 239, § 246 does not apply to crimes committed on or after July 1, 1993.

Attempted crimes under K.S.A. 21-3301 and the crime of conspiracy under K.S.A. 21-3302 when read together do not include a crime of attempted conspiracy. See *State v. Sexton*, 232 Kan. 539, 657 P.2d 43 (1983).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

No all-purpose definition for "overt act" may be established. Each case must depend largely on its particular facts and the inferences which the jury may reasonably draw therefrom. *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING  
OFFENSE - NO DEFENSE**

**The Committee recommends that there be no separate instruction given.**

**Notes on Use**

K.S.A. 21-3301(b) provides that it shall not be a defense to a charge of attempt that the circumstances under which the act was performed or the means employed or the act itself were such that the commission of the crime was not possible. The Committee believes that PIK 3d 55.01, Attempt, is sufficient without the injection of impossibility of committing the offense into the case. For a discussion of factual impossibility, see *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

**Comment**

The Supreme Court of Kansas held in *State v. Logan & Cromwell*, 232 Kan. 646, 650, 656 P.2d 777 (1983), that under the provisions of K.S.A. 21-3301(b) neither legal impossibility nor factual impossibility is a defense to an attempted crime.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**55.03 CONSPIRACY**

The defendant is charged with the crime of conspiracy to commit \_\_\_\_\_. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant agreed with (another person) (others) to (commit) (assist in the commission of) the crime of \_\_\_\_\_;
2. That the defendant did so agree with the intent that the crime of \_\_\_\_\_ be committed;
3. That the defendant or any party to the agreement acted in furtherance of the agreement by \_\_\_\_\_; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The definition of \_\_\_\_\_, the crime charged to be the subject of the conspiracy, is as (follows: \_\_\_\_\_) (set forth in Instruction No. \_\_\_\_\_).

**Notes on Use**

For authority, see K.S.A. 21-3302. K.S.A. 21-3302(c) provides that conspiracy to commit an off-grid felony (murder in the first degree, treason) is a severity level 2 crime. A conspiracy to commit any other nondrug felony offense is ranked two crime severity levels below the severity level for the completed crime. The lowest level for a conspiracy to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3302(d) provides that conviction for conspiracy to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months.

This instruction should be given in all crimes of conspiracy along with PIK 3d 55.05, Conspiracy - Defined, and PIK 3d 55.06, Conspiracy - Overt Act Defined. When the evidence warrants its submission, PIK 3d 55.04, Conspiracy - Withdrawal as a Defense, should be given.



## PATTERN INSTRUCTIONS FOR KANSAS 3d

The name of the applicable crime should be set forth in the first sentence of the instruction and the statutory definition of that crime should be set forth in the concluding portion of the instruction.

### Comment

In the trial of a conspiracy case, a court may become involved with the conspiracy evidence rule. Under this rule, statements and acts of a co-conspirator said or done outside the presence of the other are admissible in evidence as an exception to the hearsay rule. In *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959), the conspiracy evidence rule is discussed in depth. Several cases have been decided since *Borserine* and the conspiracy evidence rule has been recognized by statutory enactment. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii. (1978); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21 (1972); *State v. Nirschl*, 208 Kan. 111, 490 P.2d 917 (1971); *State v. Trotter*, 203 Kan. 31, 453 P.2d 93 (1969); *State v. Paxton*, 201 Kan. 353, 440 P.2d 650 (1968); *State v. Adamson*, 197 Kan. 486, 419 P.2d 860 (1966); *State v. Shaw*, 195 Kan. 677, 408 P.2d 650 (1965); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); and K.S.A. 60-460(i).

The conspiracy evidence rule is based on the concept that a party to an agreement to commit a crime is an agent or a partner of the other.

In *Borserine*, the Supreme Court held that the order of proof in a conspiracy case is largely controlled by the trial judge. Where the crime has to be established by circumstantial evidence, a prosecutor must be given permission to present that proof bit-by-bit as best he or she can without too rigid enforcement of the rule. If, on the completion of the State's case, all of the facts tend to show conspiracy, the order of proof in which the acts of the conspiracy are shown is not important. To the same effect, see *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d at 198.

In *State v. Campbell*, 217 Kan. 756, 770, 539 P.2d 329 (1975), the Court stated that a specific intent is essential to the crime of conspiracy. The Court divided the concept of intent into two elements: (1) the intent to agree or conspire, and (2) the intent to commit the offense. Quoting with approval *Wharton's Criminal Law and Procedure* § 85, the Court recognized the obvious difficulty of proving the dual intent and concluded generally that no distinction should be made between the two specific intents. The Court embraced K.S.A. 21-3201 as satisfying the intent requirement in conspiracy cases.

Conspiracy is not synonymous with aiding or abetting or participating. Conspiracy implies an agreement to commit a crime; whereas, to aid and abet requires an actual participation in the act constituting the offense. See *State v. Campbell*, 217 Kan. at 769; *State v. Rider, Edens & Lemons*, 229 Kan. 394, 625 P.2d 425 (1981).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

As a general rule, conspiracy to commit a crime and the substantive crime are held to be separate and distinct offenses. Thus, conspiracy to commit burglary is not a lesser included offense of burglary. See *State v. Burnett*, 221 Kan. 40, 45, 558 P.2d 1087 (1976).

It is not required that a co-conspirator have a financial stake in the success of a conspiracy. It is only necessary that he be shown not to be indifferent to the outcome of the conspiracy. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

Conspiracy is not a lesser included offense of murder. See *State v. Adams*, 223 Kan. 254, 573 P.2d 604 (1977).

The elements of conspiracy as defined in K.S.A. 21-3302 were reviewed in *State v. McQueen & Hardyway*, 224 Kan. 420, 582 P.2d 251 (1978); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981); *State v. Becknell*, 5 Kan. App. 2d 269, 271, 615 P.2d 795 (1980); *State v. Small*, 5 Kan. App. 2d 760, 762, 625 P.2d 1 (1981).

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d, 182, 205, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii (1978).

In *State v. Taylor*, 2 Kan. App. 2d 532, 534, 583 P.2d 1033 (1978), the Court of Appeals of Kansas held that in its proof of conspiracy, the State is not limited to the overt acts alleged in the information.

To constitute a conspiracy there must be an agreement which requires a "meeting of the minds." See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from certain acts of the persons accused that were done in pursuance of the unlawful purpose. See *State v. Small*, 5 Kan. App. at 762-763.

Attempted crimes under K.S.A. 21-3301 and the crime of conspiracy under K.S.A. 21-3302 when read together do not include a crime of attempted conspiracy. See *State v. Sexton*, 232 Kan. 539, 657 P.2d 43 (1983).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**55.04 CONSPIRACY - WITHDRAWAL AS A DEFENSE**

**It is a defense to a charge of conspiracy that the defendant in good faith withdrew from the agreement and communicated the fact of such withdrawal to any party to the agreement before any party acted in furtherance of it.**

**Notes on Use**

For authority, see K.S.A. 21-3302(b). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

**Comment**

It is a jury question whether one has withdrawn from a conspiracy when conflicting evidence as to that withdrawal is presented. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 55.05 CONSPIRACY - DEFINED

**A conspiracy is an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement.**

**The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all of the facts and circumstances.**

#### Notes on Use

For authority, see K.S.A. 21-3302(a) and the Judicial Council comment to K.S.A. 21-3302. *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); *State v. Small*, 5 Kan. App. 2d 760, 625 P.2d 1 (1981); 16 Am. Jur. 2d, Conspiracy, §§ 1, 7, and 11. This instruction should be given in all cases involving the crime of conspiracy.

#### Comment

In *Campbell*, the Supreme Court of Kansas emphasized that the essence of a conspiracy is the agreement to commit a crime, not simply to commit a particular act. The Court further held that the provisions of K.S.A. 21-3302 were not unconstitutionally vague and indefinite. 217 Kan. at 770.

The agreement may be expressed or implied from the acts of the parties. *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

The agreement requires a "meeting of the minds" of at least two persons. See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 55.06 CONSPIRACY - OVERT ACT DEFINED

A person may be convicted of a conspiracy only if some act in furtherance of the agreement is proved to have been committed. An act in furtherance of the agreement is any act knowingly committed by a member of the conspiracy in an effort to effect or accomplish an object or purpose of the conspiracy. The act itself need not be criminal in nature. It must, however, be an act which follows and tends towards the accomplishment of the object of the conspiracy. The act may be committed by a conspirator alone and it is not necessary that the other conspirator be present at the time the act is committed. Proof of only one act is sufficient.

#### Notes on Use

For authority, see K.S.A. 21-3302(a). *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); 16 Am. Jur. 2d, Conspiracy §§ 7, 10, 11 and 14.

#### Comment

In *Campbell*, the Court observed that membership in a conspiracy could be proved only by willful, knowing and intentional conduct of the accused. In other words, a person cannot unintentionally or accidentally become a member of a conspiracy.

The State is not obligated to prove that the accused has a "stake" in the outcome of the conspiracy. All that is required is that the accused not be indifferent to its outcome. *State v. Daugherty*, 221 Kan. 612, 620, 562 P.2d 42 (1977).

A conspiracy to commit a crime is not established by mere association or knowledge of acts of other parties. There must be some intentional participation in the conspiracy with a view to the furtherance of the common design and purpose. See *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 225 Kan. 846 (1978).

The State is not limited to the overt acts alleged in the information in its proof of conspiracy. See *State v. Taylor*, 2 Kan. App. 2d 532, 583 P.2d 1033 (1978).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**55.07 CONSPIRACY - DECLARATIONS**

**Declarations of one conspirator, made in furtherance of the conspiracy, may be considered by you as evidence against all co-conspirators. However, declarations of a conspirator, not in furtherance of the conspiracy, can be considered by you only as to the declarant to prove (his)(her) participation in the conspiracy.**

**Notes On Use**

For authority, see *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 225 Kan. 846 (1978). This instruction should be given when there is an issue of fact as to whether or not the declarations of one conspirator were made in furtherance of the conspiracy.

**Comment**

The Court of Appeals has recognized the general rule that declarations of one conspirator, made in furtherance of the conspiracy, may be used against all co-conspirators on the theory that the declarant is an agent of the other conspirators. However, declarations not in furtherance of the conspiracy are admissible only as to the declarant to prove his participation in the conspiracy. *State v. Marshall & Brown-Sidorowicz* at 198-199. See also, *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981); *State v. Roberts*, 223 Kan. 49, 574 P.2d 164 (1977).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**55.08 CONSPIRACY - SUBSEQUENT ENTRY**

All of the conspirators need not enter into the agreement at the same time. If a person later joins an already formed conspiracy with knowledge of its unlawful purpose, that person may be found guilty as a conspirator.

Notes on Use

For authority, see *State v. Becknell*, 5 Kan. App. 2d 269, 272, 615 P.2d 795 (1980); and 16 Am. Jur. 2d, Conspiracy § 10.

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.09 CRIMINAL SOLICITATION

The defendant is charged with the crime of solicitation to commit \_\_\_\_\_, a felony. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (commanded) (encouraged) (requested) \_\_\_\_\_ (to commit) (attempt to commit) the crime of \_\_\_\_\_, a felony;

or

That the defendant intentionally (commanded) (encouraged) (requested) \_\_\_\_\_ to aid and abet in the (commission) (attempted commission) of the crime of \_\_\_\_\_, a felony, for the purpose of promoting or facilitating the felony; and

2. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The definition of \_\_\_\_\_, the felony charged to be the subject of the solicitation, is as (follows: \_\_\_\_\_) (set forth in Instruction No. \_\_\_\_\_).

Notes on Use

For authority, see K.S.A. 21-3303. K.S.A. 21-3303(d) provides that soliciting another to commit an off-grid felony (murder in the first degree, treason) is a severity level 3 crime. Soliciting another to commit any other nondrug felony offense is ranked three crime severity levels below the appropriate level for the completed crime. The lowest severity level for soliciting another to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3303(e) provides that conviction for solicitation of a drug felony reduces the prison term prescribed in the sentencing grid for the underlying or completed crime by six months.



## PATTERN INSTRUCTIONS FOR KANSAS 3d

The name of the applicable crime should be set forth in the first sentence of the instruction and the statutory definition of that crime should be set forth in the concluding portion of the instruction.

### Comment

The crime of solicitation is separate and distinct from an attempt to commit a crime or from the crime of conspiracy. Solicitation is in the nature of preparation; whereas, an attempt involves an overt act beyond the solicitation. See *State v. Bowles*, 70 Kan. 821, 837, 79 Pac. 726 (1905); and 21 Am. Jur. 2d, Criminal Law, §§ 161 and 162. Solicitation is distinguished from the crime of conspiracy in that the latter requires an agreement between two or more persons to commit, or assist in committing, a crime along with an overt act in furtherance of the object of the conspiracy. See *State v. Crozier*, 225 Kan. 120, 126, 587 P.2d 331 (1978). The crime of solicitation, on the other hand, is complete when the solicitation request is made without the requirement of an agreement or an overt act.

It should be noted that subsection (b) provides that it is immaterial ". . . that the actor fails to communicate with the person solicited to commit a felony if the person's conduct was designed to effect a communication." Apparently, this subsection covers the unusual situation where one might place an offer in a newspaper or use some other form of communication or utilize the concepts of an agency to carry out the prohibited solicitation. In the event the provision becomes material, an appropriate paraphrase of the statute should be presented.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**55.10 CRIMINAL SOLICITATION - DEFENSE**

**It is a defense to a charge of criminal solicitation that the defendant, after soliciting another person to commit a felony, persuaded that person not to do so or otherwise prevented the commission of the felony, under circumstances demonstrating a complete and voluntary abandonment of the defendant's criminal plan.**

**Notes on Use**

For authority, see K.S.A. 21-3303(c). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 56.00

CRIMES AGAINST PERSONS

	PIK Number
Murder In The First Degree . . . . .	56.01
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Sentencing Proceeding . . . . .	56.01-A
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Aggravating Circumstances . . . . .	56.01-B
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Mitigating Circumstances . . . . .	56.01-C
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Burden Of Proof . . . . .	56.01-D
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## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 56.01 MURDER IN THE FIRST DEGREE

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed \_\_\_\_\_;
2. That such killing was done with premeditation; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3401. Murder in the first degree is an off-grid person felony. For felony murder, see PIK 3d 56.02, Murder in the First Degree - Felony Murder. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment to PIK 3d 56.02, for authority to instruct on both theories.

Instructions on definitions of terms should be given as defined in PIK 3d 56.04, Homicide Definitions.

The elements of this crime were modified, effective July 1, 1993. For instructions under prior law, see PIK 2d 56.01.

#### Comment

"In a homicide case, the corpus delicti is the body or substance of the crime which consists of the killing of the decedent by some criminal agency, and is established by proof of two facts, that one person was killed, and that another person killed him." Such may be proved by circumstantial evidence. *State v. Doyle*, 201 Kan. 469, 441 P.2d 846 (1968).

A helpful discussion of murder and manslaughter is found in *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). There it is said, "At the common law, homicides were of two classes only, those done with malice aforethought, either express or implied and called murder, and those done without malice aforethought and called manslaughter." Effective July 1, 1993, however, the Legislature has deleted "malice" from the statutory definition of murder in the first degree.

The term "premeditation" is not defined in the code, but is to be given the meaning established by the decisions of the Supreme Court of Kansas.

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The definition of "death" as set out in K.S.A. 77-202 (Repealed L. 1984, ch. 345, § 4) applies in criminal cases. *State v. Shaffer*, 223 Kan. 244, 574 P.2d 205 (1977).

It is the duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inconclusive. For a thorough analysis on lesser included offenses, see *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977). See also, Barbara, *Kansas Criminal Law Handbook* (1974).

The duty only arises when the evidence and trial would support a conviction of the lesser offense. *State v. Yarrington*, 238 Kan. 141, 143, 708 P.2d 524 (1985).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.01-A MURDER IN THE FIRST DEGREE -  
MANDATORY MINIMUM 40 YEAR  
SENTENCE - SENTENCING PROCEEDING**

**The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of premeditated murder to determine whether the defendant shall be required to serve a mandatory minimum 40 year term of imprisonment. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.**

**Notes on Use**

For authority, see K.S.A. 21-4624(1), (2), and (3).

At the time of arraignment, the county or district attorney shall file written notice of an intention to request a separate sentencing proceeding to determine whether the defendant should be required to serve a mandatory minimum 40 year sentence. If the written notice is not filed, the sentencing proceeding is not permitted and the defendant shall be sentenced as otherwise provided by law.

The instruction should be preceded by the applicable introductory and cautionary instructions as contained in PIK 3d 51.02, 51.04, 51.05, and 51.06.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.01-B MURDER IN THE FIRST DEGREE -  
MANDATORY MINIMUM 40 YEAR  
SENTENCE - AGGRAVATING CIRCUMSTANCES**

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.]

and/or

[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]

and/or

[That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]

and/or

[That the defendant authorized or employed another person to commit the crime.]

and/or

[That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]

and/or

[That the defendant committed the crime in an especially heinous, atrocious or cruel manner. The term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; and "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.]

and/or

[That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]

and/or

[That the victim was killed while engaging in, or because of the victim's performance or prospective

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### **performance of, the victim's duties as a witness in a criminal proceeding.]**

#### **Notes on Use**

For authority, see K.S.A. 21-4625. This instruction should be included in all cases involving the mandatory minimum 40 year sentencing proceeding.

The applicable clauses in brackets should be selected as contained in the written notice and as supported by the evidence.

The definitions of the words contained in the sixth clause are taken from *Foster v. State*, 779 P.2d 591 (Okla. Cr. 1989).

#### **Comment**

In *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), an Oklahoma case, the United States Supreme Court held the terms "heinous", "atrocious" and "cruel" were unconstitutionally vague because they did not "on their face offer sufficient guidance to the jury to escape the strictures of [the court's] judgement in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972)." However, a later decision by the Court of Criminal Appeals of Oklahoma in *Foster v. State*, 779 P.2d 591 (Okla. Cr. 1989), noted the unconstitutional vagueness problem in *Maynard v. Cartwright*, and held that the vagueness problem was satisfied with the inclusion of an additional instruction to the jury that the "term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; and 'cruel' means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others."

The definitions from *Foster*, 779 P.2d 591 have been included in the sixth clause of aggravated circumstances.

In *State v. Bailey*, 251 Kan. 156, 174, 834 P.2d 342 (1992), the Supreme Court rejected defendant's argument that the second, fifth and sixth clauses of aggravated circumstances are unconstitutionally vague. The decision noted that the trial court had included the *Foster* definitions in the instructions.

In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Supreme Court rejected the argument that the fifth aggravating circumstance, murder to avoid arrest or prosecution, requires proof that an arrest was imminent or that avoiding arrest was the dominant motive for the murder. Furthermore, the sixth aggravating circumstance, murder committed in an especially heinous, atrocious or cruel manner, encompasses conduct after a victim has been rendered unconscious. Abuse of the body after the victim is dead is not relevant to the manner in which the murder was committed.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.01-C MURDER IN THE FIRST DEGREE -  
MANDATORY MINIMUM 40 YEAR  
SENTENCE - MITIGATING CIRCUMSTANCES**

The defendant contends that mitigating circumstances include, but are not limited to, the following:

[The defendant has no significant history of prior criminal activity.]

and/or

[The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.]

and/or

[The victim was a participant in or consented to the defendant's conduct.]

and/or

[The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.]

and/or

[The defendant acted under extreme distress or under the substantial domination of another person.]

and/or

[The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.]

and/or

[The age of the defendant at the time of the crime.]

and/or

[At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.]

and/or

[Other \_\_\_\_\_.]

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Notes on Use

For authority, see K.S.A. 21-4624(3) and 21-4626. The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the mandatory 40 year sentencing proceeding.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.01-D MURDER IN THE FIRST DEGREE -  
MANDATORY MINIMUM 40 YEAR  
SENTENCE - BURDEN OF PROOF**

**The State has the burden of proof to persuade you beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh any mitigating circumstances.**

**Notes on Use**

For authority, see K.S.A. 21-4625.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.01-E MURDER IN THE FIRST DEGREE - MANDATORY MINIMUM 40 YEAR SENTENCE - AGGRAVATING AND MITIGATING CIRCUMSTANCES - THEORY OF COMPARISON**

**In making the determination whether aggravating circumstances are outweighed by mitigating circumstances, you should keep in mind that your decision should not be determined solely by the number of aggravating or mitigating circumstances that are shown to exist.**

**Notes on Use**

This instruction should be given in all mandatory minimum 40 year sentencing proceedings to provide guidance to the jury that their decision should not be determined solely by the number of aggravating or mitigating circumstances that are shown to exist.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.01-F MURDER IN THE FIRST DEGREE - MANDATORY MINIMUM 40 YEAR SENTENCE - REASONABLE DOUBT**

If you find beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances, then you shall recommend a mandatory minimum term of 40 years. If you recommend that the defendant shall serve a mandatory minimum term of 40 years, you must designate upon the verdict form with particularity the aggravating circumstances which you found beyond a reasonable doubt.

If you have a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, then it is your duty to return a verdict of life imprisonment with parole eligibility in 15 years.

Notes on Use

For authority, see K.S.A. 21-4624(5).

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**56.01-G MURDER IN THE FIRST DEGREE - MANDATORY MINIMUM 40 YEAR SENTENCE - SENTENCING RECOMMENDATION**

**At the conclusion of your deliberations, you shall sign the verdict form upon which you agree.**

**The verdict forms provide the following alternative verdicts:**

- A. Life imprisonment with the defendant eligible for parole after 15 years;**
- or**
- B. Life imprisonment with the defendant eligible for parole after 40 years.**

**Notes on Use**

For authority, see K.S.A. 21-4624(5).



PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.02 MURDER IN THE FIRST DEGREE - FELONY  
MURDER**

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant killed \_\_\_\_\_;
2. That such killing was done while (in the commission of) (attempting to commit) (in flight from [committing] [attempting to commit]) \_\_\_\_\_; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The elements of \_\_\_\_\_ are (set forth in Instruction No. \_\_\_\_\_) (as follows: \_\_\_\_\_).

**Notes on Use**

For authority, see K.S.A. 21-3401. Felony murder is an off-grid person felony.

In addition to this instruction, the elements of the underlying inherently dangerous felony should be set out. Effective July 1, 1993, an "inherently dangerous felony" is defined to include murder in the first degree under K.S.A. 21-3401(a), murder in the second degree under K.S.A. 21-3402(a), voluntary manslaughter under K.S.A. 21-3403(a), kidnapping, aggravated kidnapping, robbery, aggravated robbery, rape, aggravated criminal sodomy, abuse of a child, felony theft under K.S.A. 21-3701(a) or (c), burglary, aggravated burglary, arson, aggravated arson, treason, and any felony offense as provided in K.S.A. 65-4127a, 65-4127b, 65-4159 or 21-4219. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment below for authority to instruct on both theories. The elements of the applicable underlying felony should be set forth either by reference to another instruction which lists them or the elements should be set forth in the concluding portion of this instruction.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

Premeditated murder and felony murder are not separate or different offenses. The statute merely provides alternative methods of proving the deliberation and premeditation which are required for a first-degree murder conviction under K.S.A. 21-3401.

A prosecution under this rule merely changes the type of proof necessary to support a conviction. Proof that the homicide was committed in the perpetration of a felony is tantamount to premeditation which otherwise would be necessary to constitute murder in the first degree. *State v. McCowan*, 226 Kan. 752, 759, 602 P.2d 1363 (1979).

To apply the felony-murder rule, it is only necessary to establish that the accused committed a felony inherently dangerous to human life and that the killing took place during the commission of the felony. Even an accidental killing is subject to this rule if the participant in the felony could reasonably foresee or expect that a life might be taken in the perpetration of the felony. *State v. Branch and Bussey*, 223 Kan. 381, 573 P.2d 1041 (1978); *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980).

The State may properly allege premeditated murder and felony murder in separate counts for the commission of a single homicide, and may introduce evidence on both theories but the jury must be instructed to bring in a verdict on one alternative. Conviction on both theories is improper. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

When the murder is committed during the commission of a felony, the general rule is that no instructions on lesser included offenses should be given. The felonious conduct is held tantamount to the elements of premeditation in first degree murder. But where the evidence of the underlying felony is inconclusive or reasonably in dispute, instructions must be given on lesser included offenses which are supported by the evidence. *State v. Foy*, 224 Kan. 558, 582 P.2d 281 (1978).

Cases defining which crimes are inherently dangerous to human life have been supplanted by K.S.A. 21-3436.

In a felony-murder case, evidence of who the triggerman is is irrelevant and all participants are principals. *State v. Myrick & Nehms*, 228 Kan. 406, 416, 616 P.2d 1066 (1980).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.02-A MURDER IN THE FIRST DEGREE AND FELONY  
MURDER - ALTERNATIVES**

In this case, the State has charged the defendant with one offense of murder in the first degree and has introduced evidence on two alternate theories of proving this crime.

The State may prove murder in the first degree by proving beyond a reasonable doubt that the defendant killed \_\_\_\_\_ and that such killing was done while (in the commission of) (attempting to commit) (in flight from [committing] [attempting to commit]) \_\_\_\_\_ or in the alternative by proving beyond a reasonable doubt that the defendant killed \_\_\_\_\_ intentionally and with premeditation, as fully set out in these instructions.

Where evidence is presented on the two alternate theories of proving the crime charged, you must consider both in arriving at your verdict.

In Instruction No. \_\_\_\_\_, the Court has set out for your consideration the essential claims which must be proved by the State before you may find the defendant guilty of felony murder, that is the killing of a person (in the commission of) (in an attempt to commit) (in flight from [committing] [attempting to commit]) \_\_\_\_\_.

In Instruction No. \_\_\_\_\_, the Court has set out for your consideration the essential claims which must be proved by the State before you may find the defendant guilty of premeditated murder.

If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty.

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree on both theories, then you must enter a verdict of not guilty.]

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### OR

**[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree, then you must consider whether the defendant is guilty of (murder in the second degree) (voluntary manslaughter) (involuntary manslaughter).]**

### Notes on Use

For authority, see K.S.A. 21-3401. This statute establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime. Where the information and evidence include both felony murder and premeditated murder, this instruction must be given in addition to PIK 3d 56.01, Murder in the First Degree, and PIK 3d 56.02, Murder in the First Degree - Felony Murder.

Choice of the bracketed paragraphs depends on whether or not there are lesser included offenses. See PIK 3d 69.01, Murder in the First Degree With Lesser Included Offenses.

### Comment

While K.S.A. 21-3401 establishes but one offense of murder in the first degree, where the evidence supports both theories, one of premeditation and one of felony murder, that is a killing occurring during the commission of or an attempt to commit an inherently dangerous felony, the State may proceed on both theories. The defendant is entitled to notice that the State is proceeding under both theories in the filing of the information. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978); *State v. Wise*, 237 Kan. 117, 123, 697 P.2d 1295 (1985).

Generally, alternate theories would be utilized where the evidence may show that the underlying felony was planned but not a killing, and that the homicide took place during the commission or attempted commission of the felony. A finding by the jury that a killing was committed not with premeditation but actually in the commission of the felony would not be inconsistent. *State v. Wise*, 237 Kan. at 121 and 122. The State is not required to elect between the two theories as long as the defendant is fully apprised of the charges. *State v. Jackson*, 223 Kan. at 557.

*State v. Hartfield*, 245 Kan. 431, 447, 781 P.2d 1050 (1989), recommends that the elements of each alternative be in separate instructions, but since the instruction refers to "either or both theories" in the conclusion, no error was found.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990), that "[w]hen an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilty based on proof of premeditation while other arrive at a verdict of guilty by reason of the killer's malignant purpose." To the same effect, see *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989).

Before the mandatory minimum 40 year sentence is imposed, however, the jury must have unanimously found that premeditated murder occurred. In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Court upheld the use of this instruction in a "Hard 40" case where separate verdict forms for premeditated murder and felony murder were used.

**56.03 MURDER IN THE SECOND DEGREE**

- A. (The defendant is charged with the crime of murder in the second degree. The defendant pleads not guilty.)**
- B. (If you do not agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.)**

To establish this charge, each of the following claims must be proved:

- 1. That the defendant intentionally killed \_\_\_\_\_; and**
  - [2. That it was not done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]); and]**
- 2. or [3.] That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.**

**Notes on Use**

For authority, see K.S.A. 21-3402. Murder in the second degree is a severity level 1, person felony, if intentional. If unintentional, see PIK 3d 56.03-A, Murder in the Second Degree - Unintentional.

If the information charges murder in the second degree, omit paragraph B; but if the information charges murder in the first degree, omit paragraph A. See PIK 3d 68.01, Concluding Instruction, and 69.01, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

Bracketed element 2 should be added where there is evidence which requires an instruction on voluntary manslaughter.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.03.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

See Comment to PIK 3d 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.03-A MURDER IN THE SECOND DEGREE - UNINTENTIONAL**

- A. (The defendant is charged with the crime of murder in the second degree. The defendant pleads not guilty.)**
- B. (If you do not agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.)**

To establish this charge, each of the following claims must be proved:

- 1. That the defendant killed \_\_\_\_\_ unintentionally but recklessly under circumstances showing extreme indifference to the value of human life; and**
- 2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.**

**Notes on Use**

For authority, see K.S.A. 21-3402. Murder in the second degree is a severity level 2, person felony, if unintentional but reckless.

If the information charges murder in the second degree, omit paragraph B; but if the information charges murder in the first degree, omit paragraph A. See PIK 3d 68.01, Concluding Instruction, and 69.01, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.03.

**Comment**

See Comment to PIK 3d 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.



56.04 HOMICIDE DEFINITIONS

(a) Maliciously.

Maliciously means willfully doing a wrongful act without just cause or excuse.

For a collection of cases dealing with the definition of this term, see *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). See also, *State v. Wilson*, 215 Kan. 437, 524 P.2d 224 (1974); *State v. Childers*, 222 Kan. 32, 39, 563 P.2d 999 (1977); *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980); and *State v. Hill*, 242 Kan. 68, 82, 744 P.2d 1228 (1987).

Effective July 1, 1993, "malice" is no longer a statutory element of murder in the first degree or murder in the second degree.

(b) Deliberately and with premeditation.

Deliberately and with premeditation means to have thought over the matter beforehand.

For authority, see *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560 (1886), in which it is said: Premeditation means "that there was a design or intent before the act; that is, that the accused planned, contrived and schemed beforehand to kill Sherman." See also, *State v. Johnson*, 92 Kan. 441, 140 Pac. 839 (1914); *State v. Martinez*, 223 Kan. 536, 575 P.2d 30 (1978); *State v. Patterson*, 243 Kan. 262, 268, 755 P.2d 551 (1988), for approval of this instruction.

Effective July 1, 1993, "deliberately" is no longer included in the statutory definition of murder in the first degree.

(c) Willfully.

Willfully means conduct that is purposeful and intentional and not accidental.

For authority, see K.S.A. 21-3201(b).

See also, *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973); *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987).

PATTERN INSTRUCTIONS FOR KANSAS 3d

(d) **Intentionally.**

**Intentionally means conduct that is purposeful and willful and not accidental. Intentional includes the terms "knowing", "willful", "purposeful" and "on purpose."**

For authority, see K.S.A. 21-3201(b). See also, *State v. Stafford*, 223 Kan. 62, 65, 573 P.2d 970 (1977).

(e) **Heat of Passion.**

**Heat of passion means any intense or vehement emotional excitement which was spontaneously provoked from circumstances.**

For authority, see *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); *State v. Jones*, 185 Kan. 235, 341 P.2d 1042 (1959); *State v. Ritchey*, 223 Kan. 99, 573 P.2d 973 (1977).

(f) **Reckless.**

**Reckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence", "culpable negligence", "wanton negligence" and "wantonness" are included within "reckless".**

For authority, see K.S.A. 21-3201(c).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.05 VOLUNTARY MANSLAUGHTER**

- A. (The defendant is charged with the crime of voluntary manslaughter. The defendant pleads not guilty.)
- B. (In considering whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter. If there is a reasonable doubt as to which of these two offenses the defendant is guilty, the defendant may be convicted of voluntary manslaughter only.)

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed \_\_\_\_\_;
2. That it was done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3403. Voluntary manslaughter is a severity level 3, person felony.

If the information charges voluntary manslaughter, omit paragraph B; but if the information charges a higher degree, omit paragraph A. See PIK 3d 68.09, Lesser Included Offenses, and 69.01, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses. See PIK 3d 56.04, Homicide Definitions, for definition of "heat of passion".

**Comment**

See Comment to PIK 3d 56.01, Murder in the First Degree, and *State v.*

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*Seelke*, 221 Kan. 672, 561 P.2d 869 (1977), on the duty of the trial judge to instruct on lesser included offenses in homicide cases.

An intentional homicide is reduced from murder to voluntary manslaughter if it is committed upon a sudden quarrel or in the heat of passion or upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211, 21-3212 or 21-3213. Where the homicide is intentional and committed under the mitigating circumstances contained in K.S.A. 21-3404, the voluntary manslaughter statute is concurrent with and controls the statute on intentional murder in the second degree, K.S.A. 21-3402(a).

The Court, in *State v. Wilson*, 240 Kan. 606, 609, 610, 731 P.2d 306 (1987), admonished trial judges to use the pattern jury instructions when appropriate unless there is some compelling and articulated reason not to do so.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.06 INVOLUNTARY MANSLAUGHTER**

- A. (The defendant is charged with the crime of involuntary manslaughter. The defendant pleads not guilty.)
- B. (If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.)

To establish this charge, each of the following claims must be proved:

1. That the defendant unintentionally killed \_\_\_\_\_;
2. That it was done:
  - (a) recklessly;
  - or
  - (b) (while in the commission of) (while attempting to commit) (in flight from [committing] [attempting to commit]) \_\_\_\_\_;
  - or
  - (c) during the commission of a lawful act in an unlawful manner; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3404. Involuntary manslaughter is a severity level 5, person felony.

If the information charges involuntary manslaughter, omit paragraph B; but if the information charges a higher degree, omit paragraph A. See PIK 3d 68.09, Lesser Included Offenses, and 69.01, Murder in the First Degree With Lesser Included Offenses, for lead-in instructions on lesser included offenses. K.S.A. 21-3404(b) provides that a felony or a misdemeanor can serve as the basis for an involuntary manslaughter charge if the statute was enacted for the protection of

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human life or safety and is not an inherently dangerous felony as defined in K.S.A. 21-3436. K.S.A. 8-1566, 8-1567 and 8-1568 are specifically cited as misdemeanors which were enacted for the protection of human life or safety.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.06, Involuntary Manslaughter.

### Comment

See Comment to PIK 3d 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

The use of excessive force may be found to be an "unlawful manner" of committing the "lawful act" of self-defense, and thereby supply an element of involuntary manslaughter. *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). *State v. Warren*, 5 Kan. App. 2d 754, 624 P.2d 476, rev. denied 229 Kan. 671 (April 29, 1981).

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**56.07 VEHICULAR HOMICIDE**

The defendant is charged with the crime of vehicular homicide. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant unintentionally killed \_\_\_\_\_ by the operation of (an automobile) (an airplane) (a motorboat) (other motor vehicle);
2. That the defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another; and
3. That the defendant operated the vehicle in a manner which constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3405. Vehicular homicide is a class A, person misdemeanor.

**Comment**

The gravamen of the offense prior to the 1972 amendment was simple negligence. However, the Court in *State v. Gordon*, 219 Kan. 643, 654, 549 P.2d 886 (1976), held that legislative intent contemplated "something more than simple negligence."

Where the homicide is unintentional and caused by the operation of a motor vehicle, the statute is concurrent with and controls the general statute on involuntary manslaughter, K.S.A. 21-3404. But, where the charge is involuntary manslaughter and the issue is whether or not the conduct of the accused was wanton, vehicular homicide would be a lesser included offense of involuntary

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manslaughter and the jury should be instructed thereon. *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978); *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). See PIK 3d 56.06, Involuntary Manslaughter.

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defendant's conduct was or was not the direct cause of decedent's death. The decedent's negligence may have been such a substantial factor in his death as to be itself the cause. *State v. Gordon*, supra.

In *State v. Boydston*, 4 Kan. App. 2d 540, 609 P.2d 224 (1980), the defendant requested an instruction that a material deviation lies between ordinary negligence and wanton conduct. The Court held it was not necessary to define a material deviation. Failure to yield the right of way, or to stop at a stop sign, or reckless driving are not lesser degrees of vehicular homicide as none of these offenses have elements which are necessary elements of this crime.



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**56.07-A AGGRAVATED VEHICULAR HOMICIDE**

The statute upon which this instruction was based (K.S.A. 21-3405a) has been repealed, effective July 1, 1993.

See PIK 3d 56.06, Involuntary Manslaughter.

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**56.07-B VEHICULAR BATTERY**

**The statute upon which this instruction was based (K.S.A. 21-3405b) has been repealed, effective July 1, 1993.**

**See PIK 3d 56.18, Aggravated Battery.**

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**56.08 ASSISTING SUICIDE**

The defendant is charged with the crime of assisting suicide. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally advised, encouraged or assisted \_\_\_\_\_ in the taking of (his)(her) own life; and
2. That the defendant's conduct resulted in the (suicide) (attempted suicide) of \_\_\_\_\_; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3406. Assisting suicide is a severity level 9, person felony.

**Comment**

This statute contemplates some participation in the events leading up to the commission of the final overt act by the suicide victim such as obtaining or furnishing the means for bringing about the death (e.g., gun, knife, poison).

Where the accused actually performs or actively assists in performing the overt act resulting in death, such as shooting or stabbing the victim, or administering the poison, his or her act constitutes murder, *State v. Cobb*, 229 Kan. 522, 526, 625 P.2d 1133 (1981). In *Cobb*, the defendant pushed the plunger of the needle into the victim's arm, after the victim prepared the syringe containing cocaine, and injected the needle into his arm. After the second time, the defendant then shot the victim. The cause of death was the bullet wound to the head.

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### 56.09 UNINTENDED VICTIM - TRANSFERRED INTENT

**When a homicidal act is directed against one other than the person killed, the responsibility of the actor is exactly as it would have been had the act been completed against the intended victim.**

#### Notes on Use

For authority, see *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967).

This instruction should be given in cases where there was an unintended victim, such as in cases of mistaken identity or where a bystander is killed.

#### Comment

It is no defense to the crime of murder that the defendant may have mistaken the victim for some other person, or that he may have supposed himself wronged by some other person. The fact that the homicidal act was directed against a person other than the person killed does not relieve the slayer of criminal responsibility. *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967). Where a person intends to kill one person but actually kills another, he is just as responsible as if he had killed the person intended.

This principle rests on the basis of "transferred intent", and is equally applicable to prosecutions for assault and battery, notwithstanding proof of specific intent to injure is required. "The intent follows the bullet." 40 Am. Jur. 2d, Homicide § 11, pp.302-303. *State v. Stringfield*, 4 Kan. App. 2d 559, 608 P.2d 1041 (1980).

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**56.10 CRIMINAL ABORTION**

**The statute upon which this instruction was based (K.S.A. 21-3407(1)) has been repealed, effective July 1, 1993.**

**See L. 1992, ch. 183, § 9.**

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**56.11 CRIMINAL ABORTION - JUSTIFICATION**

**Notes on Use**

See PIK 3d 56.10, Criminal Abortion.

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### 56.12 ASSAULT

**The defendant is charged with the crime of assault. The defendant pleads not guilty.**

**To establish this charge, each of the following claims must be proved:**

- 1. That the defendant intentionally placed \_\_\_\_\_ in reasonable apprehension of immediate bodily harm; and**
- 2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.**

**No bodily contact is necessary.**

#### Notes on Use

For authority, see K.S.A. 21-3408. Assault is a class C misdemeanor. The elements of this crime were modified, effective July 1, 1993.

#### Comment

Apprehension is fear of harm to the person who is threatened, not fear of harm to a third person. *State v. Warbritton*, 215 Kan. 534, 527 P.2d 1050 (1974).

The statute does not impose any requirement of proof that the assault be established by some physical, overt act by the accused. A conviction based upon threatening words alone is proper especially in light of the definition of "threat" in K.S.A. 21-3110(24), meaning ". . . a communicated intent to inflict physical or other harm. . ." *In re Geisler*, 4 Kan. App. 2d 684, 610 P.2d 640 (1980).

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**56.13 ASSAULT OF A LAW ENFORCEMENT OFFICER**

The defendant is charged with the crime of assault of a law enforcement officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally placed \_\_\_\_\_ in reasonable apprehension of immediate bodily harm;
2. That \_\_\_\_\_ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
3. That \_\_\_\_\_ was engaged in the performance of (his)(her) duty; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

No bodily contact is necessary.

**Notes on Use**

For authority, see K.S.A. 21-3409. Assault of a law enforcement officer is a class A, person misdemeanor. Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, PIK 3d 56.12, Assault, should be given.

The elements of this crime were modified, effective July 1, 1993.

**Comment**

See Comment to PIK 3d 56.12, Assault.



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**56.14 AGGRAVATED ASSAULT**

The defendant is charged with the crime of aggravated assault. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally placed \_\_\_\_\_ in reasonable apprehension of immediate bodily harm;
2. (a) That the defendant used a deadly weapon;  
or  
(b) That the defendant was disguised in a manner designed to conceal identity;  
or  
(c) That the defendant did so with intent to commit \_\_\_\_\_, a felony; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

No bodily contact is necessary.

[The elements of \_\_\_\_\_ are (set forth in Instruction No. \_\_\_\_\_) (as follows: \_\_\_\_\_).]

**Notes on Use**

For authority, see K.S.A. 21-3410. Aggravated assault is a severity level 7, person felony. If a firearm is used, a sentence of imprisonment is presumed although the court may impose an optional nonprison sentence upon certain findings. L. 1992, ch. 239, § 4(h), as amended by § 254 of 1993 Senate Bill No. 423.

Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, instruction on assault should be included. See PIK 3d 56.12, Assault.

Under circumstances when the phrase "deadly weapon" should be defined, see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

Where element 2(c) is applicable, the elements of the intended felony should be referred to or set forth in the concluding portion of the instruction.

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The elements of this crime were modified, effective July 1, 1993.

### Comment

In *State v. Nelson*, 224 Kan. 95, 577 P.2d 1178 (1978), it was error for the trial court to omit one of the elements necessary to establish aggravated assault with a deadly weapon. The predecessor to this instruction was cited as being correct.

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**56.15 AGGRAVATED ASSAULT OF A LAW ENFORCEMENT OFFICER**

The defendant is charged with the crime of aggravated assault of a law enforcement officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally placed \_\_\_\_\_ in reasonable apprehension of immediate bodily harm;
2. That \_\_\_\_\_ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
3. That \_\_\_\_\_ was engaged in the performance of (his)(her) duty;
4. (a) That the defendant used a deadly weapon;  
or  
(b) That the defendant was disguised in a manner designed to conceal identity;  
or  
(c) That the defendant did so with intent to commit \_\_\_\_\_, a felony; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

No bodily contact is necessary.

[The elements of \_\_\_\_\_ are (set forth in Instruction No. \_\_\_\_\_) (as follows: \_\_\_\_\_).]

**Notes on Use**

For authority, see K.S.A. 21-3411. Aggravated assault of a law enforcement officer is a severity level 6, person felony. There is a presumed sentence of imprisonment with an optional nonprison sentence available upon certain findings where the defendant's criminal history score is in one of the two lowest

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categories. L. 1992, ch. 239, § 4(g), as amended by § 254 of 1993 Senate Bill No. 423.

Assault of a law enforcement officer, as defined by K.S.A. 21-3409, and Assault, as defined by K.S.A. 21-3408, are lesser included offenses and where the evidence warrants it, PIK 3d 56.13, Assault of a Law Enforcement Officer and PIK 3d 56.12, Assault, should be given.

If there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his or her duty at the time, PIK 3d 56.14, Aggravated Assault, should be considered as a lesser included offense, as it constitutes a class D felony. *State v. Holloway*, 214 Kan. 636, 522 P.2d 364 (1974).

Where element 4(c) is applicable, the elements of the intended felony should be referred to or set forth in the concluding portion of the instruction.

The elements of this crime were modified, effective July 1, 1993.

### Comment

Proof of actual knowledge that the person assaulted was a law enforcement officer is not necessary where it is undisputed that the officer was in uniform or properly identified as an officer. *State v. Farris*, 218 Kan. 136, 542 P.2d 725 (1975). This is distinguishable where the officer is not in uniform and the question of knowledge was raised in deciding what was required to establish that the officer had properly identified himself. *State v. Bradley*, 215 Kan. 642, 527 P.2d 988 (1974).

See Comment to PIK 3d 56.14, Aggravated Assault.

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**56.16 BATTERY**

The defendant is charged with the crime of battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (intentionally) (recklessly) caused bodily harm to another person;  
or  
That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner; and
2. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3412. Battery is a class B, person misdemeanor. The elements of this crime were modified, effective July 1, 1993.

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**56.17 BATTERY AGAINST A LAW ENFORCEMENT OFFICER**

The defendant is charged with the crime of battery against a law enforcement officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (intentionally) (recklessly) caused bodily harm to \_\_\_\_\_;  
or  
That the defendant intentionally caused physical contact with \_\_\_\_\_ in a rude, insulting or angry manner; and
2. That \_\_\_\_\_ was a uniformed or properly identified (state) (county) (city) law enforcement officer;  
or  
That \_\_\_\_\_ was a correctional officer or employee and defendant was a person in the custody of the Secretary of Corrections; and
3. That \_\_\_\_\_ was engaged in the performance of (his)(her) duty; and
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3413. Battery against a state, county or city law enforcement officer is a class A, person misdemeanor. Battery against a correctional officer or employee is a severity level 7, person felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

The statute defines "correctional officer or employee" as "any officer or employee of the Kansas Department of Corrections, or any independent contractor, or any employee of such contractor, working at a correctional institution." The elements of this crime were modified, effective July 1, 1993.

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**56.18 AGGRAVATED BATTERY\***

The defendant is charged with the crime of aggravated battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. (a) That the defendant intentionally caused (great bodily harm to) (disfigurement of) another person;  
or
  - (b) That the defendant intentionally caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);  
or
  - (c) That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);  
or
  - (d) That the defendant recklessly caused (great bodily harm to) (disfigurement of) another person;  
or
  - (e) That the defendant recklessly caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

\*Special Advisory:

In preparing this instruction, the Committee relied on the amendments to K.S.A. 21-3414 contained in 1993 Senate Bill No. 423. The primary purpose of

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1993 SB 423 was to reconcile differences between L. 1992, ch. 239 (sentencing guidelines) and L. 1992, ch. 298 (recodification of criminal code), prior to their effective dates of July 1, 1993.

For the most part, the 1992 sentencing guidelines legislation amended the substantive offenses by conforming the penalty provisions to the new sentencing scheme under the guidelines. In a limited number of instances, new substantive provisions were adopted. These included aggravated battery. L. 1992, ch. 239, New Sec. 52.

The joint recommendation of the Sentencing Commission and the Judicial Council for reconciling the 1992 versions of aggravated battery was adopted by the Legislature in § 29 of 1993 SB 423. However, through inadvertence, New Sec. 52 of L. 1992, ch. 239 was not repealed.

### Notes on Use

For authority, see K.S.A. 21-3414. Aggravated battery as described in 1(a) is a severity level 4, person felony; as described in 1(b) or 1(c), a severity level 7, person felony; as described in 1(d), a severity level 5, person felony; and as described in 1(e), a severity level 8, person felony. If a firearm is used, a sentence of imprisonment is presumed although the court may impose an optional nonprison sentence upon certain findings. L. 1992, ch. 239, § 4(h), as amended by § 254 of 1993 Senate Bill No. 423. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

The elements of this crime were modified, effective July 1, 1993.

### Comment

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).



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**56.18-A CRIMINAL INJURY TO PERSON**

**Comment**

On March 25, 1977, the Supreme Court declared K.S.A. 21-3431 unconstitutional in *State v. Kirby*, 222 Kan. 1, 563 P.2d 408 (1977).

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**56.19 AGGRAVATED BATTERY AGAINST A LAW ENFORCEMENT OFFICER\***

The defendant is charged with the crime of aggravated battery against a law enforcement officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. (a) That the defendant intentionally caused (great bodily harm to) (disfigurement of) another person;  
or  
(b) That the defendant intentionally caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);  
or  
(c) That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);
2. That \_\_\_\_\_ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
3. That \_\_\_\_\_ was engaged in the performance of (his)(her) duty; and
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**\*Special Advisory:**

In preparing this instruction, the Committee relied on the amendments to K.S.A. 21-3415 contained in 1993 Senate Bill No. 423. The primary purpose of 1993 SB 423 was to reconcile the differences between L. 1992, ch. 239 (sentencing guidelines) and L. 1992, ch. 298 (recodification of criminal code),

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prior to their effective dates of July 1, 1993.

For the most part, the 1992 sentencing guidelines legislation amended the substantive offenses by conforming the penalty provisions to the new sentencing scheme under the guidelines. In a limited number of instances, new substantive provisions were adopted. These included aggravated battery against a law enforcement officer. L. 1992, ch. 239, New Sec. 54.

The joint recommendation of the Sentencing Commission and the Judicial Council for reconciling the 1992 versions of aggravated battery against a law enforcement officer was adopted by the Legislature in § 30 of 1993 SB 423. However, through inadvertence, New Sec. 54 of L. 1992, ch. 239 was not repealed.

### Notes on Use

For authority, see K.S.A. 21-3415. Battery against a law enforcement officer, as defined by K.S.A. 21-3413, and Battery, as defined by K.S.A. 21-3412, are lesser included offenses and where the evidence warrants it, PIK 3d 56.17, Battery Against A Law Enforcement Officer, and PIK 3d 56.16, Battery, should be given.

Also, if there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his or her duty at the time, PIK 3d 56.18, Aggravated Battery, should be considered as a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).

Aggravated battery against a law enforcement officer as described in 1(a) is a severity level 3, person felony; and as described in 1(b) or (c), a severity level 6, person felony. There is a presumed sentence of imprisonment for violation of K.S.A. 21-3415(b) (severity level 6) with an optional nonprison sentence available upon certain findings where the defendant's criminal history score is in one of the two lowest categories. L. 1992, ch. 239, § 4(g), as amended by § 254 of 1993 Senate Bill No. 423.

The elements of this crime were modified, effective July 1, 1993.

### Comment

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).

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**56.20 UNLAWFUL INTERFERENCE WITH A  
FIREFIGHTER**

The defendant is charged with the crime of unlawful interference with a firefighter. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally placed \_\_\_\_\_ in reasonable apprehension of immediate bodily harm;  
or  
That the defendant knowingly and intentionally interfered with \_\_\_\_\_;  
or  
That the defendant knowingly and intentionally (obstructed) (interfered with) (impeded) the efforts of \_\_\_\_\_ to reach the location of a fire;
2. That \_\_\_\_\_ was a firefighter engaged in the performance of (his)(her) duties; and
3. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3416. Unlawful interference with a firefighter is a class B, person misdemeanor.

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**56.21 ATTEMPTED POISONING**

**The statute upon which this instruction was based (K.S.A. 21-3417) has been repealed, effective July 1, 1993.**

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**56.22 PERMITTING DANGEROUS ANIMAL TO BE AT LARGE**

The defendant is charged with the crime of permitting a dangerous animal to be at large. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was the owner or custodian of an animal of a dangerous or vicious nature;
2. That the defendant knew of such nature;
3. That the defendant (permitted the animal to go at large) (kept such animal without taking ordinary care to restrain it); and
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3418. Permitting a dangerous animal to be at large is a class B misdemeanor and is treated as a nonperson crime for purposes of determining criminal history under L. 1992, ch. 239, § 10.

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56.23 CRIMINAL THREAT

The defendant is charged with criminal threat. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant threatened to commit violence;
2. That such threat was communicated with the intent (to terrorize \_\_\_\_\_) (to cause the evacuation of a [building] [place of assembly] [facility of transportation]); and

or

That such threat was communicated in reckless disregard of the risk of causing (terror to \_\_\_\_\_) (the evacuation of a [building] [place of assembly] [facility of transportation]); and

3. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

[Under this instruction, a statement that defendant has already committed violence is the same as a threat to commit violence.]

Notes on Use

For authority, see K.S.A. 21-3419. Criminal threat is a severity level 9, person felony.

The last paragraph reflects the 1984 amendment to K.S.A. 21-3419, and should be used only where the defendant communicated a statement of past conduct rather than a threat of future conduct.

Comment

The above instruction, less the last paragraph, was approved in *State v. Knight*, 219 Kan. 863, 867, 549 P.2d 1397 (1976), when the defendant himself did the threatening and communicated the threat. However, if the threat to commit violence is allegedly made by another person and the defendant communicates the threat with the intent to terrorize, the instruction needs to be modified to so state

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as it is not essential to prove the crime that the defendant threatened to do the acts mentioned in the communication itself. It is sufficient if the defendant communicates the threat made by another person if he does so with the specific intent to terrorize the victim.

For definitions of "threat" and "terrorize", see *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

The 1984 amendment also added a proscription against threatening to adulterate or contaminate food or drink. Since this new crime requires no specific intent, a separate instruction was deemed necessary. See PIK 3d 56.23-A, Criminal Threat - Adulteration or Contamination of Food or Drink.



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**56.23-A CRIMINAL THREAT - ADULTERATION OR  
CONTAMINATION OF FOOD OR DRINK**

The defendant is charged with criminal threat. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant threatened to adulterate or contaminate a (food) (beverage) (public water supply); and
2. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

[Under this instruction, a statement that defendant has already committed the act described in Claim No. 1 is the same as a threat to commit the act.]

**Notes on Use**

For authority, see K.S.A. 21-3419. Criminal threat is a severity level 9, person felony.

The last paragraph reflects the 1984 amendment to K.S.A. 21-3419, and should be used only where the defendant communicated a statement of past conduct rather than a threat of future conduct.

**Comment**

The 1984 Legislature added the crime defined by this instruction to former K.S.A. 21-3419. Note that unlike a threat to commit violence, this crime requires no specific intent.

The Committee has grave reservations about the validity of the amendment because of the lack of any required intent to affect other persons, and also because of the potential ambiguity in the term "adulterate".

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56.24 KIDNAPPING

The defendant is charged with the crime of kidnapping. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (took) (confined) \_\_\_\_\_ by (force) (threat) (deception);
2. That it was done with the intent to hold such person:
  - (a) for ransom or as a shield or hostage;  
or
  - (b) to facilitate flight or the commission of any crime;  
or
  - (c) to inflict bodily injury or to terrorize the victim, or another;  
or
  - (d) to interfere with the performance of any governmental or political function; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3420. Kidnapping is a severity level 3, person felony.

Comment

This instruction was approved in *State v. Glymph*, 222 Kan. 73, 75, 563 P.2d 422 (1977); and in *State v. Nelson*, 223 Kan. 572, 575 P.2d 547 (1978). *State v. McKessor*, 246 Kan. 1, 11, 785 P.2d 1332 (1990).

The "taking or confinement" requires no particular distance or removal, nor any particular time or place of confinement. It is the taking or confinement that supplies the necessary element of kidnapping. The word "facilitate" means something more than just to make more convenient. "To facilitate" must have

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some significant bearing on making the commission of the crime easier. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

Where the defendant is charged with kidnapping by "deception", the State must prove that the taking or confinement was the result of the defendant knowingly and willfully making a false statement or representation, expressed or implied. *State v. Holt*, 223 Kan. 34, 574 P.2d 152 (1977).

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**56.25 AGGRAVATED KIDNAPPING**

**The defendant is charged with the crime of aggravated kidnapping. The defendant pleads not guilty.**

**To establish this charge, each of the following claims must be proved:**

- 1. That the defendant (took) (confined) \_\_\_\_\_  
by (force) (threat) (deception);**
- 2. That it was done with the intent to hold such person:**
  - (a) for ransom or as a shield or hostage;**  
or
  - (b) to facilitate flight or the commission of any crime;**  
or
  - (c) to inflict bodily injury or to terrorize the victim, or another;**  
or
  - (d) to interfere with the performance of any governmental or political function;**
- 3. That bodily harm was inflicted upon \_\_\_\_\_;  
and**
- 4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_, in \_\_\_\_\_  
County, Kansas.**

**Notes on Use**

For authority, see K.S.A. 21-3421. Aggravated kidnapping is a severity level 1, person felony. Kidnapping as defined by K.S.A. 21-3420 is a lesser included offense and where the evidence warrants it, PIK 3d 56.24, Kidnapping, should be given.

"Bodily harm" includes any act of physical violence even though no permanent injury results. Trivial or insignificant bruises or impressions resulting from the act itself should not be considered as "bodily harm". Unnecessary acts of violence upon the victim, and those occurring after the initial abduction would constitute "bodily harm". *State v. Sanders*, 225 Kan. 156, 587 P.2d 906 (1978);

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*State v. Taylor*, 217 Kan. 706, 538 P.2d 1375 (1975); *State v. Mason*, 250 Kan. 393, 396, 827 P.2d 748 (1992).

If there is a fact issue as to whether bodily harm is sustained by the victim or as to the extent of the harm, the above instruction should include the definition of "bodily harm", otherwise failure to define it does not constitute error. *State v. Royal*, 234 Kan. 218, 222, 670 P.2d 1337 (1983); *State v. Peltier*, 249 Kan. 415, 426, 819 P.2d 628 (1991).

Rape is an act of violence unnecessary to and not a part of the kidnapping itself. *State v. Barry*, 216 Kan. 609, 533 P.2d 1308 (1974). Throwing the victim into a swollen stream was sufficient to comply with the requirement of "bodily harm". *State v. Taylor*, *supra*.

In *State v. Peck*, 237 Kan. 756, 764, 703 P.2d 781 (1985), the Court approved this instruction.

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**56.26 INTERFERENCE WITH PARENTAL CUSTODY**

The defendant is charged with the crime of interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a child under 16 years of age;
2. That the child was in the custody of \_\_\_\_\_ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to detain or conceal the child from \_\_\_\_\_; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3422. Interference with parental custody is a class A, person misdemeanor if the perpetrator is a parent entitled to joint custody of the child either on the basis of a court order or by virtue of the absence of a court order. Interference with parental custody is a severity level 10, person felony in all other cases.

**Comment**

In the absence of a court order, both parents have an equal right to the custody of their minor children. *State v. Al-Turck*, 220 Kan. 557, 552 P.2d 1375 (1976). Therefore, if the defendant is the natural parent of the child, the instruction should include reference to the custody order in favor of the custodial parent.

The 1986 Legislature amended the age of the child from 14 years to 16 years under K.S.A. 21-3422(a).

It is not a defense to a prosecution under this section that the defendant is a parent entitled to joint custody. K.S.A. 21-3422(b).

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**56.26-A AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY PARENT'S HIRING ANOTHER**

The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a child under 16 years of age;
2. That the child was in the custody of \_\_\_\_\_, as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant \_\_\_\_\_, hired another person to (take) (carry away) (decoy or entice away) \_\_\_\_\_;
4. That \_\_\_\_\_ was (taken) (carried away) (decoyed or enticed away) by such other person;
5. That this was done with the intent to detain or conceal the child from \_\_\_\_\_; and
6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3422a. Aggravated interference with parental custody is a severity level 7, person felony. Considering the various alternatives, the Committee is of the opinion that separate instructions would be more feasible and clearer to juries than one instruction with all alternative elements. PIK 3d 56.26-A is applicable where the defendant is the non-custodial parent who hires another to interfere with parental custody. PIK 3d 56.26-B, Aggravated Interference with Parental Custody by Hiree, is applicable when the person hired to interfere with parental custody is the defendant, and PIK 3d 56.26-C, Aggravated Interference with Parental Custody - Other Circumstances, would apply to any person, parent or otherwise, provided one of the elements of paragraph 5 is present.

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### Comment

Note that the misdemeanor charge (PIK 3d 56.26, Interference with Parental Custody) includes the element of "intent to detain or conceal such child," whereas the language of the felony offense states "when done with the intent to deprive of custody. . ." The Committee has retained the language of the respective statutes, although it would appear that "intent to deprive" and "intent to detain or conceal" are synonymous as any intent to detain or conceal implies intent to deprive.



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**56.26-B AGGRAVATED INTERFERENCE WITH  
PARENTAL CUSTODY BY HIREE**

The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a child under 16 years of age;
2. That the child was in the lawful custody of \_\_\_\_\_ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed away) the child;
4. That the defendant was hired by another to (take) (carry away) (decoy or entice) the child;
5. That this was done with the intent to deprive \_\_\_\_\_ of the custody of the child; and
6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3422a. Aggravated Interference with parental custody by hiree is a severity level 7, person felony. See PIK 3d 56.26-A, Aggravated Interference with Parental Custody by Parent's Hiring Another, for Comment.

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**56.26-C AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY - OTHER CIRCUMSTANCES**

The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a child under 16 years of age;
2. That the child was in the custody of \_\_\_\_\_ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to deprive \_\_\_\_\_ of the custody of the child;
5. That the defendant has previously been convicted of interference with parental custody;

or

That the defendant took the child outside the state without the consent of \_\_\_\_\_ (or the court);

or

That the defendant, after lawfully taking the child outside the state while exercising visitation or custody rights, refused to return the child at the expiration of these rights;

or

That the defendant (refused to return) (impeded the return) of the child at the expiration of visitation or custody rights outside the state;

or

That the defendant detained or concealed the child in a place unknown to \_\_\_\_\_, either inside or outside this state; and

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6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Comment**

See PIK 3d 56.26-A, Aggravated Interference with Parental Custody by Parent's Hiring Another, for Notes on Use and Comment.

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**56.27 INTERFERENCE WITH THE CUSTODY OF A COMMITTED PERSON**

The defendant is charged with the crime of interference with the custody of a committed person. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a person committed to the custody of \_\_\_\_\_;
2. That the defendant knowingly (took) (enticed) \_\_\_\_\_ away from the control of (his)(her) custodian without privilege to do so; and
3. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3423. Interference with the custody of a committed person is a class A, nonperson misdemeanor.

**Comment**

The status of a committed person is usually a question of law to be determined by the Court.

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**56.28 CRIMINAL RESTRAINT**

The defendant is charged with criminal restraint. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and without legal authority restrained \_\_\_\_\_ so as to interfere substantially with (his)(her) liberty; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

(A merchant, [his][her] agent or employee, who has probable cause to believe that a person [has actual possession of] [has wrongfully taken] [is about to wrongfully take] merchandise from [his][her] mercantile establishment, may detain such person [on the premises] [in the immediate vicinity thereof] in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession.)

**Notes on Use**

For authority, see K.S.A. 21-3424. Criminal restraint is a class A, person misdemeanor.

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**56.29 MISTREATMENT OF A CONFINED PERSON**

The defendant is charged with the crime of mistreatment of a confined person. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was (a law enforcement officer) (a person in charge of or employed by the owner or operator of a [correctional institution] [hospital] [nursing home]);
2. That the defendant (intentionally abused) (neglected) (ill-treated) \_\_\_\_\_;
3. That \_\_\_\_\_ was (physically disabled) (mentally ill) (detained or confined involuntarily); and
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3425. Mistreatment of a confined person is a class A, person misdemeanor.

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**56.30 ROBBERY**

The defendant is charged with the crime of robbery.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally took property from the (person) (presence) of \_\_\_\_\_;
2. That the taking was by (threat of bodily harm to \_\_\_\_\_) (force); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3426. Robbery is a severity level 5, person felony.

**Comment**

In *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973), the Court, in granting a new trial, relied on the failure of the trial court to include felonious intent, "one of the necessary elements of robbery." In tracing the history of robbery, the Court noted three ingredients as essential: the use of force and violence, the taking from a person of another money or other personal property, and an intent to rob or steal. (Modified in *State v. Lucas*, *infra*.)

In *State v. Rueckert*, 221 Kan. 727, 561 P.2d 850 (1977), the Court stated that specific intent is not an element of the crime of aggravated robbery, (therefore) voluntary intoxication would not be a defense to a general intent crime, although it may be used to demonstrate the inability to form a particular state of mind necessary for a specific intent crime. *State v. Rueckert* at 732-733.

*State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980), holds that aggravated robbery is not a specific intent crime; it requires only general criminal intent. See also, *State v. Knoxsah*, 229 Kan. 36, 622 P.2d 140 (1981). The Committee is of the opinion that alleging an "intention to take property" should suffice for establishing criminal intent under K.S.A. 21-3201.

In *State v. Lucas*, 221 Kan. 88, 557 P.2d 1296 (1976), the trial court failed to instruct on the intent requirement. In refusing to hold error, the Court found that

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the defendant's use of a deadly weapon established clear proof of intent.

The ownership of property taken is not an element of robbery; thus, failure to allege ownership is not defective. The State is not required to allege that the property taken was not that of the defendant. Therefore, the Committee has revised the above instruction to exclude "of another". See *State v. Lucas*, supra.

Presence means a possession or control so immediate that violence or intimidation is essential to sever it. "A thing is in the presence of a person with respect to robbery, which is so within his control that he could, if not overcome by violence or prevented by fear, retain his possession of it." *State v. Glymph*, 222 Kan. 73, 563 P.2d 422 (1977).

Theft is a lesser included crime of robbery as a "lesser degree of the same crime" under K.S.A. 21-3107(2). *State v. Long*, 234 Kan. 580, 675 P.2d 832 (1984).



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**56.31 AGGRAVATED ROBBERY**

The defendant is charged with the crime of aggravated robbery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally took property from the (person) (presence) of \_\_\_\_\_;
2. That the taking was by (threat of bodily harm to \_\_\_\_\_) (force);
3. That the defendant (was armed with a dangerous weapon) (inflicted bodily harm on any person in the course of such conduct); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3427. Aggravated robbery is a severity level 3, person felony. Robbery as defined by K.S.A. 21-3426 is a lesser included offense and where the evidence warrants it PIK 3d 56.30, Robbery, should be given.

Under the circumstances, when the phrase "deadly weapon" should be defined, see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

**Comment**

See Comment to PIK 3d 56.30, Robbery.

In *State v. Mitchell*, 234 Kan. 185, 190, 672 P.2d 1 (1983), the Court approved the use of "deadly weapon" as being synonymous with the statutory use of "dangerous weapon."

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**56.32 BLACKMAIL**

The defendant is charged with the crime of blackmail. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant threatened to communicate (accusations) (statements) about \_\_\_\_\_ that would subject \_\_\_\_\_ to public (ridicule) (contempt) (degradation);
2. That the defendant did so to ([gain] [attempt to gain] something of value from \_\_\_\_\_) (compel \_\_\_\_\_ to act against [his][her] will); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3428. Blackmail is a severity level 7, nonperson felony.

The elements of this crime were modified effective July 1, 1993.

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**56.33 DISCLOSING INFORMATION OBTAINED IN PREPARING TAX RETURNS**

The defendant is charged with the crime of disclosing information obtained in preparing tax returns. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (person, firm, corporation, association, partnership, joint venture or any employee therefor) engaged in the business of (the preparation of federal or state income tax returns) (assisting taxpayers in preparing federal or state income tax returns);
2. That the defendant disclosed or used for commercial purposes any information obtained in assisting taxpayers in the preparation of federal or state income tax returns; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

A person is engaged in the business of preparing federal or state income tax returns or in the business of assisting taxpayers in preparing such returns if (he)(she) advertises or gives publicity to the effect that (he)(she) prepares or assists others in the preparation of such returns or prepares or assists others in the preparation of such returns for compensation.

**Notes on Use**

For authority, see K.S.A. 21-3430. Disclosing information obtained in preparing tax returns is a class A, nonperson misdemeanor.

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**56.34 DEFENSE TO DISCLOSING INFORMATION  
OBTAINED IN PREPARING TAX RETURNS**

**It is a defense to the charge of disclosing information obtained in preparing tax returns that the defendant disclosed such information (with the separate written consent of the taxpayer) (under a state or federal tax law expressly authorizing [him][her] to do so) (as a necessary element in the preparation of the tax return) (pursuant to a court order).**

**Notes on Use**

For authority, see K.S.A. 21-3430. In addition to the above defense, K.S.A. 21-3430 provides that contacting a taxpayer to obtain his or her written consent to disclosure does not violate this statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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**56.35 AIRCRAFT PIRACY**

**The statute upon which this instruction was based (K.S.A. 21-3433) has been repealed, effective July 1, 1993.**

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56.36 HAZING

The defendant is charged with the crime of (promoting) (permitting) hazing. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant is a social or fraternal organization;
2. That the defendant participated in (coercing) (demanding) (encouraging) another person \_\_\_\_\_ to perform as a condition of membership in a social or fraternal organization, any act which could reasonably be expected to result in great bodily harm, disfigurement or death;

or

- That the defendant participated in (coercing) (demanding) (encouraging) another person \_\_\_\_\_ to perform as a condition of membership in a social or fraternal organization, any act in a manner whereby great bodily harm, disfigurement or death could be inflicted;
3. That the defendant did so purposely and intentionally, realizing the imminence of danger, and with a reckless disregard, indifference or unconcern for the consequences; and
  4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3434. Promoting or permitting hazing is a class B, nonperson misdemeanor.

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**56.37 MISTREATMENT OF A DEPENDENT ADULT**

The defendant is charged with the crime of mistreatment of a dependent adult. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and intentionally inflicted (physical injury) (unreasonable confinement) (cruel punishment) upon \_\_\_\_\_

\_\_\_\_\_;

or

That the defendant knowingly and intentionally took unfair advantage of \_\_\_\_\_'s (physical) (financial) resources for another individual's (personal) (financial) advantage by the use of (undue influence) (coercion) (harassment) (duress) (deception) (false pretense);

or

That the defendant knowingly and intentionally (omitted) (deprived) \_\_\_\_\_ of (treatment) (goods) (services) necessary to maintain the (physical) (mental) health of \_\_\_\_\_;

2. That \_\_\_\_\_ was a dependent adult; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Dependent adult means an individual 18 years of age or older who is unable to protect (his)(her) own interest.

**Notes on Use**

For authority, see K.S.A. 21-3436. Mistreatment of a dependent adult as defined in subsection (a)(1) is a severity level 6, person felony. Mistreatment of a dependent adult as defined in subsections (a)(2) and (a)(3) is a class A, person misdemeanor. K.S.A. 21-3436(c) sets forth several factual situations where an individual shall be considered a "dependent adult".

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**56.38 AFFIRMATIVE DEFENSE TO MISTREATMENT OF  
A DEPENDENT ADULT**

**It is a defense to the charge of mistreatment of a dependent adult if you find the sole reason for the mistreatment is that ( insert name of dependent adult ) relied upon or was furnished treatment by spiritual means through prayer in lieu of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination of which such dependent adult is a member or adherent.**

**Notes on Use**

For authority, see K.S.A. 21-3436(b).

If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be used.

The Committee takes no position on what is or is not a recognized church or religious denomination.



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**56.39 STALKING**

The defendant is charged with the crime of stalking. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant repeatedly followed and harassed \_\_\_\_\_;
2. That the defendant did so intentionally and maliciously;
3. That the defendant's course of conduct was such as would cause a reasonable person to suffer substantial emotional abuse;
4. That the defendant's course of conduct actually caused \_\_\_\_\_ substantial emotional distress; and
5. That these acts occurred between the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Harassment means a knowing and intentional course of conduct directed at a specific person which seriously alarms, annoys or harasses the person, and which serves no legitimate purpose.

Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.

**Notes on Use**

For authority, see K.S.A. 21-3437. Stalking is a class B, person misdemeanor, except that any person who is convicted of stalking when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior against the same victim, is guilty of a class A, person misdemeanor.

Any person who has a second or subsequent conviction within seven years of a prior conviction of stalking involving the same victim is guilty of a class A, person misdemeanor.

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This statute does not apply to conduct which occurs during labor picketing. Constitutionally protected activity is not included within the meaning of "course of conduct".

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**56.40 UNLAWFULLY EXPOSING ANOTHER TO A COMMUNICABLE DISEASE**

The defendant is charged with the crime of unlawfully exposing another to a communicable disease. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew (he)(she) was infected with \_\_\_\_\_, a life threatening communicable disease;
2. That the defendant:
  - engaged in sexual intercourse or sodomy with another individual;
  - or
  - sold or donated defendant's blood, blood products, semen, tissue, organs, or other body fluids;
  - or
  - shared with another individual a hypodermic needle or syringe for the introduction of drugs or other substance into the other individual's body;
  - or
  - shared with another individual a hypodermic needle, syringe, or both, for the withdrawal of blood or body fluids from the other individual's body;
3. That the defendant intended to expose (that individual) (the recipient) (another person) to a life threatening communicable disease; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

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### Notes on Use

For authority, see K.S.A. 21-3435. Unlawfully exposing another to a communicable disease is a class A, person misdemeanor. The statute provides that neither sexual intercourse nor sodomy include penetration by any object other than the male penis.

See K.A.R. 28-1-1 for a definition of "communicable disease." This definition would need to be supplemented as the crime requires the disease to be life threatening.

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CHAPTER 57.00

SEX OFFENSES

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**57.01 RAPE**

The defendant is charged with the crime of rape. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had sexual intercourse with \_\_\_\_\_;
2. That \_\_\_\_\_ was under 14 years of age when the act of sexual intercourse occurred; and  
or  
That the act of sexual intercourse was committed without the consent of \_\_\_\_\_ under circumstances when:
  - (a) (she)(he) was overcome by (force) (fear); and  
or
  - (b) (she)(he) was unconscious or physically powerless; and  
or
  - (c) (she)(he) was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to the defendant; and  
or
  - (d) (she)(he) was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3502. Rape is a severity level 2, person felony. The statute provides four categories when the consent of the victim was not

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obtained. The appropriate category should be selected. In addition, PIK 3d 57.02, Sexual Intercourse - Definition, and PIK 3d 54.01-A, General Criminal Intent, should be given.

### Comment

In 1992, the Legislature amended K.S.A. 21-3502 to include as rape, sexual intercourse with a child under 14 years of age. Therefore, sexual intercourse with a child under 14 years of age is rape regardless of whether the child actually consented to the sexual intercourse.

In *State v. Cantrell*, 234 Kan. 426, 434, 673 P.2d 1147 (1983), the Kansas Supreme Court held that the crime of rape under K.S.A. 21-3502 did not require a specific intent to commit rape. Language to the contrary in *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974), and in *State v. Carr*, 230 Kan. 322, 634 P.2d 1104 (1981) was overruled.

The Kansas Legislature made three key amendments to the crime of rape in 1983. Sex discrimination, spousal immunity, and the requirement of resistance to rape were eliminated. It is now possible for a female to be charged with the rape of a male. Of greater impact, however, is the recognition that spousal abuse by marital rape should be a crime. It is no longer permissible for a defendant to assert the defense that she or he was the spouse of the victim. Furthermore, the need of resistance to an attack was removed. Undoubtedly, the Legislature was persuaded that victims should not be required to resist an attack with an exposure to a far more serious injury. See 52 J.B.A.K. 99, 104 (1983).

A conviction of forcible rape precludes a conviction for taking a woman for defilement under K.S.A. 21-427 (now repealed) and a conviction for assault with felonious intent under K.S.A. 21-431 (now repealed) where the offenses arise from one act of the defendant. The test of duplicity is whether each offense requires proof of an element of the crime which the other does not. *Jarrell v. State*, 212 Kan. 171, 510 P.2d 127 (1973).

In *State v. Lassley*, 218 Kan. 758, 761-762, 545 P.2d 383 (1976), the Supreme Court held it was duplicitous for the same act of force which was relied on for the charges of rape and kidnapping to also provide the basis for an aggravated assault charge.

Evidence of similar crimes with proper limiting instructions under K.S.A. 60-455 may be relevant and admissible in prosecutions for rape. See Comment to PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence.

In *State v. Lee*, 221 Kan. 109, 558 P.2d 1096 (1976), the Supreme Court held that the word "consent" as used in PIK 57.01 was a common word that did not require further definition.

In *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978), the Supreme Court held that additional convictions for attempted rape and aggravated sodomy were



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multiple convictions for the same offense when the defendant had already been convicted on one count for both offenses.

The *corpus delicti* of the crime of rape may be proved by extrajudicial admissions and circumstantial evidence. See *State v. Higdon*, 224 Kan. 720, 723, 585 P.2d 1048 (1978).

A search warrant is required before pubic hair may be extracted from a person. *State v. Gammill*, 2 Kan. App. 2d 627, 585 P.2d 1074 (1978).

Qualified expert psychiatric testimony regarding the existence of rape trauma syndrome is relevant and admissible where the defense is consent. *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982). However, the holding in *Marks* was reaffirmed by a narrow majority in *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984). In *McQuillen*, the dissent stressed that the rule in *Marks* had caused confusion and was an indirect circumvention of the rape shield statute. In stating that *Marks* should be overruled, the dissent quoted with approval decisions from other states that held that the existence of the rape trauma syndrome was irrelevant and inadmissible. See *State v. Saldana*, 324 N.W. 2d 227 (Minn. 1982); *State v. McGee*, 324 N.W. 2d 232 (Minn. 1982); *State v. Taylor*, 663 S.W. 2d 235 (Mo. 1984); and *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

Unless the defense is consent and the expert presenting the testimony has special training in psychiatry, evidence of the rape trauma syndrome is inadmissible. Even if the evidence is admissible, the expert is not permitted to express an opinion as to whether the victim was raped. See *State v. Bressman*, 236 Kan. 296, 303, 304, 689 P.2d 901 (1984).

Lewd and lascivious behavior consists of elements separate and distinct from the crime of rape. The trial court committed no error when it failed to give an instruction on lewd and lascivious behavior when the defendant was charged with rape. *State v. Davis*, 236 Kan. 538, 542, 694 P.2d 418 (1985).

Two acts of rape perpetrated by the same accused against the same victim on the same afternoon may support two separate rape convictions. *State v. Wood*, 235 Kan. 915, 920, 686 P.2d 128 (1984). The result in this case is distinguished from *State v. Dorsey*, 224 Kan. at 152. See also, *State v. Richmond*, 250 Kan. 375, 379, 827 P.2d 743 (1992).

In *Keim v. State*, 13 Kan. App. 2d 604, 608, 777 P.2d 278 (1989), the Court held that legislation prohibiting intercourse with a victim incapable of giving consent because of mental deficiency or disease was not unconstitutionally vague.

Adultery is not a lesser included offense of forcible rape because it is a crime of consenting parties and would require that at least one of the parties be married. *State v. Platz*, 214 Kan. 74, 77, 519 P.2d 1097 (1974).

Rape is not a lesser included offense of aggravated kidnapping. *State v. Schriener*, 215 Kan. 86, 90, 523 P.2d 703 (1974); *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). However, rape constitutes "bodily harm" to make a

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kidnapping aggravated kidnapping. *State v. Barry*, 216 Kan. 609, 618, 533 P.2d 1308 (1974); *State v. Ponds and Garrett*, 218 Kan. 416, 420-421, 543 P.2d 967 (1975); *State v. Adams*, 218 Kan. 495, 504, 545 P.2d 1134 (1976).

Battery is not a lesser included offense of attempted rape. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).

Patronizing a prostitute is not a lesser included offense of rape or aggravated sodomy. See *State v. Blue*, 225 Kan. 576, 580, 592 P.2d 897 (1979).

The crime of indecent liberties with a child is a lesser included offense of rape where the evidence establishes that the defendant forcibly raped a female under 16 years of age. *State v. Lilley*, 231 Kan. 694, 696, 647 P.2d 1323 (1982) and *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983).

The age limitation for indecent liberties with a child was amended in 1992 to include children under 16 years but 14 or more years of age. See PIK 3d 57.05, Indecent Liberties with a Child.

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**57.01-A RAPE - DEFENSE OF MARRIAGE**

**It is a defense to the charge of rape of a child under 14 years of age that at the time of the offense the child was married to the accused.**

**Notes on Use**

For authority, see K.S.A. 21-3502(b). This instruction should be given only with respect to a prosecution of rape of a child under 14 years of age.

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### 57.02 SEXUAL INTERCOURSE - DEFINITION

**Sexual intercourse means any penetration of the female sex organ by (a finger) (the male sex organ) (any object). Any penetration, however slight, is sufficient to constitute sexual intercourse.**

**(Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of the performance of:**

- (a) Generally recognized health care practices; or**
- (b) a body cavity search conducted in accordance with the law.)**

#### Notes on Use

For authority, see K.S.A. 21-3501. This instruction should be given in all rape prosecutions. The applicable parenthetical reference should be selected.

#### Comment

The Kansas Legislature amended the definition of sexual intercourse in 1983 to include rape by an object or a finger. The sufficiency of penetration is discussed in *State v. Ragland*, 173 Kan. 265, 246 P.2d 276 (1952). See also, *State v. Cross*, 144 Kan. 368, 59 P.2d 35 (1936), and 65 Am. Jur. 2d, Rape, § 3.

The trial court's failure to give a definition of sexual intercourse was not reversible error when no objection was raised at trial and the instruction given was complete. *State v. James*, 217 Kan. 96, 100, 535 P.2d 991 (1975).

See also, Wason, *Survey of Kansas Law: Criminal Law*, 32 Kan. L. Rev. 395 (1984).

A charge of attempted rape may be proven without evidence of attempted penetration if the surrounding circumstances provide sufficient evidence from which a rational factfinder could conclude that the attacker intended to rape the victim. *State v. Hanks*, 236 Kan. 524, 694 P.2d 407 (1985).

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### 57.03 RAPE, CREDIBILITY OF PROSECUTRIX'S TESTIMONY

**The Committee recommends that there be no separate instruction given.**

#### Comment

The Committee believes PIK 3d 52.09, Credibility of Witnesses, adequately covers the credibility of the testimony of the prosecutrix. See *State v. Loomer*, 105 Kan. 410, 184 Pac. 723 (1919) and 65 Am. Jur. 2d, Rape §§ 86-87.

The credibility of the prosecutrix's testimony is a question of fact for the jury. See *State v. Nichols*, 212 Kan. 814, 512 P.2d 329 (1973), a prosecution for rape and indecent liberties with a child; *State v. Griffin*, 210 Kan. 729, 504 P.2d 150 (1972), a prosecution for indecent liberties with a child; *State v. Morgan*, 207 Kan. 581, 485 P.2d 1371 (1971), a prosecution for forcible rape; and *State v. Wade*, 203 Kan. 811, 457 P.2d 158 (1969), a prosecution for burglary and attempted forcible rape.

In *Nichols*, the Supreme Court approved the trial court's refusal to give a requested cautionary instruction on the testimony of a 13-year-old prosecutrix where the instructions as a whole were adequate.

The rape shield statute, as contained in K.S.A. 1983 Supp. 21-3525, was originally enacted into law in 1976 in K.S.A. 60-447a. The statute prohibits the admission into evidence of previous sexual conduct of the victim unless its relevancy has been determined at a pretrial hearing. It requires the defendant to file a written motion within seven days before the commencement of the trial if such inquiry will be made and requires the court to have a hearing on the relevancy of the proffered evidence. The statute was expanded by the Kansas Legislature in 1983 to cover several additional sex crimes. Reference to the statute should be made to determine whether the crime charged is covered by the statute. The statute was further held to be constitutional in *In re Nichols*, 2 Kan. App. 2d 431, 580 P.2d 1370 (1978); *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978); and in *State v. Blue*, 225 Kan. 576, 592 P.2d 897 (1979). Furthermore, in *State v. Cook*, 224 Kan. 132, 135, 578 P.2d 257 (1978), the Supreme Court interpreted the provisions of K.S.A. 60-422(c) to prohibit cross-examination on sexual morality as it was not relevant to the honesty or veracity of a witness.

In *State v. Williams*, 235 Kan. 485, 681 P.2d 660 (1984), the Supreme Court held that a prosecutrix could not be cross-examined as to prior sexual contact with the accused when the provisions of the rape shield statute, K.S.A. 1983 Supp. 21-

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3525(2), had not been complied with because the affidavit was inadequate. The Court further held that the incident was irrelevant because it was too remote.

To stop further sexual assaults upon her, the statement of the prosecutrix that she had gonorrhea did not justify inquiry into her prior history of gonorrhea in order to attack her credibility. *State v. Bressman*, 236 Kan. 296 P.2d 901 (1984). A ruling that excludes evidence of a victim's prior sexual conduct will be overturned only if the ruling is a clear abuse of discretion. See *State v. Zuniga*, 237 Kan. 788, 793, 703 P.2d 805 (1985).

Where consent is the sole issue on a rape charge, the truthfulness of the complaining witness' testimony is an essential element of the State's prosecution. Therefore, it is prejudicial error to exclude rebuttal evidence bearing on the credibility of the complaining witness, even when such testimony is collateral to the issue at hand. *State v. Beans*, 247 Kan. 343, 800 P.2d 145 (1990).

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### 57.04 RAPE, CORROBORATION OF PROSECUTRIX'S TESTIMONY UNNECESSARY

The Committee recommends that no separate instruction be given.

#### Comment

At common law the evidence of the prosecutrix was sufficient to sustain a conviction without corroboration. This was true even though the prosecutrix was an infant. Several states have modified the common law and require some corroboration by statute to sustain a conviction. See 65 Am. Jur. 2d, Rape, § 96. Kansas has not modified the common law and a conviction can be had without corroboration. See *State v. Tinkler*, 72 Kan. 262, 83 Pac. 830 (1905); *State v. Morgan*, 207 Kan. 581, 485 P.2d 1371 (1971); *State v. Robinson*, 219 Kan. 218, 220, 547 P.2d 335 (1976); *State v. Sanders*, 227 Kan. 892, 895, 610 P.2d 633 (1980).

In *State v. Matlock*, 233 Kan. 1, 6, 660 P.2d 945 (1983), the Kansas Supreme Court retained the rule that the uncorroborated testimony of the prosecutrix may be sufficient to convict a defendant of rape. However, in that case the Court held that no rational factfinder could have believed the uncorroborated testimony of the prosecutrix to find the defendant guilty beyond a reasonable doubt.

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**57.05 INDECENT LIBERTIES WITH A CHILD**

The defendant is charged with the crime of indecent liberties with a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant submitted to lewd fondling or touching of (his)(her) person by \_\_\_\_\_, with intent to arouse or to satisfy the sexual desires of either \_\_\_\_\_ or the defendant, or both;  
or

That the defendant fondled or touched the person of \_\_\_\_\_ in a lewd manner, with intent to arouse or to satisfy the sexual desires of either \_\_\_\_\_ or the defendant, or both;

or

That the defendant solicited \_\_\_\_\_ to engage in lewd fondling or touching of the person of another with the intent to arouse or to satisfy the sexual desires of \_\_\_\_\_, the defendant or another;

2. That \_\_\_\_\_ was then a child 14 or more years of age but less than 16 years of age; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3503. If a definition of the words "lewd fondling or touching" is desired, see PIK 3d Chapter 53.00.

Indecent liberties with a child is a severity level 5, person felony.

**Comment**

In 1992, the Legislature amended K.S.A. 21-3503 to remove "sexual intercourse" from the statute. Sexual intercourse with children under 14 years of



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age is rape under K.S.A. 21-3502(b). Sexual intercourse with children 14 to 16 years of age and "lewd fondling or touching" of children under 14 years of age are both covered by K.S.A. 21-3504, Aggravated indecent liberties with a child. See PIK 3d 57.06, Aggravated Indecent Liberties With a Child.

Evidence of similar crimes, with proper limiting instructions under K.S.A. 60-455, may be relevant and admissible in prosecutions for indecent liberties with a child. See Comment to PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence.

In *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), the Supreme Court construed the meaning to be given to the words "lewd fondling or touching" under the provisions of K.S.A. 21-3503 and held that the statute did not require the State to prove a lewd fondling or touching of the *sexual organs* of the child or the offender as an element of the crime.

Time is not an indispensable ingredient of the offense of indecent liberties with a child if the offense was committed within the statute of limitations, and the defendant's defense was not prejudiced by the allegation concerning the date of the crime. See *State v. Wonsler*, 217 Kan. 406, 537 P.2d 197 (1975); and *State v. Kilpatrick*, 2 Kan. App. 2d 349, 578 P.2d 1147 (1978).

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

In *State v. Crossman*, 229 Kan. 384, 387, 624 P.2d 461 (1981), the Kansas Supreme Court held that ". . . in cases of crimes involving illicit sexual relations or acts between an adult and a child, evidence of prior acts of similar nature between the same parties is admissible independent of K.S.A. 60-455 where the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged."

The decision of the trial court in permitting a mother to testify to statements made by her 4-year-old child who was the victim of the crime of indecent liberties with a child was upheld in *State v. Rodriguez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983). The Court determined that the testimony was admissible under K.S.A. 60-460(d)(2). Since that holding, the Legislature has enacted K.S.A. 60-460(dd) that specifically permits such testimony when certain findings are made by the trial court.

In *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985), the Supreme Court held that the child hearsay exception, K.S.A. 60-460(dd), did not violate the defendant's Sixth Amendment right to confrontation. The case also lists the factors a court should consider in evaluating the credibility and trustworthiness of a child witness. See also, *State v. Pendleton*, 10 Kan. App. 2d 26, 690 P.2d 959 (1984).

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The Legislature amended K.S.A. 21-4619(c) to provide that there shall be no expungement of a conviction for indecent liberties with a child. In addition, K.S.A. 21-3106(2) provides that prosecution for indecent liberties with a child must be commenced within five years after its commission if the victim is less than 16 years of age.

The authority statute was further amended in 1987 to enlarge the crime to include solicitation of a child to engage in any lewd fondling or touching of another person.

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties. In 1992, the Legislature deleted subsection (1)(b) from K.S.A. 21-3503; therefore, these offenses are no longer identical. Both Criminal sodomy, K.S.A. 21-3505, and Aggravated indecent liberties with a child, K.S.A. 21-3504, include sexual relations with a child at least 14 but less than 16 years of age. However, K.S.A. 21-3504 specifies "sexual intercourse" while K.S.A. 21-3505 specifies oral or anal sexual relations.

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**57.05-A INDECENT LIBERTIES WITH A CHILD - SODOMY**

**This instruction has been deleted due to the 1985 amendment of K.S.A. 21-3503. The Legislature deleted the section in K.S.A. 21-3503 which referred to sodomy since the crime of sodomy with a child was covered by K.S.A. 21-3506, Aggravated criminal sodomy. See PIK 3d 57.07, Criminal Sodomy and PIK 3d 57.08, Aggravated Criminal Sodomy - Nonmarital Child Under 14.**

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### **57.05-B AFFIRMATIVE DEFENSE TO INDECENT LIBERTIES WITH A CHILD**

**It is a defense to the charge of indecent liberties with a child that at the time of the offense the child was married to the accused.**

#### **Notes on Use**

For authority, see K.S.A. 21-3503(b). This instruction should be given only with respect to a prosecution of indecent liberties with a child in which the defendant is charged with:

- (a) fondling or touching a child in a lewd manner;
- (b) submitting to lewd fondling or touching by a child.

Pursuant to K.S.A. 21-3503(b), this defense is not applicable to prosecutions in which the defendant is charged with soliciting the child to engage in any lewd fondling or touching of the person of another.

#### **Comment**

*State v. Sedlack*, 246 Kan. 305, 787 P.2d 709 (1990), and *State v. Wade*, 244 Kan. 136, 766 P.2d 811 (1989), hold that the common-law rule that males aged 14 and females aged 12 have the capacity to form a common-law marriage is the rule in Kansas. If the defense is raised, the court or jury may have to determine the existence of a valid common-law marriage. The elements of common-law marriage are set forth in *State v. Johnson*, 216 Kan. 445, 448, 532 P.2d 1325 (1975).

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**57.06 AGGRAVATED INDECENT LIBERTIES WITH A CHILD**

The defendant is charged with the crime of aggravated indecent liberties with a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had sexual intercourse with \_\_\_\_\_;
2. That \_\_\_\_\_ was a child 14 or more years of age but less than 16 years of age; and

OR

1. That the defendant submitted to lewd fondling or touching of (his)(her) person by \_\_\_\_\_, with intent to arouse or to satisfy the sexual desires of either \_\_\_\_\_ or the defendant, or both;

or

That the defendant fondled or touched the person of \_\_\_\_\_ in a lewd manner, with intent to arouse or to satisfy the sexual desires of either \_\_\_\_\_ or the defendant, or both;

or

That the defendant caused \_\_\_\_\_ to engage in fondling or touching of the person of another in a lewd manner, with intent to arouse or satisfy the sexual desires of \_\_\_\_\_, the defendant or another;

2. That \_\_\_\_\_ was a child 14 or more years of age but less than 16 years of age; and
3. That \_\_\_\_\_ did not consent to such fondling or touching; and

OR

1. That the defendant submitted to lewd fondling or touching of (his)(her) person by \_\_\_\_\_, with intent to arouse or satisfy the sexual desires of

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either \_\_\_\_\_ or the defendant, or both;

or

That the defendant fondled or touched the person of \_\_\_\_\_ in a lewd manner, with intent to arouse or satisfy the sexual desires of either \_\_\_\_\_ or the defendant, or both;

or

That the defendant solicited \_\_\_\_\_ to engage in fondling or touching of the person of another in a lewd manner, with intent to arouse or satisfy the sexual desires of \_\_\_\_\_, the defendant or another;

2. That \_\_\_\_\_ was a child under the age of 14; and

[3.] or [4.] That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3504. Aggravated indecent liberties with a child involving sexual intercourse is a severity level 3, person felony. Aggravated indecent liberties with a child under 14 years of age involving lewd fondling or touching is a severity level 3, person felony. Aggravated indecent liberties with a child between 14 and 16 years of age is a severity level 4, person felony.

If a definition of the words "lewd fondling or touching" is desired, see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

If the charge of aggravated indecent liberties involves sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Sexual intercourse with a child under age 14 is rape. See PIK 3d 57.01, Rape.

**Comment**

K.S.A. 21-3504 was amended in 1992 to delete the category of defendants who were guardians, proprietors, or employees of any foster homes, orphanages or other such institutions to whose charge a child was committed or entrusted by law.

The crime of aggravated indecent liberties with a child as defined in K.S.A. 21-3504 was amended in 1984 by deleting the category of defendants who

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were parents, adoptive parents, stepparents, or grandparents of the child. At the same time, the crime of incest as defined in K.S.A. 1984 Supp. 21-3602 was expanded to include additional biological relatives of the child and the crime of aggravated incest as defined in K.S.A. 1984 Supp. 21-3603 was substantially enlarged by including certain biological, step and adoptive relatives of the child.

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the crime of aggravated indecent liberties with a child. In addition, the provisions of K.S.A. 21-3106(2) provide that a prosecution for the crime of aggravated indecent liberties with a child must be commenced within five years after its commission if the victim is less than 16 years of age.

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**57.06-A AFFIRMATIVE DEFENSE TO AGGRAVATED  
INDECENT LIBERTIES WITH A CHILD**

**It is a defense to the charge of aggravated indecent liberties with a child that at the time of the offense the child was married to the accused.**

**Notes on Use**

For authority, see K.S.A. 21-3504(b). This instruction should be given only with respect to a prosecution of aggravated indecent liberties with a child in which the defendant is charged with:

- (a) sexual intercourse with a child;
- (b) fondling or touching a child in a lewd manner;
- (c) submitting to lewd fondling or touching by a child.

Pursuant to K.S.A. 21-3504(b), this defense is not applicable to prosecutions in which the defendant is charged with causing or soliciting the child to engage in any lewd fondling or touching of the person of another.



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**57.07 CRIMINAL SODOMY**

The defendant is charged with criminal sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant engaged in sodomy with (another person of the same sex who was 16 or more years of age) (an animal); and  
or  
That the defendant engaged in sodomy with a child who was 14 or more years of age but less than 16 years of age; and  
or  
That the defendant caused a child 14 or more years of age but less than 16 years of age to engage in sodomy with (any person) (an animal); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Sodomy means: ( See PIK 3d 57.18, Sex Offenses - Definitions, for appropriate definition. )**

**Notes on Use**

For authority, see K.S.A. 21-3505. Criminal sodomy involving sexual relations between the defendant and a person of the same sex and 16 or more years of age or between the defendant and an animal is a class B, nonperson misdemeanor. Criminal sodomy with a child 14 or more years of age but less than 16 years of age is a severity level 3, person felony. For a definition of "sodomy", see K.S.A. 21-3501(2) and PIK 3d 57.18, Sex Offenses - Definitions.

If the crime is sexual intercourse with an animal, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

**Comment**

Sodomy between a husband and wife or between consenting adults of the opposite sex is not a crime.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.07-A AFFIRMATIVE DEFENSE TO CRIMINAL  
SODOMY**

**It is a defense to the charge of criminal sodomy that at the time of the offense the child was married to the accused.**

**Notes on Use**

For authority, see K.S.A. 21-3505(b). This instruction should be given only with respect to a prosecution of criminal sodomy in which the defendant is charged with sodomy with a child (second alternative to paragraph 1). Pursuant to K.S.A. 21-3505(b), this defense is not applicable to prosecutions in which the defendant is charged with sodomy with a member of the same sex or with causing a child to engage in sodomy with any person or animal.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.08 AGGRAVATED CRIMINAL SODOMY -  
NONMARITAL CHILD UNDER 14**

The defendant is charged with aggravated criminal sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant engaged in sodomy with a child who was under 14 years of age; and  
or  
That the defendant caused a child under 14 years of age to engage in sodomy with (any person) (an animal); and
2. That the act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Sodomy means: ( See PIK 3d 57.18, Sex Offenses -  
Definitions, for appropriate definition )**

**Notes on Use**

For authority, see K.S.A. 21-3506(a). Aggravated criminal sodomy is a severity level 2, person felony.

**Comment**

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission.

In *State v. Wilson*, 247 Kan. 87, 95, 795 P.2d 336 (1990), the Court stated: "We approve of the use of PIK 2d 57.08 in this case. We find no error in the use of the phrase anal sexual relations in place of the term anal copulation in the pattern instruction on aggravated criminal sodomy."

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In *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989), the Court held that oral-genital stimulation between the tongue of a male and the genital area of a female is not sodomy under K.S.A. 21-3501(2). The Legislature amended the statute in L. 1990, ch. 149, § 2. A new definition of sodomy has been included in PIK 3d 57.18, Sex Offenses - Definitions.

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.08-A AGGRAVATED CRIMINAL SODOMY - CAUSING  
CHILD UNDER 14 TO ENGAGE IN SODOMY  
WITH A PERSON OR AN ANIMAL**

**This instruction has been consolidated into  
PIK 3d 57.08, Aggravated Criminal Sodomy - Nonmarital  
Child Under 14.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.08-B AGGRAVATED CRIMINAL SODOMY - NO  
CONSENT**

The defendant is charged with the crime of aggravated criminal sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant engaged in sodomy with \_\_\_\_\_;

or

That the defendant caused \_\_\_\_\_ to engage in sodomy with (any person) (an animal);

2. That the act of sodomy was committed without the consent of \_\_\_\_\_ under circumstances when:

(a) (she)(he) was overcome by (force) (fear); and  
or

(b) (she)(he) was unconscious or physically powerless; and  
or

(c) (she)(he) was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to the defendant; and

or

(d) (she)(he) was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and

3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Sodomy means: (See PIK 3d 57.18, Sex Offenses - Definitions, for appropriate definition).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Notes on Use

For authority, see K.S.A. 21-3506(a)(3). The crime of aggravated criminal sodomy is a severity level 2, person felony.

If the crime involves sexual intercourse with an animal, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

### Comment

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.08-C AFFIRMATIVE DEFENSE TO AGGRAVATED  
CRIMINAL SODOMY**

**It is a defense to the charge of aggravated criminal sodomy that at the time of the offense the child was married to the accused.**

**Notes on Use**

For authority, see K.S.A. 21-3506(b). This instruction should be given only with respect to a prosecution of aggravated criminal sodomy in which the defendant is charged with engaging in sodomy with a child under 14 years of age (PIK 3d 57.08, Aggravated Criminal Sodomy - Nonmarital Child Under 14, first alternative to paragraph 1). Pursuant to K.S.A. 21-3506(b), this defense is not applicable to prosecutions in which the defendant is charged with causing a child under 14 years of age to engage in sodomy with any person or animal or is charged with nonconsensual sodomy under K.S.A. 21-3506(a)(3).



PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.09 ADULTERY**

The defendant is charged with the crime of adultery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (had sexual intercourse) (engaged in sodomy) with \_\_\_\_\_;
2. That the defendant was then married to a person other than \_\_\_\_\_; and  
or  
That the defendant was not then married and knew that \_\_\_\_\_ was married; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3507. Adultery is a class C misdemeanor. If the charge is based on sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the charge is based on sodomy, the definition of sodomy, PIK 3d 57.18, Sex Offenses - Definitions, should be given.

**Comment**

Adultery is not a lesser included offense of forcible rape because it is a crime of consenting parties and would require that at least one of the parties be married. *State v. Platz*, 214 Kan. 74, 519 P.2d 1097 (1974).

The Legislature amended K.S.A. 21-3507 in 1983 to include sodomy in the crime of adultery.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.10 LEWD AND LASCIVIOUS BEHAVIOR**

The defendant is charged with the crime of lewd and lascivious behavior. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant publicly engaged in an otherwise lawful act of (sexual intercourse) (sodomy) with knowledge or reasonable anticipation that the participants were being viewed by others; and  
or  
That the defendant publicly exposed (his)(her) sex organ or exposed (his)(her) sex organ in the presence of a person not (his)(her) spouse and who had not consented thereto, with the intent to arouse or to gratify the sexual desires of the defendant or another; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3508. Lewd and lascivious behavior is a class B, nonperson misdemeanor. If the act under Element No. 1 is sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the act under Element No. 1 is sodomy, PIK 3d 57.18(d), Sex Offenses - Definitions, should be given.

**Comment**

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy and is neither a lesser degree of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977); *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 307, 624 P.2d 964 (1981).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

The crime of lewd and lascivious behavior was enlarged in 1983 to include the exposure of the sex organ in a public place.

Lewd and lascivious behavior is not a lesser included offense of rape or sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.11 ENTICEMENT OF A CHILD**

The statute upon which this instruction was based (K.S.A. 21-3509) was repealed in 1992. L. 1992, ch. 298. See PIK 3d 57.12, Indecent Solicitation of a Child.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.12 INDECENT SOLICITATION OF A CHILD

The defendant is charged with the crime of indecent solicitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (enticed) (solicited) \_\_\_\_\_ to (commit) (submit to) an act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery);

or

That the defendant (invited) (persuaded) (attempted to persuade) \_\_\_\_\_ to enter any (vehicle) (building) (room) (secluded place) with intent to commit an act of [(rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery)] [(upon) (with)] \_\_\_\_\_;

2. That \_\_\_\_\_ was then 14 or more years of age but less than 16 years of age; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: \_\_\_\_\_.

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### Notes on Use

For authority, see K.S.A. 21-3510. Indecent solicitation of a child is a severity level 7, person felony. The applicable unlawful sexual act as defined in PIK 3d 57.18, Sex Offenses - Definitions, should be added to the concluding part of the above instruction.

### Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12 years of age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

The Legislature enlarged the definition of an unlawful sex act in 1983.

The provisions of K.S.A. 21-4619(c) were amended to provide that there shall be no expungement of convictions for the offense of indecent solicitation of a child. Furthermore, the provisions of K.S.A. 21-3106(2) were amended to provide that a prosecution for the crime of indecent solicitation of a child must be commenced within five years after its commission.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.12-A SEXUAL EXPLOITATION OF A CHILD

The defendant is charged with the crime of sexual exploitation of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (insert name of child) to engage in sexually explicit conduct for the purpose of promoting any (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (play) (other live presentation);

or

That the defendant possessed a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) in which (insert name of child) is (shown) (heard) engaging in sexually explicit conduct with intent to arouse or to satisfy the sexual desires or appeal to the prurient interest of the offender, (insert name of child) or another;

or

That the defendant was a (parent) (guardian) (other person having custody or control of a child) and knowingly permitted the child to (engage in) (assist another to engage in) sexually explicit conduct for the purpose of: [promoting any (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (play) (other live presentation)] [possessing any (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording)] with intent to arouse or satisfy the

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sexual desires or appeal to the prurient interest of the offender, ( insert name of child ) or another;

or

That the defendant promoted any (film) (photograph) (negative) (slide) (book) (magazine) ( other printed or visual medium ) (audio tape recording) (play) ( other live presentation ), knowing the character and content of the (film) (photograph) (negative) (slide) (book) (magazine) ( other printed or visual medium ) (audio tape recording) (play) ( other live presentation ) included sexually explicit conduct by ( insert name of child );

2. That \_\_\_\_\_ was then a child under the age of 16 years; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

These definitions apply to this instruction:

- a. Sexually explicit conduct means actual or simulated: exhibition in the nude; sexual intercourse; or sodomy. It includes [(genital-genital) (oral-genital) (oral-anal) (anal-genital) contact, whether between persons of the same or opposite sex] [masturbation] [sado-masochistic abuse for the purpose of sexual stimulation] [lewd exhibition of the genitals or pubic area of any person].
- b. Promoting means procuring, selling, providing, lending, mailing, delivering, transferring, transmitting, distributing, circulating, disseminating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising:
  - (i) for pecuniary profit;or



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- (ii) with intent to arouse or to gratify the sexual desire or appeal to the prurient interest of the offender, the child, or another.
- c. Nude means any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.

### Notes on Use

For authority, see K.S.A. 21-3516. The newer version includes references to live performances and makes it a crime to possess child pornography as described in the statute.

Sexual exploitation of a child is a severity level 5, person felony. The applicable parenthetical words under Element No. 1 of the instruction should be selected as well as the applicable bracketed phrases under the definition of "sexually explicit conduct". For a definition of the word "lewd", see *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977).

### Comment

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of sexual exploitation of a child. In addition, the provisions of K.S.A. 21-3106(2) provide that the prosecution for the crime of sexual exploitation of a child must be commenced within five years after its commission if the victim is less than 16 years of age.

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**57.12-B PROMOTING SEXUAL PERFORMANCE BY A  
MINOR**

**The statute upon which this instruction was based (K.S.A. 21-3519) was repealed in 1992. L. 1992, ch. 298. The crime of promoting sexual performance by a minor has been incorporated into the crime of sexual exploitation of a child. See PIK 3d 57.12-A, Sexual Exploitation of a Child.**

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**57.13 AGGRAVATED INDECENT SOLICITATION OF A CHILD**

The defendant is charged with the crime of aggravated indecent solicitation of a child. The defendant pleads not guilty.

To establish this crime, each of the following claims must be proved:

1. That the defendant (enticed) (solicited) \_\_\_\_\_ to (commit) (submit to) the act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery);

or

That the defendant (invited) (persuaded) (attempted to persuade) \_\_\_\_\_ to enter any (vehicle) (building) (room) (secluded place) with the intent to commit [(rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery)] [(upon) (with)] \_\_\_\_\_;

2. That \_\_\_\_\_ was then a child under the age of 14 years; and

3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: \_\_\_\_\_.

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### Notes on Use

For authority, see K.S.A. 21-3511. Aggravated indecent solicitation of a child is a severity level 6, person felony. The applicable unlawful sexual act as defined in PIK 3d 57.18, Sex Offenses - Definitions, should be added to the concluding part of the above instruction. The only difference between the crimes of indecent solicitation of a child and aggravated indecent solicitation of a child is in the age of the child.

### Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12 years of age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979). Note: K.S.A. 21-3511, as amended by L. 1992, ch. 298, provides that the child be under the age of 14 at the time of the crime.

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated indecent solicitation of a child. Furthermore, the provisions of K.S.A. 21-3106(2) provide that a prosecution for the crime of aggravated indecent solicitation of a child must be commenced within five years after its commission.

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**57.14 PROSTITUTION**

The defendant is charged with the crime of prostitution. The defendant pleads not guilty.

To establish this crime, each of the following claims must be proved:

1. That the defendant (performed for hire) (offered to perform for hire) (agreed to perform for hire) the act of (sexual intercourse) (sodomy) (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or to gratify the sexual desires of the defendant or another person); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3512. Prostitution is a class B, nonperson misdemeanor. If the act under Element No. 1 is sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the act under Element No. 1 is sodomy, PIK 3d 57.18, Sex Offenses - Definitions, should be given.

**Comment**

In *City of Junction City v. White*, 2 Kan. App. 2d 403, 580 P.2d 891 (1978), the Court of Appeals held that it was within the police power of the State to prohibit prostitution and that the right of privacy does not protect solicitation of customers by a prostitute.

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), the Kansas Supreme Court held that K.S.A. 21-3512, which prohibits prostitution, is not unconstitutionally vague or overbroad. The language gives a definite warning as to the conduct proscribed when measured by common understanding and practice.

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**57.15 PROMOTING PROSTITUTION**

The defendant is charged with the crime of promoting prostitution. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

**1. That the defendant:**

- (a) (established) (owned) (maintained) (managed) a house of prostitution; and  
or
- (b) participated in the (establishment) (ownership) (maintenance) (management) of a house of prostitution; and  
or
- (c) permitted any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; and  
or
- (d) procured a prostitute for a house of prostitution; and  
or
- (e) induced another to become a prostitute; and  
or
- (f) solicited a patron for a prostitute or for a house of prostitution; and  
or
- (g) procured a prostitute for a patron; and  
or
- (h) (procured transportation for) (paid for the transportation of) (transported) a person with the intention of assisting or promoting that person's engaging in prostitution; and  
or
- (i) was employed to perform any act of [ set out applicable section of (a) through (h) ]; and

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2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3513. Promoting prostitution is a class A, nonperson misdemeanor when the prostitute is 16 or more years of age, except that promoting prostitution when the prostitute is 16 or more years of age is a severity level 7, person felony if committed by a person who has previously been convicted of promoting prostitution. When the prostitute is under 16 years of age, promoting prostitution is a severity level 6, person felony.

The appropriate category of the offense should be selected.

**Comment**

In *State v. Dodson*, 222 Kan. 519, 565 P.2d 291 (1977), the Court stated that when the offer is implicit in the defendant's words and actions when taken in the context in which they occurred, no overt act is required to complete the offense of solicitation.

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**57.15-A PROMOTING PROSTITUTION - CHILD UNDER 16**

The defendant is charged with the crime of promoting prostitution of a child under age 16. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (procured \_\_\_\_\_ as a prostitute for a house of prostitution) (induced \_\_\_\_\_ to become a prostitute) (solicited a patron for \_\_\_\_\_, a prostitute) (procured \_\_\_\_\_, a prostitute, for a patron) [(procured transportation for) (paid for the transportation of) (transported) \_\_\_\_\_ with the intent of assisting or promoting \_\_\_\_\_'s engaging in prostitution];
2. That \_\_\_\_\_ was then under 16 years of age; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3513. Promoting prostitution of a prostitute under 16 years of age is a severity level 6, person felony.



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**57.16 HABITUALLY PROMOTING PROSTITUTION**

The statute upon which this instruction was based (K.S.A. 21-3514) was repealed in 1992. L. 1992, ch. 298. See PIK 3d 57.15, Promoting Prostitution.

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**57.17 PATRONIZING A PROSTITUTE**

The defendant is charged with the crime of patronizing a prostitute. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (entered) (remained) in a house of prostitution with the intent to engage in (sexual intercourse) (sodomy) (an unlawful sexual act) with a prostitute; and

or

That the defendant hired a prostitute to engage in (sexual intercourse) (sodomy) (an unlawful sexual act); and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The act of (sexual intercourse) (sodomy) (unlawful sexual act) means: \_\_\_\_\_.

**Notes on Use**

For authority, see K.S.A. 21-3515. Patronizing a prostitute is a class C misdemeanor. See PIK 3d 57.18, Sex Offenses - Definitions, for definition of sodomy or unlawful sexual act. See PIK 3d 57.02, Sexual Intercourse - Definition, for a definition of sexual intercourse.

**Comment**

Patronizing a prostitute is not a lesser included offense of rape or aggravated sodomy. *State v. Blue*, 225 Kan. 576, 580, 592 P.2d 897 (1979).

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**57.18 SEX OFFENSES - DEFINITIONS**

**A. The word "spouse" means a lawful husband or wife, unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance, or divorce, or for relief under the Protection From Abuse Act.**

**B. Unlawful sexual acts are defined as follows:**

**(a) Rape.**

**Rape means sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender; or (5) sexual intercourse with a child who is under 14 years of age.**

**(b) Indecent liberties with a child.**

**Indecent liberties with a child means engaging in either of the following acts with a child who is 14 or more years of age but less than 16 years of age: (1) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender or both; (2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another.**

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**(c) Aggravated indecent liberties with a child.**

Aggravated indecent liberties with a child means: (1) sexual intercourse with a child 14 or more years of age but under 16 years of age; or (2) engaging in any of the following acts with a child 14 or more years of age but under 16 years of age who does not consent thereto: (a) any lewd fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; or (b) causing the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another; or (3) engaging in any of the following acts with a child who is under 14 years of age: (a) any lewd fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; (b) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another.

**(d) Sodomy.**

Sodomy means: (1) oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; (2) oral or anal sexual relations between a person and an animal; (3) sexual intercourse with an animal; or (4) anal penetration, however slight, of a male or female by any body part or object. Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search conducted in accordance with the law.

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(e) **Criminal sodomy.**

**Criminal sodomy means: (1) sodomy between persons who are 16 or more years of age and who are members of the same sex or between a person and an animal; or (2) sodomy with a child who is 14 or more years of age but under 16 years of age; or (3) causing a child 14 or more years of age but under 16 years of age to engage in sodomy with any person or animal.**

(f) **Aggravated criminal sodomy.**

**Aggravated criminal sodomy means: (1) sodomy with a child who is under 14 years of age; (2) causing a child under 14 years of age to engage in sodomy with any person or an animal; or (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under conditions when: (a) the victim is overcome by force or fear; (b) the victim is unconscious or physically powerless; (c) the victim is incapable of giving consent because of mental deficiency or disease, which was known by the offender or was reasonably apparent to the offender; or (d) the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender.**

(g) **Lewd and lascivious behavior.**

**Lewd and lascivious behavior means: (1) publicly engaging in otherwise lawful sexual intercourse or sodomy with knowledge or reasonable anticipation that the participants are being viewed by others, or (2) publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with an intent to arouse or**

## PATTERN INSTRUCTIONS FOR KANSAS 3d

gratify the sexual desires of the offender or another.

**(h) Sexual battery.**

Sexual battery means the intentional touching of the person of another who is 16 or more years of age, who is not the spouse of the offender and who does not consent to the touching, with the intent to arouse or to satisfy the sexual desires of the offender or another.

**(i) Aggravated sexual battery.**

Aggravated sexual battery means the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or to satisfy the sexual desires of the offender or another under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by or was reasonably apparent to the offender; (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender.

### Notes on Use

Authority for the definitions is contained in several statutes: Rape, K.S.A. 21-3502; Indecent liberties with a child, K.S.A. 21-3503; Aggravated indecent liberties with a child, K.S.A. 21-3504; Sodomy, K.S.A. 21-3501(2); Criminal sodomy, K.S.A. 21-3505; Aggravated criminal sodomy, K.S.A. 21-3506; Lewd and lascivious behavior, K.S.A. 21-3508; Sexual battery, K.S.A. 21-3517; and Aggravated sexual battery, K.S.A. 21-3518.

In defining the term "spouse", only the applicable language should be used.

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### 57.19 SEXUAL BATTERY

The defendant is charged with the crime of sexual battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally touched the person of \_\_\_\_\_;
2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;
3. That \_\_\_\_\_ was not the spouse of defendant;
4. That \_\_\_\_\_ did not consent to the touching;
5. That \_\_\_\_\_ was then 16 or more years of age; and
6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3517. Sexual battery is a class A, person misdemeanor. The definition of a spouse, as contained in PIK 3d 57.18, Sex Offenses - Definitions, should be given.

#### Comment

Sexual battery is not a lesser included crime of aggravated kidnapping, attempted aggravated sodomy, or attempted rape. *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.20 AGGRAVATED SEXUAL BATTERY - FORCE OR FEAR**

The defendant is charged with the crime of aggravated sexual battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally touched the person of \_\_\_\_\_;
2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;
3. That \_\_\_\_\_ was then 16 or more years of age;
4. That the touching was committed without the consent of \_\_\_\_\_ under circumstances when \_\_\_\_\_ was overcome by force or fear; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3518(a)(1). Aggravated sexual battery is a severity level 5, person felony.

**Comment**

Aggravated sexual battery is not a lesser included crime of rape. *State v. Gibson*, 246 Kan. 298, 787 P.2d 1176 (1990).

The State does not need to prove that the victim was physically harmed or that the victim had no freedom of movement to prove that the touching was not consensual. *State v. Blount*, 13 Kan. App. 2d 347, 770 P.2d 852 (1989).

The Court of Appeals in *Blount* also held that K.S.A. 21-3518 was not unconstitutionally vague or overbroad as the language put a person of ordinary intelligence on notice of the prohibited conduct.



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**57.21 AGGRAVATED SEXUAL BATTERY - CHILD  
UNDER 16**

**L. 1992, ch. 298 deleted this provision from K.S.A. 21-3518. See PIK 3d 57.05, Indecent Liberties with a Child and PIK 3d 57.06, Aggravated Indecent Liberties with a Child.**

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**57.22 AGGRAVATED SEXUAL BATTERY - DWELLING**

**L. 1992, ch. 298 deleted this provision from K.S.A. 21-3518. See PIK 3d 59.17, Burglary and PIK 3d 59.18, Aggravated Burglary.**

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**57.23 AGGRAVATED SEXUAL BATTERY - VICTIM  
UNCONSCIOUS OR PHYSICALLY POWERLESS**

The defendant is charged with the crime of aggravated sexual battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally touched the person of \_\_\_\_\_;
2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;
3. That \_\_\_\_\_ was then 16 or more years of age;
4. That the touching was done without the consent of \_\_\_\_\_ under circumstances when \_\_\_\_\_ was (unconscious) (physically powerless); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3518(a)(2). Aggravated sexual battery is a severity level 5, person felony.

**Comment**

See Comment to PIK 3d 57.20, Aggravated Sexual Battery - Force or Fear.

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**57.24 AGGRAVATED SEXUAL BATTERY - MENTAL DEFICIENCY OF VICTIM**

The defendant is charged with the crime of aggravated sexual battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally touched the person of \_\_\_\_\_;
2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;
3. That \_\_\_\_\_ was then 16 or more years of age;
4. That the touching was done without the consent of \_\_\_\_\_ under circumstances when \_\_\_\_\_ was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by or was reasonably apparent to the defendant; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3518(a)(3). Aggravated sexual battery is a severity level 5, person felony.

**Comment**

See Comment to PIK 3d 57.20, Aggravated Sexual Battery - Force or Fear.

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**57.25 AGGRAVATED SEXUAL BATTERY -  
INTOXICATION**

The defendant is charged with the crime of aggravated sexual battery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally touched the person of \_\_\_\_\_;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or another;
3. That \_\_\_\_\_ was then 16 or more years of age;
4. That the touching was done without the consent of \_\_\_\_\_ under circumstances when \_\_\_\_\_ was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3518(a)(3). Aggravated sexual battery is a severity level 5, person felony.

**Comment**

See Comment to PIK 3d 57.20, Aggravated Sexual Battery - Force or Fear.

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PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 58.00

CRIMES AFFECTING FAMILY  
RELATIONSHIPS AND CHILDREN

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**58.01 BIGAMY**

**The defendant is charged with the crime of bigamy.  
The defendant pleads not guilty.**

**To establish this charge, each of the following claims  
must be proved:**

- 1. That the defendant entered into a marriage in the  
State of Kansas while married to another; and  
or  
That the defendant entered into a marriage in the  
State of Kansas with a person the defendant knew  
was the spouse of another; and  
or  
That the defendant, after entering into a marriage  
in another state or country, cohabited within the  
State of Kansas with a spouse while married to  
another at the time of the cohabitation; and  
or  
That the defendant, after entering into a marriage  
in another state or country, cohabited within the  
State of Kansas with a spouse whom the defendant  
knew was a spouse of another at the time of the  
cohabitation; and**
- 2. That this act occurred on or about the \_\_\_\_ day  
of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_  
County, Kansas.**

**Notes on Use**

For authority, see K.S.A. 21-3601(a). Bigamy is a severity level 10,  
nonperson felony.



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**58.02 AFFIRMATIVE DEFENSE TO BIGAMY**

**It is a defense to the charge of bigamy that at the time of the (marriage) (cohabitation) the defendant reasonably believed that the earlier marriage had been dissolved by (death) (divorce) (annulment).**

**This belief must have been based on circumstances which would have led a reasonable person to conclude that the earlier marriage had been dissolved.**

**Notes on Use**

For authority, see K.S.A. 21-3601(b). This instruction should be given whenever there is evidence that the defendant believed an earlier marriage was dissolved. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be used.

**Comment**

For discussion of "reasonable belief", see *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

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58.03 INCEST

The defendant is charged with the crime of incest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (married) (engaged in sexual intercourse with) (engaged in sodomy with) \_\_\_\_\_;
2. That \_\_\_\_\_ was a person 18 or more years of age;
3. That \_\_\_\_\_ was known to the defendant to be related to the defendant as biological (parent) (child) (grandparent of any degree) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

(Sexual intercourse) (sodomy) means: \_\_\_\_\_.

Notes on Use

For authority, see K.S.A. 21-3602. Incest is a severity level 10, person felony.

Reference should be made to PIK 3d 57.02, Sexual Intercourse - Definition, for a definition of sexual intercourse, or PIK 3d 57.18, Sex Offenses - Definitions, for a definition of sodomy.

Comment

It is the Committee's opinion that the words "otherwise lawful" are intended to distinguish this crime from other offenses and are not necessary in the instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**58.04 AGGRAVATED INCEST**

The defendant is charged with the crime of aggravated incest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant married \_\_\_\_\_;
2. That \_\_\_\_\_ was under 18 years of age;

OR

1. That the defendant engaged in (sexual intercourse) (sodomy) with \_\_\_\_\_;

or

That the defendant (engaged in lewd fondling or touching of the person of \_\_\_\_\_) (submitted to lewd fondling or touching of [his][her] person by \_\_\_\_\_) with the intent to arouse or to satisfy the sexual desires of either \_\_\_\_\_ or the defendant, or both;

2. That \_\_\_\_\_ was at least 16 years old but under 18 years old;
3. That the defendant knew that \_\_\_\_\_ was related to defendant as ([biological] [adopted] [step]) ([child] [grandchild of any degree] [brother] [sister] [half-brother] [half-sister] [uncle] [aunt] [nephew] [niece]); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

(Sexual intercourse) (sodomy) (lewd fondling or touching) means: \_\_\_\_\_.

Notes on Use

For authority, see K.S.A. 21-3603. Aggravated incest is a severity level 7, person felony, except when it results from otherwise lawful sexual intercourse or sodomy which is a severity level 5, person felony.

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Reference should be made to PIK 3d 57.02, Sexual Intercourse - Definition, for a definition of sexual intercourse, or PIK 3d 57.18, Sex Offenses - Definitions, for a definition of sodomy.

### Comment

It is the Committee's opinion that the words "otherwise lawful" are intended to distinguish this crime from other offenses and are not necessary in the instruction.

Lewd fondling or touching has been defined as: "fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person and which is done with a specific intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977). Also refer to PIK 3d 57.05, Indecent Liberties with a Child, Notes on Use.

In *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), the Supreme Court compared the then existing elements of aggravated incest and indecent liberties with a child. The Court held that when a defendant is related to the victim as set forth in K.S.A. 21-3603(a), the State may charge the defendant with aggravated incest for engaging in the acts prohibited therein but not with indecent liberties with a child. 250 Kan. at 737. Section 15 of 1993 Senate Bill No. 170 amended K.S.A. 21-3603 so that it covers sexual acts with children between the ages of 16 and 18. Sexual acts with children under 16 are addressed by other sex offenses.

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.05 ABANDONMENT OF A CHILD

The defendant is charged with the crime of abandonment of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (parent) (guardian) of \_\_\_\_\_;  
or  
That the defendant was a person to whom the care and custody of \_\_\_\_\_ had been entrusted;
2. That the defendant left \_\_\_\_\_ in a place where \_\_\_\_\_ might suffer because of neglect;
3. That the defendant left \_\_\_\_\_ with the intent to abandon \_\_\_\_\_;
4. That at the time \_\_\_\_\_ was under 16 years of age; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3604. Abandonment of a child is a severity level 8, person felony.

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**58.05-A AGGRAVATED ABANDONMENT OF A CHILD**

The defendant is charged with the crime of aggravated abandonment of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (parent) (guardian) of \_\_\_\_\_;  
or  
That the defendant was a person to whom the care and custody of \_\_\_\_\_ had been entrusted;
2. That the defendant left \_\_\_\_\_ in a place where \_\_\_\_\_ might suffer because of neglect;
3. That the defendant left \_\_\_\_\_ with the intent to abandon \_\_\_\_\_;
4. That \_\_\_\_\_ suffered great bodily harm because of the abandonment;
5. That at the time \_\_\_\_\_ was under 16 years of age; and
6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3604a. Aggravated abandonment of a child is a severity level 5, person felony.

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### 58.06 NONSUPPORT OF A CHILD

The defendant is charged with the crime of nonsupport of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was (a natural parent) (an adoptive parent) of \_\_\_\_\_ who was under the age of 18 years;
2. That the defendant willfully and without just cause (failed) (neglected) (refused) to provide for the support and maintenance of \_\_\_\_\_ who was then in necessitous circumstances; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Necessitous circumstances means needing the necessities of life, which cover not only basic physical needs, things absolutely indispensable to human existence and decency, but those things also which are in fact necessary to the particular person left without support.

#### Notes on Use

For authority, see K.S.A. 21-3605(a)(1). Nonsupport of a child is a severity level 10, nonperson felony.

#### Comment

Whether the Legislature believed that there was a difference between "without lawful excuse" in the nonsupport of a child provision, K.S.A. 21-3605(a)(1) and "without just cause" in the nonsupport of a spouse provision, K.S.A. 21-3605(b)(1), nonsupport of a spouse, is not known. It is arguable that a juror might have no difficulty understanding what is meant by the term "without just cause", but would have some difficulty in understanding the term "without lawful excuse." Since the Committee does believe that "without just cause" is more understandable to jurors than "without lawful excuse", and since there are no statutory "lawful excuses", it has concluded that "without just cause" should be

## PATTERN INSTRUCTIONS FOR KANSAS 3d

used.

One who is outside the state may be chargeable with nonsupport of a child within this state even though he or she did not know the child was within the state.

It is no defense that the necessities of a child are provided by others. In a factual situation of the latter type, it would appear proper to instruct that "the children should be deemed to be in destitute or necessitous circumstances, if they would have been in such condition had they not been provided for by someone else." *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918); *State v. Knetzer*, 3 Kan. App. 2d 673, 600 P.2d 160 (1979).

Evidence that the defendant failed to provide support during a period of time later than the period of time charged in the information is not admissible. *State v. Long*, 210 Kan. 436, 502 P.2d 810 (1972).

The omission from K.S.A. 21-3605(1) of the term "destitute" does not change existing case law that interprets the phrase "destitute or necessitous circumstances." *State v. Knetzer*, supra.

Necessitous circumstances was defined in *State v. Waller*, 90 Kan. 829, 136 Pac. 215 (1913), and was cited with approved in *State v. Knetzer*, supra.



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### 58.07 NONSUPPORT OF A SPOUSE

The defendant is charged with the crime of nonsupport of a spouse. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was the (wife) (husband) of \_\_\_\_\_;
2. That the defendant willfully and without just cause failed to provide for the support of \_\_\_\_\_, who was in necessitous circumstances; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Necessitous circumstances means needing the necessities of life, which cover not only basic physical needs, things absolutely indispensable to human existence and decency, but those things also which are in fact necessary to the particular person left without support.

#### Notes on Use

For authority, see K.S.A. 21-3605(b)(1). Nonsupport of a spouse is a severity level 10, nonperson felony.

#### Comment

If the support claim is founded upon a common-law marriage, an instruction should be given that common-law marriages are recognized in this State, and as to what is necessary to prove a common-law marriage. The basic elements of a common-law marriage are: (1) capacity of the parties to marry, (2) a present marriage agreement, and (3) a holding out of each other as husband and wife to the public. *Fleming v. Fleming*, 221 Kan. 290, 559 P.2d 329 (1977). The statute makes no reference to that type of marriage.

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**58.08 CRIMINAL DESERTION**

**The statute on which this instruction was based (K.S.A. 21-3606) was repealed effective July 1, 1993.**

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**58.09 ENCOURAGING JUVENILE MISCONDUCT**

The statute on which this instruction was based (K.S.A. 21-3607) was repealed effective July 1, 1978. L. 1978, ch. 123, § 3.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 58.10 ENDANGERING A CHILD

The defendant is charged with the crime of endangering a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally and unreasonably caused or permitted \_\_\_\_\_ to be placed in a situation in which \_\_\_\_\_'s life, body or health might be injured or endangered;
2. That \_\_\_\_\_ was then a child under the age of 18 years; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3608(a). Endangering a child is a class A, person misdemeanor. See K.S.A. 21-3608(b) for exception based on good faith selection of spiritual means for treatment, cure or care of a child.

#### Comment

The constitutionality of K.S.A. 21-3608(1)(b), [now K.S.A. 21-3608(a)] was upheld upon the finding that the purpose of the statute is to prevent people from placing children in situations where their lives and bodies are in imminent peril, and that the statute, given a common-sense interpretation, is not vague. *State v. Fisher*, 230 Kan. 192, 631 P.2d 239 (1981).

In *State v. Walker*, 244 Kan. 275, 768 P.2d 290 (1989), the Supreme Court held that the State is not required to prove that the defendant had any independent legal duty to the child.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**58.10-A AFFIRMATIVE DEFENSE TO ENDANGERING A CHILD**

**If the sole reason for the charge of endangering a child is that defendant relied upon or furnished treatment by spiritual means through prayer in lieu of medical treatment or remedial care of the child, it is a defense to the charge of endangering a child that the defendant in good faith selected and depended upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination.**

**Notes on Use**

For authority, see K.S.A. 21-3608.

This instruction should only be given if the defendant is the parent or guardian of the child. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be used.

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### 58.11 ABUSE OF A CHILD

The defendant is charged with the crime of abuse of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (tortured) (cruelly beat) (inflicted cruel and inhuman bodily punishment upon) \_\_\_\_\_;
2. That \_\_\_\_\_ was a child under the age of 18 years; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3609. Abuse of a child is a severity level 5, person felony.

#### Comment

The words torture, beat, abuse, cruel punishment, or inhuman punishment are not so vague or indefinite as to be unenforceable as a penal statute. *State v. Fahy*, 201 Kan. 366, 440 P.2d 566 (1968).

Abuse of a child is not a lesser offense of aggravated battery and both may be separately charged in the same information, even though they arise out of the same episode or transaction. However, when a conviction is set aside, any new trial is limited to the crime originally charged or, if conviction was on a lesser included offense, the included crime of which the defendant was convicted. Other crimes proven in the first trial, and which could have been but were not charged or relied upon, may not be added as new charges in the new trial. A conviction on the lesser offense of criminal injury to persons which is later vacated because of the statute's unconstitutionality is a bar pursuant to K.S.A. 21-3108(2)(a) to a prosecution for abuse of a child. *In re Berkowitz*, 3 Kan. App. 2d 726, 602 P.2d 99 (1979).

In a felony-murder case, the proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the

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homicide, following *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977). A charge of abuse of a child may meet the *Rueckert* test for merger into a charge of felony-first-degree murder. In *State v. Brown*, 236 Kan. 800, 803, 696 P.2d 954 (1985), the Court stated: "We are not called upon, and do not here decide, whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony-murder."

In *State v. Lucas*, 243 Kan. 462, 759 P.2d 90 (1988), *aff'd on rehearing* 244 Kan. 193, 767 P.2d 1308 (1989), the Court addressed the question left open in *Brown*. The Court concluded that a single instance of assaultive conduct cannot be the underlying felony justifying a charge of felony-murder. Moreover, when a child dies from an act of assaultive conduct, prior acts of abuse cannot be used as the basis for charging felony-murder. See also, *State v. Prouse*, 244 Kan. 292, 297, 767 P.2d 1308 (1989).

In *Lucas*, the Court expressed concern that the *Rueckert* test for merger is misleading. The key is "whether the elements of the underlying felony are so distinct from the homicide so as not to be an ingredient of the homicide." 243 Kan. at 469.

After the *Lucas* and *Prouse* decisions, the Legislature amended K.S.A. 21-3401 to provide that felony murder includes a killing committed in the perpetration of abuse of a child. In 1993, the Legislature included abuse of a child in the list of inherently dangerous felonies for purposes of felony murder. See K.S.A. 21-3436.

K.S.A. 21-3609 does not require a specific intent to injure. *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991).

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**58.12 FURNISHING ALCOHOLIC LIQUOR TO A MINOR**

The defendant is charged with the crime of furnishing alcoholic liquor to a minor. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant directly or indirectly (sold alcoholic liquor to) (bought alcoholic liquor for) (gave alcoholic liquor to) (furnished alcoholic liquor to) \_\_\_\_\_;
2. That \_\_\_\_\_ was a person under the age of 21 years; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3610. Furnishing alcoholic liquor to a minor is a class B, person misdemeanor for which the minimum fine is \$200.

**Comment**

See K.S.A. 41-102 for definitions of alcoholic liquor and minor.

See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986) (knowledge of the age of a minor is not a requirement of the statute).

K.S.A. 21-3610 is not intended to impose civil liability for injuries or death sustained by a minor as a result of having become intoxicated. *Mills v. City of Overland Park*, , 251 Kan. 434, 837 P.2d 370 (1992).

See PIK 3d 58.12-C, Furnishing Alcoholic Beverages to a Minor - Defense, for defense available to licensed retailer, club, drinking establishment or caterer.



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### 58.12-A FURNISHING CEREAL MALT BEVERAGE TO A MINOR

The defendant is charged with the crime of furnishing cereal malt beverage to a minor. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant directly or indirectly (sold cereal malt beverage to) (bought cereal malt beverage for) (gave cereal malt beverage to) (furnished cereal malt beverage to) \_\_\_\_\_  
\_\_\_\_\_;
2. That \_\_\_\_\_ was a person under the age of 21 years; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3610a(a). Furnishing cereal malt beverage to a minor is a class B, person misdemeanor for which the minimum fine is \$200.

#### Comment

K.S.A. 21-3610a(c) and K.S.A. 41-2701 exempts from prosecution under this statute the parents or legal guardians of the minor or ward.

See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986).

See PIK 3d 58.12-D, Furnishing Cereal Malt Beverage to a Minor - Defense, for defense available to licensed retailers.

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**58.12-B FURNISHING ALCOHOLIC BEVERAGES TO A MINOR FOR ILLICIT PURPOSES**

The defendant is charged with the crime of furnishing alcoholic beverages to a minor for illicit purposes. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant directly or indirectly ((sold] [bought] [gave] [furnished]) ((a cereal malt beverage] [an intoxicating liquor]) ((for] [to]) \_\_\_\_\_  
\_\_\_\_\_;
2. That \_\_\_\_\_ was a child under 18 years of age;
3. That the defendant did so with the intent (to commit against \_\_\_\_\_) (to [encourage] [induce] \_\_\_\_\_ to [commit] [participate in]) the crime of (set out the crime as defined in Article 35 of Chapter 21 of Kansas Statutes Annotated or in K.S.A. 21-3602 or 21-3603 and amendments thereto); and
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3610b. Furnishing alcoholic beverages to a minor for illicit purposes is a severity level 9, person felony.

For a definition of "cereal malt beverage", see K.S.A. 41-2701 and amendments thereto.

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**58.12-C FURNISHING ALCOHOLIC LIQUOR TO A  
MINOR - DEFENSE**

**It is a defense to the charge of furnishing alcoholic liquor to a minor that the defendant was a licensed retailer, club, drinking establishment or caterer, or holds a temporary permit, or an employee thereof; that the defendant sold the alcoholic liquor to the person with reasonable cause to believe that the person was 21 or more years of age; and that to purchase the alcoholic liquor, the minor exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document containing a photograph of the minor and purporting to establish that such minor was 21 or more years of age.**

**Notes on Use**

For authority, see K.S.A. 21-3610(d). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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**58.12-D FURNISHING CEREAL MALT BEVERAGE TO A MINOR - DEFENSE**

It is a defense to the charge of furnishing cereal malt beverage to a minor that the defendant was a licensed retailer or an employee thereof; that the defendant sold the cereal malt beverage to the person with reasonable cause to believe that such person was of legal age for consumption of cereal malt beverage; and that to purchase the cereal malt beverage, the person exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document containing a photograph of the minor and purporting to establish that such person was of legal age for consumption of cereal malt beverage.

**Notes on Use**

For authority, see K.S.A. 21-3610a(d). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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**58.13 AGGRAVATED JUVENILE DELINQUENCY**

The defendant is charged with the crime of aggravated juvenile delinquency. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was confined in ( insert name of training or rehabilitation facility ) a (training) (rehabilitation) facility under the jurisdiction of the Department of Social and Rehabilitation Services;
2. That the defendant (ran away) (escaped) from ( insert name of training or rehabilitation facility ) after previously having run away or escaped therefrom;
3. That the defendant is 16 or more years of age;
4. That the defendant has been adjudicated to be a (delinquent or miscreant child under the Kansas Juvenile Code) (juvenile offender under the Kansas Juvenile Offenders Code); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3611. Aggravated juvenile delinquency is a severity level 9, nonperson felony.

**Comment**

A conviction of escape from the State Industrial School for Boys is a prior felony conviction within the purview of the Habitual Criminal Act, *Le Vier v. State*, 214 Kan. 287, 520 P.2d 1325 (1974).

K.S.A. 21-3611 was held constitutional in *State v. Sherk*, 217 Kan. 726, 538 P.2d 1399 (1975).

A defendant may be charged under K.S.A. 21-3611 because of a second escape, although he departs from a hospital while in custody rather than from an institution or facility. *State v. Prüchett*, 222 Kan. 719, 567 P.2d 886 (1977).

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**58.14 CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION**

The defendant is charged with the crime of contributing to a child's (misconduct) (deprivation). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a child under 18 years of age;
2. That the defendant intentionally:
  - (a) (caused) (encouraged) \_\_\_\_\_ to become or remain a child in need of care; and  
or
  - (b) (caused) (encouraged) \_\_\_\_\_ to commit a traffic infraction; and  
or
  - (c) (caused) (encouraged) \_\_\_\_\_ to commit an act which if committed by an adult would be a (felony) (misdemeanor); and  
or
  - (d) (caused) (encouraged) \_\_\_\_\_ to purchase (a parimutuel ticket) (an interest in a parimutuel ticket); and  
or
  - (e) (caused) (encouraged) \_\_\_\_\_ to illegally (purchase) (obtain) (attempt to purchase) (attempt to obtain) alcoholic liquor from any person; and  
or
  - (f) failed to reveal upon inquiry by a uniformed or properly identified law enforcement officer engaged in the performance of such officer's duty, information the defendant had regarding a runaway, with intent to aid the runaway in avoiding detection or apprehension; and

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or

(g) (sheltered) (concealed) a runaway with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers; and

3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Child in need of care means: ( include appropriate definition from K.S.A. 38-1502(a) ). Runaway means: ( include appropriate definition from K.S.A. 21-3612(c) ).

[The elements of \_\_\_\_\_ are as follows: \_\_\_\_\_.]

Notes on Use

For authority, see K.S.A. 21-3612. Contributing to a child's misconduct or deprivation is a class A, nonperson misdemeanor, except that causing or encouraging a child to commit an act which, if committed by an adult would be a felony, is a severity level 7, person felony and sheltering or concealing a runaway (with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers) is a severity level 8, person felony. For a definition of "child in need of care", see K.S.A. 38-1502.

Where the defendant is charged with causing or encouraging a child to commit a criminal act, the elements of such crime should be set forth in the concluding portion of the instruction.

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CHAPTER 59.00

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59.01 THEFT

The defendant is charged with the crime of theft of property of the value of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was the owner of the property;
2. That the defendant (obtained) (exerted) unauthorized control over the property;  
or  
That the defendant obtained control over the property by means of a false statement or representation which deceived \_\_\_\_\_ who had relied in whole or in part upon the false representation or statement of the defendant;  
or  
That the defendant obtained by threat control over property;  
or  
That the defendant obtained control over property knowing the property to have been stolen by another;
3. That the defendant intended to deprive \_\_\_\_\_ permanently of the use or benefit of the property;
4. That the value of the property was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3701. Theft of property of the value of \$25,000 or more is a severity level 7, nonperson felony. Theft of property of the value

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of at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of property of the value of less than \$500 is a class A, nonperson misdemeanor, except that it is a severity level 9, nonperson felony if committed by a person who has within five years immediately preceding commission of the crime, been convicted of theft two or more times.

In a felony theft prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

For a definition of "deprive permanently", see PIK 3d Chapter 53.00, Definitions and Explanation of Terms.

In cases where the State resorts to the statutory presumption of K.S.A. 21-3702 to establish intent to permanently deprive, an instruction on the meaning of *prima facie* is required. See PIK 3d 54.01-B, Presumption of Intent to Deprive, and *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977).

In situations where there is a question in the mind of the prosecutor as to the type of theft to charge under K.S.A. 21-3701, it is permissible to charge in the alternative. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980).

When instructing on the lesser included offense of criminal deprivation of property (PIK 3d 59.04), see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

### Comment

PIK 59.01 is approved in *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976).

In a prosecution for felony theft where value is in issue, an instruction with respect to the element of value and a finding as to value is required. *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975); *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976); *State v. Green* 222 Kan. 729, 567 P.2d 893 (1977).

The Committee believes that no instruction should be given relating to the circumstances of possession of goods proven to have been recently stolen. The statute defining the crime of theft as compared with what was formerly larceny does not require the elements of taking and carrying away. These were elements which the traditional instruction permitted to be inferred against the possessor by the fact of possession.

There is doubt that the principle was ever proper as an instruction. The circumstance of possession of goods recently stolen is a rule of evidence, not a rule of law. Its only application should have been in determining whether as a matter of law there was sufficient evidence to justify submitting the case to the jury. Comment noted and approved in *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

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To convict a defendant of theft under K.S.A. 21-3701(d), the State has the burden of proving that the defendant, at the time he received property, had a belief or reasonable suspicion from all the circumstances known to him that the property was stolen, and that the act was done with intent to deprive the owner permanently of the possession, use, or benefit of his property. Although PIK 59.01 was approved, additional instruction was required to fully inform the jury of the elements of the offense. *State v. Bandt*, 219 Kan. 816, 549 P.2d 936 (1976). PIK 3d 59.01-A should be used with PIK 3d 59.01 in possession of stolen property cases.

*State v. Finch*, 223 Kan. 398, 573 P.2d 1048 (1978), requires the State to prove in a theft-by-deception prosecution, pursuant to K.S.A. 21-3701(b), that the victim was deceived by reliance in whole or in part upon the false statement. See also, *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

More recent cases relating to the deception and the reliance necessary for a K.S.A. 21-3701(b) violation are: *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980), where concealment of merchandise in a toy box was deceptive because the cashier was unaware of the concealed merchandise, and *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

In *State v. Keeler*, 238 Kan. 356 Syl. ¶ 8, 710 P.2d 1279 (1985), the Court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 1984 Supp. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved." See also, *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

In *State v. Ringi*, 238 Kan. 523 Syl. ¶ 2, 712 P.2d 1223 (1986), the Court held: "The charge of theft by deception under K.S.A. 1984 Supp. 21-3701(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3707." In that case, a defendant could be charged with both offenses when they occurred on different days.

In *State v. Hanks*, 10 Kan. App. 2d 666, 708 P.2d 991 (1985), the Court rejected the defendant's arguments that: (1) proof of two prior theft convictions is an element of a class E felony theft which should have been included in the jury instructions, and (2) that "theft" is a lesser included offense of "theft after having been convicted of theft two or more times within the preceding five years."

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the Court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the

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obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

The asportation (carrying away) element of common-law larceny is included within the term "obtain or exert control" by statutory definition contained in K.S.A. 21-3110(12) and does not need to be separately set forth in a theft charge under K.S.A. 21-3701(a) alleging a defendant obtained or exerted unauthorized control over the property. *State v. Freitag*, 247 Kan. 499, 802 P.2d 502 (1990).

Neither theft nor conspiracy to commit theft were intended by the Legislature to be a continuing offense. *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991).

Sales tax is not part of the "value" of unsold retail merchandise stolen from a store. *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814, *rev. denied* 241 Kan. 839 (1987).

An information charging the defendant with felonious theft of 8,434 gallons of regular gasoline in violation of K.S.A. 21-3701, a class E felony, and which did not allege that the defendant had been convicted of theft two or more times in the last five years, when read in its entirety, construed according to common sense, and interpreted to include facts necessarily implied, sufficiently informed the defendant that the value of the gasoline taken was \$150 or more even though not specifically alleged. *State v. Crichton*, 13 Kan. App. 2d 213, 766 P.2d 832, *rev. denied* 244 Kan. 739 (1988).

In *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991), the Court held that, under the facts of the case, convictions for forgery and theft by deception were multiplicitous, applying the second prong of the two-prong test as stated in *State v. Fike*, 243 Kan. 365, 368, 757 P.2d 724 (1988). The Court also held that, under the facts of the case, the delivery of a forged check was an included offense of theft by deception.

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

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### 59.01-A THEFT - KNOWLEDGE PROPERTY STOLEN

**Knowledge that property has been stolen by another must exist at the time control first occurs and may be proven by a showing that the defendant either knew or had a reasonable suspicion from all the circumstances known to the defendant that the property was stolen.**

#### Notes on Use

The instruction should be used with PIK 3d 59.01, Theft, in a prosecution for violation of K.S.A. 21-3701(d), receiving stolen property.

*State v. Bandt*, 219 Kan. 816, 549 P.2d 936 (1976), requires that knowledge of the stolen character of the property exists at the time control first occurs where defendant is charged under K.S.A. 21-3701(d).

#### Comment

Stolen property, once recovered either by the owner or law enforcement officers, is no longer stolen property as contemplated in K.S.A. 21-3701(d). Therefore, one cannot be convicted of theft by obtaining control over stolen property when actual physical possession of the stolen property has been recovered by the owner or by law enforcement officers as agents for the owner, before delivery of the property to the accused. *State v. Sterling*, 230 Kan. 790, 640 P.2d 1264 (1982).

For a discussion of the definition of "obtain" found in K.S.A. 21-3110(11) which relates to K.S.A. 21-3701(d), and a definition of "obtains or exerts control" as found in K.S.A. 21-3110(12) which relates to K.S.A. 21-3701(a), see *State v. Myers*, 6 Kan. App. 2d 906, 908, 636 P.2d 213 (1981).



PATTERN INSTRUCTIONS FOR KANSAS 3d

59.01-B THEFT - WELFARE FRAUD

The defendant is charged with the crime of theft of social welfare assistance of the value of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (obtained) (attempted to obtain) (aided or abetted [ name of applicant or client ] to obtain) assistance in the form of ( describe applicable assistance as defined in K.S.A. 39-702(d) ) to which ( defendant or name of other applicant or client ) was not entitled;
2. That the defendant did so by (means of a willfully false statement or representation) (impersonation) (collusion) (fraudulent device);
3. That the value of the assistance was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 39-720, 39-702(d) and 21-3701. Theft of assistance of the value of \$25,000 or more is a severity level 7, nonperson felony. Theft of assistance of the value of at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of assistance of the value of less than \$500 is a class A, nonperson misdemeanor, except that theft of assistance of the value of less than \$500 is a severity level 9, nonperson felony if committed by a person who has, within five years immediately preceding commission of the crime, been convicted of theft two or more times.

In a felony theft prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the Court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.02 THEFT OF LOST OR MISLAID PROPERTY**

The defendant is charged with the crime of theft of lost or mislaid property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was the lawful owner of the property;
2. That the property was lost or mislaid;
3. That the defendant came into possession of the property;
4. That the defendant (knew) (learned) that \_\_\_\_\_ was the lawful owner of the property;
5. That the defendant failed to take reasonable measures to restore the property to \_\_\_\_\_;
6. That the defendant intended to deprive \_\_\_\_\_ permanently of the use or benefit of the property; and
7. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3703. Theft of lost or mislaid property is a class A, nonperson misdemeanor.

For a definition of "deprive permanently", see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

**Comment**

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime. (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 59.03 THEFT OF SERVICES

The defendant is charged with the crime of theft of services of the value of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally obtained services in the form of \_\_\_\_\_ from \_\_\_\_\_;
2. That the defendant obtained these services by (deception by means of a false statement or representation which deceived \_\_\_\_\_, who relied in whole or in part upon the false representation or statement of the defendant) (threat) (coercion) (stealth) (tampering by [describe the form of tampering ]) (use of a false token or device);
3. That the value of the services obtained was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3704. Theft of services of the value of \$25,000 or more is a severity level 7, nonperson felony. Theft of services of the value of at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of services of the value of less than \$500 is a class A, nonperson misdemeanor.

In a felony theft of services prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft of services if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

Forms of tampering are described in K.S.A. 21-3704(c).

Services is defined in K.S.A. 21-3704(b).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

*State v. Finch*, 223 Kan. 398, 573 P.2d 1048 (1978), requires proof of reliance by the victim upon the false representation or statement of the defendant.

*State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Hamilton*, 6 Kan. App. 2d 646, 631 P.2d 1255 (1981), are additional cases relating to the requirements of "deception" and "reliance" in theft cases.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.04 CRIMINAL DEPRIVATION OF PROPERTY

The defendant is charged with criminal deprivation of property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was the owner of the property in question;
2. That the defendant (obtained) (exerted) unauthorized control over the property without the owner's consent;
3. That the defendant intended to temporarily deprive the owner of the use or benefit of such owner's property; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3705. Criminal deprivation of property is a class A, nonperson misdemeanor. Upon a second or subsequent conviction, the sentence shall be not less than 30 days imprisonment and not less than a \$100 fine, except where such sentence and fine would result in a manifest injustice.

For a definition of "temporarily deprive", see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

When instructing on this crime as a lesser included offense of theft, see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

Comment

In *State v. Keeler*, 238 Kan. 356, Syl. ¶ 8, 710 P.2d 1279 (1985), the Court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved." See also, *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.05 FRAUDULENTLY OBTAINING EXECUTION OF A DOCUMENT**

**The statute upon which this instruction was based (K.S.A. 21-3706) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.06 WORTHLESS CHECK**

The defendant is charged with the crime of giving a worthless check. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to \_\_\_\_\_;  
or  
That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to \_\_\_\_\_;
2. That the defendant knew that there were (no monies or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation;
3. That the defendant intended to defraud \_\_\_\_\_;
4. That the amount of the (check) (order) (draft) was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3707. Giving a worthless check is a severity level 7, nonperson felony if the check, order, or draft is drawn for \$25,000 or more. Giving a worthless check is a severity level 9, nonperson felony if the check, order, or draft is drawn for at least \$500 but less than \$25,000. Giving a worthless check is a class A, nonperson misdemeanor if the check, order, or draft is drawn for less than \$500, except it is a severity level 9, nonperson felony if committed by a person who has been convicted of giving a worthless check two or more times within five years immediately preceding the commission of the



## PATTERN INSTRUCTIONS FOR KANSAS 3d

present crime.

If the amount of the check, order or draft is in issue, it will be necessary to include PIK 3d 59.70 in the jury instruction and to use PIK 3d 68.11, Verdict Form.

Defenses to the charge of giving a worthless check are set forth in PIK 3d 59.07, Worthless Check - Defense.

If an issue exists as to whether the defendant had the intent to defraud and/or knowledge of insufficient funds in, or on deposit, and notice is claimed to have been given the defendant as provided by K.S.A. 21-3707(b), then PIK 3d 59.06-A, should be given and modified accordingly.

### Comment

Presentation for payment at drawee bank is not an element of the offense. *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

Imprisonment for a worthless check offense does not violate either Section 16 in the Bill of Rights of the Kansas Constitution, or the Fourteenth Amendment to the United States Constitution. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Yost*, 232 Kan. 370, 654 P.2d 458 (1982).

For a discussion of the intent of the worthless check statute, K.S.A. 21-3707, what constitutes the gravamen of the offense and the proof required by the defendant to rebut the statutory presumption, see *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

In *State v. Ringi*, 238 Kan. 523, Syl. ¶¶ 1, 2, 712 P.2d 1223 (1986), the Court held: (1) "Under K.S.A. 1984 Supp. 21-3707, it is not necessary for the worthless check or draft to be used to obtain possession of money, merchandise or anything of value in order to constitute the crime of passing a worthless check," and (2) "The charge of theft by deception under K.S.A. 1984 Supp. 21-3707(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3703. A defendant may be charged with both offenses when they occur as separate transactions."

K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing, and delivering of any check, order, or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order, or draft in full upon its presentment. Under the facts of this case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged. *State v. Montgomery*, 14 Kan. App. 2d 577, 796 P.2d 559 (1990).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.06-A STATUTORY PRESUMPTION OF INTENT TO DEFRAUD - KNOWLEDGE OF INSUFFICIENT FUNDS**

Where the defendant's (check) (order) (draft) has been refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds, there is a presumption that the defendant had (the intent to defraud) (knowledge of insufficient funds in, or on deposit with a [bank] [credit union] [savings and loan association] [depository]) where the defendant failed to pay the holder of a (check) (order) (draft) the amount due thereon and a service charge not exceeding \$10 for each (check) (order) (draft) within seven days after notice had been given to the defendant that the (check) (order) (draft) was not paid by the (bank) (credit union) (savings and loan association) (depository).

[There is a presumption that the defendant received the notice that the (check) (order) (draft) was refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds where the notice was deposited as restricted matter in the United States mail, addressed to the defendant at the address which appeared on the (check) (order) (draft).]

The presumption may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the defendant had (the intent to defraud) (knowledge of insufficient funds in, or on deposit with the [bank] [credit union] [savings and loan association] [depository]). This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-3707(b). If an issue exists as to the receipt of written notice given when deposited as restricted matter in the United States mail, the second paragraph should be used, otherwise it should be omitted.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

*State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973), upheld the constitutionality of the statutory presumption of K.S.A. 21-3707(b) which enables the State to establish a *prima facie* case in a worthless check prosecution by proof of failure of payment by a defendant within seven days after notice of non-payment. For further discussion of the constitutionality of statutory presumptions, see *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), and Comment to PIK 3d 54.01 on the matter of shifting the burden on the defendant to produce evidence. A discussion of what constitutes "deposited as restricted matter in the United States mail" is found in *State v. Calhoun*, 224 Kan. 579, 581 P.2d 397 (1978).

*State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976), recognizes that K.S.A. 21-3707(b) is simply a permissive rule of evidence and does not add to the elements of the offense of giving a worthless check.

The mailing of a notice, by certified mail, restricted delivery, addressed to the maker of a check at the address shown thereon, although delivered to one other than the defendant, is sufficient to raise the rebuttable presumption provided by K.S.A. 21-3707(b). *State v. Calhoun*, *supra*.

*Haremza* is cited for the proposition that the statutory presumption created by K.S.A. 21-3707(b) can be rebutted by defendant's knowing that he or she had a reasonable expectation that the check would be paid on presentation. *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.07 WORTHLESS CHECK - DEFENSE**

**It is a defense to the charge of giving a worthless check, order or draft (if it was postdated) (if the person receiving the check, order or draft knew when [he][she] accepted it that there were not sufficient funds on deposit to cover it upon presentation).**

**Notes on Use**

For authority, see K.S.A. 21-3707(c). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.08 HABITUALLY GIVING A WORTHLESS CHECK  
WITHIN TWO YEARS**

The statute upon which this instruction was based (K.S.A. 21-3708) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.09 HABITUALLY GIVING WORTHLESS CHECKS - ON  
SAME DAY**

The statute upon which this instruction was based  
(K.S.A. 21-3708) has been repealed effective July 1, 1993.  
See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.10 CAUSING AN UNLAWFUL PROSECUTION FOR WORTHLESS CHECK**

The defendant is charged with the crime of causing an unlawful prosecution for worthless check. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (filed a complaint before a judge upon which \_\_\_\_\_ was charged with the crime of giving a worthless check) (gave information upon which \_\_\_\_\_ was charged with the crime of giving a worthless check);
2. That the defendant knew when (he)(she) accepted it ((that the [check] [order] [draft] was dated later than the date on which it was actually accepted) (that \_\_\_\_\_ did not have [any] [sufficient] funds on deposit with the \_\_\_\_\_ to make the [check] [order] [draft] good); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3709. Causing an unlawful prosecution is a class A, nonperson misdemeanor and any person convicted of the violation of this statute shall pay the taxable cost of the prosecution.

**Comment**

See K.S.A. 21-3707.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.11 FORGERY - MAKING OR ISSUING A FORGED INSTRUMENT**

The defendant is charged with the crime of forgery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly made, altered or endorsed a \_\_\_\_\_ so it appeared to have been (made) (endorsed) (by \_\_\_\_\_) (at another time) (with different provisions) (by the authority of \_\_\_\_\_, who did not give such authority);

or

That the defendant issued or delivered a \_\_\_\_\_ which (he)(she) knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by \_\_\_\_\_) (with different provisions) (by the authority of \_\_\_\_\_, who did not give such authority);

2. That the defendant did this act with the intent to defraud; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3710(a)(1) and (2). Forgery is a severity level 8, nonperson felony. This instruction should not be used for K.S.A. 21-3710(a)(3).

For a definition of "intent to defraud", see K.S.A. 21-3110(9).

**Comment**

In *State v. Norris*, 226 Kan. 90, 595 P.2d 1110 (1979), K.S.A. 21-3710(a)(1) and (2) were held to be constitutional against a claim of being vague and indefinite.



## PATTERN INSTRUCTIONS FOR KANSAS 3d

In *State v. Hicks*, 11 Kan. App. 2d 76, 714 P.2d 105 (1986), the Court said that although the forgery instruction given was not clearly erroneous, it would have been preferable if the trial court had relied upon the substance of PIK 2d 59.11 to define the elements of forgery.

In *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991), the Court held that, under the facts of the case, convictions for forgery and theft by deception were multiplicitous, applying the second prong of the two-prong test as stated in *State v. Fike*, 243 Kan. 365, 368, 757 P.2d 724 (1988). The Court also held that, under the facts of the case, the delivery of a forged check was an included offense of theft by deception.

A valid debt or claim against the person whose name is forged is not a defense to a charge of forgery. *State v. Meyer*, 17 Kan. App. 2d 59, 832 P.2d 357 (1992).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.12 FORGERY - POSSESSING A FORGED INSTRUMENT**

The defendant is charged with the crime of forgery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant possessed a \_\_\_\_\_ which (he)(she) knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by \_\_\_\_\_) (at another time) (with different provisions) (by the authority of \_\_\_\_\_, who did not give such authority);
2. That the defendant intended to issue or deliver the \_\_\_\_\_;
3. That the defendant did so with the intent to defraud; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3710(a)(3). Forgery is a severity level 8, nonperson felony. This instruction should not be used for K.S.A. 21-3710(a)(1) or (2).

For a definition of "intent to defraud", see K.S.A. 21-3110(9).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 59.13 MAKING A FALSE WRITING

The defendant is charged with the crime of making a false writing. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (made) (caused to be made) a false \_\_\_\_\_;
2. That the defendant knew that such \_\_\_\_\_ (falsely stated or represented some material matter) (was not what it purported to be);
3. That the defendant intended to (defraud) (induce official action) based upon such \_\_\_\_\_; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3711. Making a false writing is a severity level 8, nonperson felony.

#### Comment

See Judicial Council comment to K.S.A. 21-3710.

In *State v. Montgomery*, 14 Kan. App. 2d 577, 796 P.2d 559 (1990), the Court held that K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing and delivering of any check, order or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order or draft in full upon its presentment. Under the facts of the case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged.

In a welfare fraud case, prosecution should be pursuant to the specific welfare fraud statute, K.S.A. 39-720, rather than the general statute for the crime of

## PATTERN INSTRUCTIONS FOR KANSAS 3d

Making a false writing, K.S.A. 21-3711. *State v. Wilcox*, 245 Kan. 76, 775 P.2d 177 (1989). The implications of *Wilcox* were considered in *State v. Jones*, 246 Kan. 180, 787 P.2d 738 (1990), and the Court held that K.S.A. 39-720 had no application to a situation involving theft (K.S.A. 21-3701) from a program or agency not administered by the Department of Social and Rehabilitation Services.

Making a false writing, K.S.A. 21-3711, as opposed to Forgery, K.S.A. 21-3710, involves a person making a false representation, or causing it to be made, while acting within his or her own identity. Forgery involves making an instrument which appears to have been made by another. *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

Knowledge is an essential element of the offense of making a false writing under K.S.A. 21-3711. Knowledge means actual information that the writing falsely states or represents to some material matter and is intended to defraud or induce some official action. Information is considered material under K.S.A. 21-3711 if a reasonable person would attach importance to the information in choosing a course of action in the transaction in question. *State v. Edwards*, 250 Kan. 320, 826 P.2d 1355 (1992).

Intent to defraud, as set forth in K.S.A. 21-3711 and defined by K.S.A. 21-3110(9), requires that the maker of the false writing intended to deceive another person and to induce such person, in reliance upon the deception, to assume, create, transfer, alter, or terminate a right, obligation, or power with reference to property. The making of an instrument to cover up a theft, which crime is unknown to the victim, does not come within the statutory definition of "intent to defraud". *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.14 DESTROYING A WRITTEN INSTRUMENT**

The defendant is charged with the crime of destroying a written instrument. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly destroyed a \_\_\_\_\_ by (tearing) (cutting) (burning) (erasing) (obliterating) in whole or in part;
2. That the defendant did so with the intent to defraud; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3712. Destroying a written instrument is a severity level 9, nonperson felony.

See Judicial Council comment to K.S.A. 21-3710.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.15 ALTERING A LEGISLATIVE DOCUMENT**

The defendant is charged with the crime of altering a legislative document. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (mutilated) (altered) (changed) \_\_\_\_\_;
2. That \_\_\_\_\_ had been introduced into the (House) (Senate) of the State of Kansas;
3. That the defendant had no legal authority to (mutilate) (alter) (change) \_\_\_\_\_; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3713. Altering a legislative document is a severity level 9, nonperson felony.

The document in question should be referred to specifically (*i.e.*, House Bill 1211, Senate Bill 211, House Concurrent Resolution 1074, etc.).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.16 POSSESSION OF FORGERY DEVICES**

The statute upon which this instruction was based (K.S.A. 21-3714) was repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.17 BURGLARY\***

The defendant is charged with the crime of burglary.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure) which is a dwelling;

or

That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure) which is not a dwelling;

or

That the defendant knowingly (entered) (remained in) a (motor vehicle) (aircraft) (watercraft) (railroad car) (describe means of conveyance of persons or property);

2. That the defendant did so without authority;
3. That the defendant did so with the intent to commit (a theft) (\_\_\_\_\_, a felony) (sexual battery) therein; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The elements of \_\_\_\_\_ are (set forth in Instruction No. \_\_\_\_\_) (as follows: \_\_\_\_\_).

**\*Special Advisory:**

In preparing this instruction, the Committee relied on the amendments to K.S.A. 21-3715 contained in 1993 Senate Bill No. 423. The primary purpose of 1993 SB 423 was to reconcile the differences between L. 1992, ch. 239 (sentencing guidelines) and L. 1992, ch. 298 (recodification of criminal code), prior to their effective dates of July 1, 1993.



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For the most part, the 1992 sentencing guidelines legislation amended the substantive offenses by conforming the penalty provisions to the new sentencing scheme under the guidelines. In a limited number of instances, new substantive provisions were adopted. These included burglary. L. 1992, ch. 239, New Sec. 114.

The joint recommendation of the Sentencing Commission and the Judicial Council for reconciling the 1992 versions of burglary was adopted by the Legislature in § 74 of 1993 SB 423. However, through inadvertence, New Sec. 114 of L. 1992, ch. 239 was not repealed.

### Notes on Use

For authority, see K.S.A. 21-3715. Burglary as described in the first alternative paragraph 1 is a severity level 7, person felony. Burglary as described in the second alternative paragraph 1 is a severity level 7, nonperson felony. Burglary as described in the third alternative paragraph 1 is a severity level 9, nonperson felony.

The phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the alternative phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. See PIK 3d 59.18, Aggravated Burglary, Notes on Use.

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

### Comment

It should be noted that the Legislature did not make "breaking" an element of this crime.

A hog pen was held not to be a "structure" within the purview of the burglary statute, K.S.A. 21-3715. *State v. Fisher*, 232 Kan. 760, 658 P.2d 1021 (1983).

The opening of the bay door of a truck and reaching into the bay compartment to remove cases of beer constituted "entry" within the purview of K.S.A. 21-3715. *State v. Zimmerman and Schmidt*, 233 Kan. 151, 660 P.2d 960 (1983).

Where the consent to enter any of the structures or vehicles listed in K.S.A. 21-3715 and 21-3716 is obtained by fraud, deceit or pretense, the entry is not an authorized entry under the statute in that it is based on an erroneous or mistaken consent. Any such entry is unauthorized and when accompanied by the requisite intent is sufficient to support a burglary or aggravated burglary conviction. *State v. Maxwell*, 234 Kan. 393, 672 P.2d 590 (1983).

An information which charges burglary is defective in form unless it specifies the felony intended by an accused in making the unauthorized entry. However, if the felony intended in a burglary is made clear at the preliminary hearing or

## PATTERN INSTRUCTIONS FOR KANSAS 3d

by the context of the other charge or charges in the information, the failure to allege the specific intended felony does not constitute reversible error. Such failure cannot result in surprise or be considered prejudicial to the defendant's substantial rights at trial when the intended felony was made clear in advance of trial. *State v. Maxwell*, supra.

In a prosecution for burglary, the manner of the entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation, if any, are all relevant in determining whether the intruder intended to commit a theft. The intent with which any entry is made is rarely susceptible of direct proof; it is usually inferred from the surrounding facts and circumstances. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984).

In a burglary prosecution, the elements of "intent to commit a felony or theft therein" and "without authority entering into or remaining within" are separate and distinct. The question of whether defendant had authority to enter the premises is to be resolved without reference to his intent at the time of entry. *State v. Harper*, 246 Kan. 14, 785 P.2d 1341 (1990).

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**59.18 AGGRAVATED BURGLARY**

The defendant is charged with the crime of aggravated burglary. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly [(entered) (remained in)] [(a building) (a manufactured home) (a mobile home) (a tent) (describe type of structure) (a motor vehicle) (an aircraft) (a watercraft) (a railroad car) (describe means of conveyance of persons or property)];
2. That the defendant did so without authority;
3. That the defendant did so with the intent to commit (a theft) ( \_\_\_\_\_, a felony) (sexual battery) therein;
4. That at the time there was a human being in (describe structure or conveyance); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

The elements of \_\_\_\_\_ are (set forth in Instruction No. \_\_\_\_\_) (as follows: \_\_\_\_\_).

**Notes on Use**

For authority, see K.S.A. 21-3716. Aggravated burglary is a severity level 5, person felony.

As used in K.S.A. 21-3716, the phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. *State v. Brown*, 6 Kan. App. 2d 556, 630 P.2d 731 (1981). See also, *State v. Mogenson*, 10 Kan. App. 2d 470, 473, 701 P.2d 1339 (1985), which cites this note with approval. When a person enters the premises after the burglary has commenced but before the defendant has left the premises, the offense constitutes aggravated burglary.

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The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

### Comment

It should be noted that the Legislature did not make "breaking" an element of this crime.

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

In *State v. Walters*, 8 Kan. App. 2d 237, 655 P.2d 947 (1982), K.S.A. 21-3716 was held to be constitutional in that it did not violate due process or equal protection requirements by allowing for a conviction of aggravated burglary even if a burglar has no knowledge of the presence of another in the structure the burglar is entering.

The crime of aggravated burglary occurs whenever a human being is present in a building during the course of the burglary. An information that charges the offense of aggravated burglary need not specify the point in time at which a victim was present, so long as it alleges that a human being was present sometime during the course of the burglary. *State v. Reed*, 8 Kan. App. 2d 615, 663 P.2d 680 (1983).

When aggravated burglary is based upon the unlawful act of "remaining without authority" after a lawful entry, intent may be formed at the time of the lawful entry or after consent to an otherwise lawful entry has been withdrawn. *State v. Mogenson*, 10 Kan. App. 2d 470, 701 P.2d 1339 (1985).

In *State v. Holcomb*, 240 Kan. 715, 732 P.2d 1272 (1987), the Court held that it was not multiplicitous to charge the defendant with aggravated burglary and aggravated robbery arising from a single transaction because each offense requires proof of facts not required to prove the other. See *State v. Higgins*, 243 Kan. 48, 755 P.2d 12 (1988).

The aggravated burglary requirement under K.S.A. 21-3716 that a burglarized building be occupied should be broadly interpreted to include multi-unit structures in which there is a possibility of contact between the victim and the burglar. *State v. Dorsey*, 13 Kan. App. 2d 286, 769 P.2d 38, rev. denied 244 Kan. 739 (1989).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992).

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**59.19 POSSESSION OF BURGLARY TOOLS**

The statute upon which this instruction was based (K.S.A. 21-3717) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

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59.20 ARSON

The defendant is charged with the crime of arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally damaged the (building) (property) of \_\_\_\_\_ by means of (fire) (an explosive);  
or  
That the defendant intentionally damaged a (building) (property) in which \_\_\_\_\_ had an interest, and that defendant did so by means of (fire) (an explosive);
2. That the defendant did so without the consent of \_\_\_\_\_; and
3. That the property damage was (\$50,000 or more) (at least \$25,000 but less than \$50,000) (less than \$25,000); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3718(a)(1). Arson is a severity level 5, nonperson felony if the damage is \$50,000 or more. If the damage is at least \$25,000 but less than \$50,000, it is a severity level 6, nonperson felony. If the damage is less than \$25,000, it is a severity level 7, nonperson felony. This instruction should not be used for crimes charged under K.S.A. 21-3718(a)(2). If the amount of damages is in issue, include PIK 3d 59.70 in the jury instructions and use PIK 3d 68.11, Verdict Form.

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

Under K.S.A. 21-3718(a)(1), the State must prove that the defendant knowingly

## PATTERN INSTRUCTIONS FOR KANSAS 3d

damaged a building and that another person had some interest in that building. The State is not required to prove the defendant knew who owned the building. *State v. Powell*, 9 Kan. App. 2d 748, 687 P.2d 1375 (1984).

In *State v. Johnson*, 12 Kan. App. 2d 239, 738 P.2d 872, *rev. denied* 242 Kan. 905 (1987), the Court held that "any interest" as used in K.S.A. 21-3718(a)(1) includes a leasehold interest in real property.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.21 ARSON - DEFRAUD AN INSURER OR LIENHOLDER**

The defendant is charged with the crime of arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally damaged \_\_\_\_\_ by means of (fire) (an explosive);
2. That \_\_\_\_\_ was an insurer of the (building) (property);  
or  
That \_\_\_\_\_ had an interest in the (building) (property) because (he)(she) had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) \_\_\_\_\_; and
4. That the property damage was (\$50,000 or more) (at least \$25,000 but less than \$50,000) (less than \$25,000); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3718(a)(2). Arson is a severity level 5, nonperson felony if the damage is \$50,000 or more. If the damage is at least \$25,000 but less than \$50,000, it is a severity level 6, nonperson felony. If the damage is less than \$25,000, it is a severity level 7, nonperson felony. This section should not be used for K.S.A. 21-3718(a)(1).

If the amount of damage is in issue, include PIK 3d 59.70 in the jury instructions, and use PIK 3d 68.11, Verdict Form.

**Comment**

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).



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59.22 AGGRAVATED ARSON

The defendant is charged with the crime of aggravated arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally damaged the (building) (property) of \_\_\_\_\_ by means of (fire) (an explosive);

or

That the defendant intentionally damaged a (building) (property) in which \_\_\_\_\_ had an interest, and that defendant did so by means of (fire) (explosive);

2. That the defendant did so without the consent of \_\_\_\_\_;

OR

1. That the defendant intentionally damaged \_\_\_\_\_ by means of (fire) (an explosive);

2. That \_\_\_\_\_ was an insurer of the (building) (property);

or

That \_\_\_\_\_ had an interest in the (building) (property) because (he)(she) had a lien thereon;

3. That the defendant did so with the intent to (injure) (defraud) \_\_\_\_\_; and

(3.) or (4.) That at the time there was a human being in the (building) (property); and

(4.) or (5.) That the (fire) (explosive) resulted in a substantial risk of bodily harm; and

(4.) (5.) or (6.) That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

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### Notes on Use

For authority, see K.S.A. 21-3719. Aggravated arson resulting in a substantial risk of bodily harm is a severity level 3, person felony. Aggravated arson not resulting in substantial risk of bodily harm is a severity level 6, person felony.

When defendant has been charged with aggravated arson resulting in a substantial risk of bodily harm, the bracketed element should be included in the instruction. If there is an issue as to the seriousness of the risk, an instruction and verdict form to the following effect should also be given:

The State has the burden of proof as to the risk of bodily harm which the defendant allegedly caused.

The State claims that the conduct of the defendant resulted in a substantial risk of bodily harm.

It is for you to determine whether or not the conduct of defendant resulted in a substantial risk of bodily harm and to so indicate on the verdict form furnished:

We, the jury, find the defendant guilty of aggravated arson and find the conduct of defendant resulted in:

a substantial risk of bodily harm

no substantial risk of bodily harm

(Place an X in the appropriate square.)

---

Presiding Juror

PIK 3d 68.03, Not Guilty Verdict - General Form, must be used with this special verdict form.

### Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

A dead person is not a "human being" within the meaning of K.S.A. 21-3719. *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993).

In *State v. Johnson*, 12 Kan. App. 2d 239, 738 P.2d 872, *rev. denied* 242 Kan. 905 (1987), the Court held that "any interest" in K.S.A. 21-3718(a)(1) includes a leasehold interest in real property.

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**59.23 CRIMINAL DAMAGE TO PROPERTY - WITHOUT CONSENT**

The defendant is charged with criminal damage to property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was (the owner of property described as \_\_\_\_\_) (had an interest as a \_\_\_\_\_ in property described as \_\_\_\_\_);
2. That the defendant intentionally (damaged) (injured) (mutilated) (defaced) (destroyed) (substantially impaired the use of) the property by means other than by fire or explosive;
3. That the defendant did so without the consent of \_\_\_\_\_;
4. That the property was damaged to the extent of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3720(a)(1). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$500 but less than \$25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than \$500 or is of the value of \$500 or more and is damaged to the extent of less than \$500.

Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

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See PIK Civil 2d, Chapter 9 for instructions as to property damage and value.

### Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than \$500, then the defendant cannot be convicted of a felony. The preceding two sentences may be made the basis for an instruction, if needed.

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than \$50, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

Criminal damage to property is not a lesser included offense of theft. *State v. Shoemaker*, 228 Kan. 572, 618 P.2d 1201 (1980).

It is doubtful if a charge under K.S.A. 21-3720(a)(1) is a lesser included offense of arson. Where the cause of damage is in issue, a charge in the alternative may be appropriate. Cases supporting this view are: *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974); *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate or required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

The sole distinction between Criminal damage to property, K.S.A. 21-3720 and Arson, K.S.A. 21-3718, is that arson proscribes knowingly damaging another person's property by means of fire or explosive and criminal damage to property proscribes willfully damaging another person's property by means other than by fire or explosive. That the damages to property of another was brought about by means other than by fire or explosive is an essential element of Criminal damage to property K.S.A. 21-3720. *Zapata v. State*, 14 Kan. App. 2d 94, 782 P.2d 1251 (1989).

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In *State v. Jones*, 247 Kan. 537, 802 P.2d 533 (1990), the criminal damage to property involved the breaking of windows in a 1977 Dodge car. The Supreme Court held that, for purposes of determining if the offense was a felony or misdemeanor, the value of damage was the cost of replacement plus installation, not to exceed the total value of the car. Since the State failed to present evidence to establish the value of the car, the Supreme Court reversed the felony convictions of criminal damage to property.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.24 CRIMINAL DAMAGE TO PROPERTY - WITH  
INTENT TO DEFRAUD AN INSURER OR  
LIENHOLDER**

The defendant is charged with criminal damage to property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (damaged) (defaced) \_\_\_\_\_ by means other than by fire or explosive;
2. That \_\_\_\_\_ was an insurer of the property;  
or  
That \_\_\_\_\_ had an interest in the property because (he)(she) had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) \_\_\_\_\_;
4. That the property was damaged to the extent of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3720(a)(2). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$500 but less than \$25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than \$500 or is of the value of \$500 or more and is damaged to the extent of less than \$500.

Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

This instruction should not be used for K.S.A. 21-3720(a)(1).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

See PIK Civil 2d, Chapter 9 for instructions as to property damage and value.

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate nor required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

### Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than \$500, then the defendant cannot be convicted of a felony. The preceding two sentences may be the basis for an instruction, if needed.

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**59.25 CRIMINAL TRESPASS**

The defendant is charged with criminal trespass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ (was the owner) (had authorized control) of the property;
2. That the property was (locked) (fenced) (enclosed) (shut) (secured against passage or entry);  
or  
That there was a sign informing persons not to enter the property, which sign was placed in a manner reasonably to be seen;  
or  
That the defendant was told (not to enter) (to leave) the property by the owner or other authorized person;  
or  
That the defendant had been restrained and personally served by a court order from (entering into) (remaining on) the property;
3. That the defendant intentionally, without authority, (entered into) (remained on) the property; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3721. Criminal trespass is a class B, nonperson misdemeanor. Property under this section can be any land, nonnavigable body of water, structure, vehicle, aircraft or watercraft.



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**59.25-A CRIMINAL TRESPASS - HEALTH CARE FACILITY**

The defendant is charged with criminal trespass involving a health care facility. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant entered or remained (upon) (in) (identify the public or private land or structure involved) in a manner that interfered with access to or from a health care facility;
2. That the defendant knew (he)(she) was not (authorized) (privileged) to do so;
3. That the defendant entered or remained (upon) (in) such (land) (structure) in defiance of an order (not to enter) (to leave) the (land) (structure) personally communicated to defendant by (the owner of the health care facility) (an authorized person); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3721(a)(2). Criminal trespass involving a health care facility is a class B, nonperson misdemeanor.

"Health care facility" means any licensed medical care facility, certificated health maintenance organization, licensed mental health center, or mental health clinic, licensed psychiatric hospital or other facility or office where services of a health care provider are provided directly to patients. K.S.A. 21-3721(b)(1).

"Health care provider" means any person: (A) licensed to practice a branch of the healing arts; (B) licensed to practice psychology; (C) licensed to practice professional or practical nursing; (D) licensed to practice dentistry; (E) licensed to practice optometry; (F) licensed to practice pharmacy; (G) registered to practice podiatry; (H) licensed as a social worker; or (I) registered to practice physical therapy. K.S.A. 21-3721(b)(2).

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**59.26 LITTERING - PUBLIC**

The defendant is charged with the crime of littering.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally or recklessly (deposited) (caused to be deposited) \_\_\_\_\_ (on) (in) a public \_\_\_\_\_;
2. That the defendant was acting without the permission of any public officer or public employee who had authority to grant such permission; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3722(a). Littering is class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.27 LITTERING - PRIVATE PROPERTY**

The defendant is charged with the crime of littering.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally or recklessly [(deposited) (caused to be deposited)] [object or substance] on private property;
2. That the defendant was acting without the permission of \_\_\_\_\_, (the owner) (the occupant) of the property; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3722(b). Littering is class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.28 TAMPERING WITH A LANDMARK**

The defendant is charged with the crime of tampering with a landmark. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant removed a marker designating a boundary for real estate;  
or  
That the defendant (defaced) (altered) marks made for the purpose of designating a boundary for real estate;  
or  
That the defendant (cut down) (removed) \_\_\_\_\_, which had marks upon it to designate a boundary for real estate;  
or  
That the defendant (altered) (removed) (damaged) (destroyed) a public land survey corner or accessory and failed to comply with the Land Survey Act by (state act or omission whereby K.S.A. 58-2011 was violated);
2. That the defendant did so willfully and maliciously; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3724(a), (b), (c) and (f). Tampering with a landmark is a class C misdemeanor.

This section should not be used for K.S.A. 21-3724(d) or (e).

When using paragraph four of Element No. 1, the applicable act or omission should be stated.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

K.S.A. 58-2005 to 58-2011 were enacted to provide for the restoration and replacement of certain land survey corners and accessories. K.S.A. 21-3724 was amended by the addition of section (f) to provide criminal sanctions for noncompliance.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.29 TAMPERING WITH A LANDMARK - HIGHWAY SIGN OR MARKER**

The defendant is charged with the crime of tampering with a landmark. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (broke) (destroyed) (removed) (defaced) a (milepost) (milestone) (highway sign) (road sign);  
or  
That the defendant (defaced) (altered) the (words) (marking) on a \_\_\_\_\_ sign;
2. That the \_\_\_\_\_ (was) (is) on a public highway or public road;
3. That the \_\_\_\_\_ was placed there by authority of the law;
4. That the defendant did so willfully and maliciously; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3724(d) and (e). Tampering with a landmark is a class C misdemeanor.

This section should not be used for K.S.A. 21-3724(a), (b), (c) and (f).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.30 TAMPERING WITH A TRAFFIC SIGNAL**

The defendant is charged with the crime of tampering with a traffic signal. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manipulated) (altered) (destroyed) (removed) a \_\_\_\_\_;
2. That the \_\_\_\_\_ was for the purpose of controlling or directing the movement of (motor vehicles) (railroad trains) (aircraft) (watercraft); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3725. Tampering with a traffic signal is a class C misdemeanor.

**Comment**

K.S.A. 21-3725 was amended to include railroad switching devices in 1975.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.31 AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL**

The defendant is charged with the crime of aggravated tampering with a traffic signal. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manipulated) (altered) (destroyed) (removed) a \_\_\_\_\_;
2. That the \_\_\_\_\_ was for the purpose of controlling or directing the movement of (motor vehicles) (railroad trains) (aircraft) (watercraft);
3. That the act of the defendant resulted in an accident (causing the death of \_\_\_\_\_) (causing great bodily injury to \_\_\_\_\_);

or

That the act of the defendant could have resulted in an accident which would have caused death or great bodily injury to a human being; and

4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3726. Aggravated tampering with a traffic signal is a severity level 7, nonperson felony.

**Comment**

The resulting accident need not now be a "traffic" accident, as formerly required. K.S.A. 21-3726.



PATTERN INSTRUCTIONS FOR KANSAS 3d

59.32 INJURY TO A DOMESTIC ANIMAL

The defendant is charged with the crime of injuring a domestic animal. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant willfully and maliciously administered a poison to a \_\_\_\_\_, a domestic animal;  
or  
That the defendant willfully and maliciously exposed a poison in such a way that it could be taken or swallowed by any domestic animal;  
or  
That the defendant willfully and maliciously (killed) (maimed) (wounded) a \_\_\_\_\_, a domestic animal;
2. That the owner of the domestic animal was \_\_\_\_\_ and that the owner did not consent to the defendant's acts; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3727. Injury to a domestic animal is a class A, nonperson misdemeanor.

The cruelty or neglect of animals in custody may be prosecuted under K.S.A. 21-4310. See PIK 3d 65.15, Cruelty to Animals.

Comment

The exceptions under K.S.A. 21-4310(g) do not apply to a prosecution under K.S.A. 21-3727. *State v. Jones*, 229 Kan. 528, 625 P.2d 503 (1981).

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**59.33 CRIMINAL HUNTING**

The defendant is charged with criminal hunting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant [(hunted) (shot) (trapped) (pursued a bird or animal) (fished)] [(upon the land) (on a nonnavigable body of water) of another] [(upon) (from)] [(a public road or road right-of-way that adjoins occupied or improved land) (from a railroad right-of-way that adjoins occupied or improved land)];
2. That the defendant did not have permission of \_\_\_\_\_, the (owner) (person in possession) of the land in question; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3728. Criminal hunting is a class C misdemeanor.

It is a defense to criminal hunting if a person licensed to hunt follows or pursues a wounded game bird or animal on to the land of another. See PIK 3d 59.33-B, Criminal Hunting - Defense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.33-A UNLAWFUL HUNTING - POSTED LAND**

The defendant is charged with the crime of hunting on posted land. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant ([shot] [hunted] [pursued]) ([a bird] [an animal]) upon the land of another;
2. That \_\_\_\_\_ was (the owner) (the person lawfully in possession) of the land, and had posted the land with signs stating that hunting on the land shall be by written permission only;
3. That the defendant did not have in (his)(her) possession written permission to ([shoot] [hunt] [pursue]) ([a bird] [an animal]) from \_\_\_\_\_, (the owner) (the person in possession) of the land in question; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 32-1013(a). Unlawful hunting upon posted land is a class C misdemeanor.

It is a defense to a charge of unlawful hunting on posted land if a person licensed to hunt follows a wounded bird or animal on the posted land.

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**59.33-B CRIMINAL HUNTING - DEFENSE**

**It is a defense to the charge of criminal hunting that the defendant went upon the land of another while following or pursuing a wounded (bird) (animal).**

**Notes on Use**

For authority, see K.S.A. 21-3721 and K.S.A. 21-3728. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

The defense of pursuit of a wounded bird or animal is permitted in situations involving criminal hunting, as well as unlawful hunting on posted land.

It is not a defense to the charge if a person fails to leave such land when so instructed by the landowner or person in lawful possession. K.S.A. 32-1013(b).

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**59.34 CRIMINAL USE OF FINANCIAL CARD OF ANOTHER**

The defendant is charged with criminal use of a financial card of another. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant used a \_\_\_\_\_ financial card;
2. That the cardholder, \_\_\_\_\_, had not consented to the use of the financial card by the defendant;
3. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500) between \_\_\_\_\_, 19\_\_\_\_\_, and \_\_\_\_\_, 19\_\_\_\_\_; and
6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3729(a)(1). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$500 but less than \$25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than \$500.

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If value is in issue, use PIK 3d 68.11, Verdict Forms - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder", see K.S.A. 21-3729(b)(1) and (2), respectively.

### Comment

Using the number taken off a stolen financial card constitutes criminal use of a financial card as prohibited by K.S.A. 21-3729(a)(1). PIK 59.34 cited *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.35 CRIMINAL USE OF FINANCIAL CARD -  
CANCELLED**

The defendant is charged with criminal use of a financial card which had been revoked or cancelled. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly used \_\_\_\_\_, a financial card or number which had been revoked or cancelled;
2. That the defendant had received written notice that the financial card was revoked or cancelled;
3. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500) between \_\_\_\_\_, 19\_\_\_\_, and \_\_\_\_\_, 19\_\_\_\_; and
6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3729(a)(2). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$500 but less than \$25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services

## PATTERN INSTRUCTIONS FOR KANSAS 3d

obtained *within a 7-day period* are of the value of less than \$500.

If value is in issue, use PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder", see K.S.A. 21-3729(b)(1) and (2), respectively.



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**59.36 CRIMINAL USE OF FINANCIAL CARD - ALTERED OR NONEXISTENT**

The defendant is charged with criminal use of a financial card which had been (altered) (nonexistent). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant used a \_\_\_\_\_ financial card that had been (falsified) (mutilated) (altered);  
or  
That the defendant used a nonexistent financial card number as if the same were a valid financial card number;
2. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);
3. That the defendant did so with the intent to defraud;
4. That the financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500) between \_\_\_\_\_, 19\_\_\_\_, and \_\_\_\_\_, 19\_\_\_\_; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3729(a)(3). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$500 but less than \$25,000. Criminal use of a financial card is a class A, nonperson

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misdeemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than \$500.

If value is in issue, use PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder", see K.S.A. 21-3729(b)(1) and (2), respectively.

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**59.37 UNLAWFUL MANUFACTURE OR DISPOSAL OF FALSE TOKENS**

The defendant is charged with the crime of unlawful manufacture or disposal of false tokens. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (manufactured for sale) (offered for sale) (gave away) false \_\_\_\_\_ calculated to be used in a coin-operated machine or equipment;
2. That the defendant did so with the intent to cheat the operator of a coin-operated machine or equipment; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3730. Unlawful manufacture or disposal of false tokens is a class B, nonperson misdemeanor.

The use of a false token to obtain goods or services is theft, PIK 3d 59.01, and does not fall within the purview of this section.

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**59.38 CRIMINAL USE OF EXPLOSIVES**

The defendant is charged with criminal use of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (had in [his][her] possession) (manufactured) (transported) \_\_\_\_\_, which the defendant intended to use to commit a crime;  
or  
That the defendant delivered \_\_\_\_\_ to \_\_\_\_\_ knowing that \_\_\_\_\_ intended to commit a crime;
2. That \_\_\_\_\_ is (an explosive) (a combustible substance); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3731. Criminal use of explosive is a severity level 8, person felony.

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**59.39 POSSESSION OR TRANSPORTATION OF  
INCENDIARY OR EXPLOSIVE DEVICE**

The statute on which this instruction was based (K.S.A. 21-3732) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97. The substance of the repealed statute now appears in K.S.A. 21-4201(a)(9).

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**59.40 CRIMINAL USE OF NOXIOUS MATTER**

The statute on which this instruction was based (K.S.A. 21-3733) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

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**59.41 IMPAIRING A SECURITY INTEREST -  
CONCEALMENT OR DESTRUCTION**

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (damaged) (destroyed) (concealed) \_\_\_\_\_;
2. That \_\_\_\_\_ was security for a debt owed to \_\_\_\_\_;
3. That the defendant did so with the intent to defraud the secured party;
4. That the property subject to the security interest (was of the value of \$25,000 or more and was subject to a security interest of \$25,000 or more) (was of the value of at least \$500 and either the value of the property or the security interest was less than \$25,000) (was of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(a)(1). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least \$500 and is subject to a security interest of at least \$500 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500.

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K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(2) or (3).

In the prosecution for impairing a security interest by concealment or destruction, it is necessary to provide the jury with the alternative of finding misdemeanor impairing security interest by concealment or destruction if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

### Comment

For a discussion of the history and purpose of K.S.A. 21-3734, see *State v. Ferguson*, 221 Kan. 103, 558 P.2d 1092 (1976).



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**59.42 IMPAIRING A SECURITY INTEREST - SALE OR EXCHANGE**

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (exchanged) (disposed of) \_\_\_\_\_;
2. That the defendant knew \_\_\_\_\_ was security for a debt owed to \_\_\_\_\_;
3. That the security agreement did not authorize the (sale) (exchange) (disposal) of \_\_\_\_\_;
4. That \_\_\_\_\_ did not consent in writing to the (sale) (exchange) (disposal) of \_\_\_\_\_;
5. That the defendant (sold) (exchanged) (disposed of) \_\_\_\_\_ with the intent to defraud (name of secured party);
6. That the property subject to the security interest (was of the value of \$25,000 or more and was subject to a security interest of \$25,000 or more) (was of the value of at least \$500 and either the value of the property or the security interest was less than \$25,000) (was of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500); and
7. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3734(a)(2). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of

## PATTERN INSTRUCTIONS FOR KANSAS 3d

the value of at least \$500 and is subject to a security interest of at least \$500 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (3).

In the prosecution for impairing a security interest by sale or exchange, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

The Committee believes that the value of the security interest should be determined by the balance due under the security agreement.

Also, see Comment to PIK 3d 59.41, Impairing a Security Interest - Concealment or Destruction.

Prior to its amendment July 1, 1987, K.S.A. 21-3734 did not require proof of an intent to defraud. In *State v. Jones*, 11 Kan. App. 2d 612, 731 P.2d 881 (1987), the Court held that absent an intent to defraud, the statute violated the prohibition against imprisonment for a debt under Section 16 of the Bill of Rights of the Kansas Constitution. The Court also noted that this element was absent from the corresponding PIK 2d instructions 59.42 and 59.43. The Supreme Court reversed the Court of Appeals in *State v. Jones*, 242 Kan. 385, 748 P.2d 839 (1988). The Supreme Court held that an agreement which creates a security interest under the Uniform Commercial Code does not create a debt within the prohibition of Section 16 and that the creditor retains title to the property and in its proceeds until payment is made. The Court then discussed the statutory distinction between general intent crimes and specific intent crimes. The Court held that violations of K.S.A. 21-3734 are general intent crimes. The Court concluded K.S.A. 21-3734 "does not punish for a *debt* in the form of a theft -- it punishes for a *willful act to deprive a secured party of its property* and, thus, is not unconstitutional imprisonment for debt." 242 Kan. at 392. Notwithstanding the Supreme Court's analysis, the issue is now moot because the 1987 amendment requires an intent to defraud.

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**59.43 IMPAIRING A SECURITY INTEREST - FAILURE TO ACCOUNT**

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ had a security interest in \_\_\_\_\_;
2. That the defendant (sold) (exchanged) (disposed of) \_\_\_\_\_ and received \_\_\_\_\_;
3. That the security agreement required that in the event of the (sale) (exchange) (disposal) of \_\_\_\_\_, the proceeds were to be given to \_\_\_\_\_;
4. That the defendant intentionally failed to account for the ([proceeds] [collateral]) ([within a reasonable time] [as specified in the security agreement]);
5. That the defendant did so with the intent to defraud \_\_\_\_\_;
6. That the property subject to the security interest (was of the value of \$25,000 or more and was subject to a security interest of \$25,000 or more) (was of the value of at least \$500 and either the value of the property or the security interest was less than \$25,000) (was of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500); and
7. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(a)(3). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security

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interest of \$25,000 or more. Impairment of a security interest is a severity level 9, nonperson felony when the property subject to the security interest is of the value of at least \$500 and is subject to a security interest of at least \$500 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor if the property subject to a security interest is of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (2).

See K.S.A. 84-1-204 which allows a reasonable time to account if no specific time is fixed in the security agreement.

In the prosecution for impairing a security interest by failure to account, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

### Comment

See Comment to PIK 3d 59.42, Impairing a Security Interest - Sale or Exchange.

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**59.44 FRAUDULENT RELEASE OF A SECURITY AGREEMENT**

The statute upon which this instruction was based (K.S.A. 21-3735) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

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**59.45 WAREHOUSE RECEIPT FRAUD - ORIGINAL RECEIPT**

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant (made) (drew) (issued) (delivered) a warehouse receipt for goods;

or

That the defendant caused or directed a warehouse receipt to be (made) (drawn) (issued) (delivered) for goods;

3. That the defendant knew that the goods shown on the receipt had not been received by (him)(her) at the time (he)(she) issued the receipt;

or

That the defendant knew that the goods shown on the receipt were not under (his)(her) actual control at the time (he)(she) issued the receipt;

or

That the defendant knew that the receipt contained a false statement; and

4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3736(a)(1) and (2). Warehouse receipt fraud is a severity level 10, nonperson felony.

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**59.46 WAREHOUSE RECEIPT FRAUD - DUPLICATE OR ADDITIONAL RECEIPT**

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant (made) (drew) (issued) (delivered) a duplicate or additional warehouse receipt for goods without placing on its face the word "duplicate";

or

That the defendant caused or directed a duplicate or additional warehouse receipt to be (made) (drawn) (issued) (delivered) for goods without placing on its face the word "duplicate";

3. That the defendant knew that there was an uncanceled and outstanding receipt for the same goods; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3736(a)(3). Warehouse receipt fraud is a severity level 10, nonperson felony.

K.S.A. 21-3736(a)(3) provides for an exception in the case of a lost, stolen or destroyed receipt after proceedings as provided in K.S.A. 34-257 or 84-7-601(1). Since K.S.A. 34-257 was repealed, L. 1967, ch. 235, § 2, it would appear that the statute referred to is K.S.A. 34-257a.

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### 59.47 UNAUTHORIZED DELIVERY OF STORED GOODS

The defendant is charged with the crime of unauthorized delivery of stored goods. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant delivered goods to \_\_\_\_\_;
3. That the defendant knew that there was a negotiable receipt for the goods outstanding and uncanceled;
4. That the defendant did not have possession of the receipt at the time (he)(she) delivered the goods; and
5. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-3737. Unauthorized delivery of stored goods is a class A, nonperson misdemeanor.

#### Comment

K.S.A. 21-3737(a) lists five exceptions which are:

- (1) In case of lost, stolen or destroyed receipts, after proceedings have been had as provided in K.S.A. 84-7-601(1), or
- (2) In the case of delivery in good faith as provided in K.S.A. 84-7-601(2), or
- (3) In the case of optional termination of storage as provided in K.S.A. 84-7-206, or
- (4) In the case of a lost or destroyed receipt, after proceedings have been had as provided in K.S.A. 34-257, or
- (5) In case of sale as provided in K.S.A. 34-276.

Note that in subparagraph (4) above, reference is made to K.S.A. 34-257. Since K.S.A. 34-257 was repealed, L. 1967, ch. 235, § 2, it would appear that the statute referred to is K.S.A. 34-257a.



## PATTERN INSTRUCTIONS FOR KANSAS 3d

Where a criminal statute sets forth an exception which is not a part of the crime, but operates to prevent an act otherwise included in the statute from being a crime, the burden is on the accused to show the applicability of the exception. Accordingly, the prosecution owes no duty to prove in its case in chief that the accused is not within the exception. This is a mere rule of procedure and does not relieve the State of its burden of proving guilt. *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 279 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932); 7 *Fifths Old Grand-Dad Whiskey v. United States*, 158 F.2d 34 (1946).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.48 AUTOMOBILE MASTER KEY VIOLATION**

The defendant is charged with the crime of automobile master key violation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (offered to sell) a motor vehicle master key to \_\_\_\_\_;  
or  
That the defendant possessed a motor vehicle master key;
2. That the defendant knew that the master key was designed to fit the ignition switch of more than one motor vehicle; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3738. Automobile master key violation is a class C misdemeanor.

**Comment**

The exceptions in subparagraph (2) should be considered. This subparagraph provides that it shall not be unlawful for the owner of two or more vehicles to possess a motor vehicle master key for any or all of the motor vehicles so owned, nor shall sale of such master keys to such owner be unlawful. The burden of claiming a status of exemption and introducing evidence that the defendant was exempt is upon the defendant.

In general, the accused has the burden of introducing evidence as a matter of defense that he or she is within an exception in the statute creating the offense where such exception is not a part of the description of the offense. Accordingly, the prosecution owes no duty to prove in its case-in-chief that the accused is not within the exception. This is a mere rule of procedure and does not relieve the State of its burden of proving guilt. *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 279 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.49 POSTING OF POLITICAL PICTURES OR  
ADVERTISEMENTS**

The defendant is charged with the crime of posting political (pictures) (advertisements). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant attached a political (picture) (advertisement) to a (telegraph) (utility) pole; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3739. Posting of political material is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.50 OPENING, DAMAGING OR REMOVING COIN-  
OPERATED MACHINES**

The statute upon which this instruction was based (K.S.A. 21-3740) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.51 POSSESSION OF TOOLS FOR OPENING,  
DAMAGING OR REMOVING COIN-OPERATED  
MACHINES**

The statute upon which this instruction was based (K.S.A. 21-3741) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.52 OBJECT FROM OVERPASS - DAMAGE TO VEHICLE, RESULTING IN BODILY INJURY**

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast (an object) (objects) from a bridge or overpass onto a (street) (highway) (road) (railroad right-of-way);
2. That a (vehicle) (engine) was damaged and that \_\_\_\_\_ was injured as a result of the damage to the vehicle; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(d). Casting an object from an overpass causing damage to a vehicle which results in bodily injury is a severity level 6, person felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.53 OBJECT FROM OVERPASS - BODILY INJURY**

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast (an object) (objects) from a bridge or overpass onto a (street) (highway) (road) (railroad right-of-way);
2. That \_\_\_\_\_ was injured; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(c). Casting an object from an overpass causing bodily injury is a severity level 7, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.54 OBJECT FROM OVERPASS - VEHICLE DAMAGE**

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast (an object) (objects) from a bridge or overpass onto a (street) (highway) (road) (railroad right-of-way);
2. That a (vehicle) (engine) (railroad car) was damaged; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3742(b). Casting an object from an overpass causing damage to a vehicle or railroad car is a class A, nonperson misdemeanor.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.55 OBJECT FROM OVERPASS - NO DAMAGE**

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast (an object) (objects) from a bridge or overpass onto a (street) (highway) (road) (railroad right-of-way); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(a). Casting an object from an overpass is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.56 SALE OF RECUT TIRES**

The defendant is charged with the crime of (selling) (offering to sell) recut or regrooved tires intended for use on a passenger vehicle or of (selling) (offering to sell) a passenger vehicle equipped with recut or regrooved tires. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (sold) (offered for sale) recut or regrooved tires for a passenger vehicle;

or

That the defendant intentionally (sold) (offered for sale) a passenger vehicle equipped with recut or regrooved tires; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Recut or regrooved tires are unretreaded or unrecapped tires into which new grooves have been cut or burned.

Passenger vehicle means any vehicle which is designed primarily to carry 10 or fewer passengers, and which is not used as a truck.

**Notes on Use**

For authority, see K.S.A. 21-3743 and 21-3744. Sale of recut tires is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.57 THEFT OF CABLE TELEVISION SERVICES**

The statute on which this instruction was based (K.S.A. 21-3752) was repealed, effective July 1, 1988. See L. 1988, ch. 113, § 3.

For an instruction on the current statute, see PIK 3d 59.03, Theft of Services.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.58 PIRACY OF RECORDINGS

The defendant is charged with the crime of piracy of recordings. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was the owner of the recordings;
2. That the defendant knowingly (duplicated) (caused to be duplicated) sounds recorded on (a phonograph record) (a disc) (a wire) (a tape) (a film) (an article on which sounds are recorded); or  
That the defendant knowingly (recorded) (caused to be recorded) any live performance;
3. That \_\_\_\_\_ did not consent to the defendant (duplicating) (causing to be duplicated) the recordings; or  
That \_\_\_\_\_ did not consent to the recording of the live performance;
4. That the defendant (duplicated) (caused to be duplicated) the recordings with the intent to (sell) (rent) (cause to be sold or rented) (give away as part of a promotion for any product or service) such duplicated sounds or any such recorded performance; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3748. Piracy of recordings is a severity level 9, nonperson felony.

Defenses to the charge of piracy of recordings are set forth in PIK 3d 59.59, Piracy of Recordings - Defenses.

In the event that there is a dispute or issue as to ownership, then refer to the statutory definition of "owner", K.S.A. 21-3748.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.58-A DEALING IN PIRATED RECORDINGS**

The defendant is charged with the crime of dealing in pirated recordings. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (offered for sale) (distributed) (possessed for the purpose of [sale] [distribution]), any sounds recorded on (a phonograph record) (a disc) (a wire) (a tape) (a film) (an article on which sounds are recorded);  
or  
That the defendant (sold) (offered for sale) (distributed) (possessed for the purpose of [sale] [distribution]) a recording of any live performance;
2. That the defendant knew or had reasonable grounds to know that such recording was produced in violation of law;
3. That the offense involved [(less than seven) (seven or more) audio visual recordings] [(less than 100) (100 or more) sound recordings] during a 180-day period; and
4. That this offense occurred between the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ and the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3749. Dealing in pirated recordings is a class A, nonperson misdemeanor if the offense involves less than seven audio visual recordings or less than 100 sound recordings during a 180-day period or a severity level 9, nonperson felony if the offense involves seven or more audio visual recordings or 100 or more sound recordings during a 180-day period.

When defendant has been charged with a felony and the number of audio or sound recordings is in issue, PIK 3d 68.09, Lesser Included Offenses, should also be given together with PIK 3d 68.10, Verdict Form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.59 PIRACY OF RECORDINGS - DEFENSES**

It is a defense to the charge of piracy of recordings if the duplication of the sound or live performance occurs (by any person in connection with or as part of a radio or television broadcast or cable television or for the purpose of archival preservation) (by any person who duplicated [such sounds] [such recording] for personal use and without compensation for such duplication);

**OR**

It is a defense to the charge of piracy of recordings if the duplication is (of any sounds initially fixed in a tangible medium of expression after February 15, 1972) (of any computer program or any audio or visual recording that is part of any computer program).

**Notes on Use**

For authority, see K.S.A. 21-3748(c). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.60 NON-DISCLOSURE OF SOURCE OF RECORDINGS**

The defendant is charged with the crime of non-disclosure of source of recordings. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (sold) (rented) (offered for sale or rental) ([possessed] [transported] [manufactured] for the purpose of [selling] [renting]) any (phonograph record) (audio or video disc) (wire) (audio or video tape) (film) (other article [known] [later developed]) on which (sounds) (images) (both sounds and images) are (recorded) (stored);
2. That the (outside cover) (box) (jacket) of the ( insert type of recording ) did not clearly and conspicuously disclose the name and address of the manufacturer of such article;
3. That the offense involved ([less than seven] [seven or more] audio visual recordings) ([less than 100] [100 or more] sound recordings) during a 180-day period; and
4. That this offense occurred between the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3750. Non-disclosure of source of recordings is a class A, nonperson misdemeanor if the offense involves less than seven audio visual recordings or less than 100 sound recordings during a 180-day period, or a severity level 9, nonperson felony if the offense involves seven or more audio visual recordings or 100 or more sound recordings during a 180-day period.

When defendant has been charged with a felony and the number of audio or sound recordings is in issue, PIK 3d 68.09, Lesser Included Offenses, should be given together with PIK 3d 68.10, Verdict Form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.61 DEFRAUDING AN INNKEEPER**

The statute upon which this instruction was based (K.S.A. 36-206) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97. See PIK 3d 59.03, Theft of Services.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.62 GRAIN EMBEZZLEMENT**

The statute upon which this instruction was based (K.S.A. 21-3753) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.63 MAKING FALSE PUBLIC WAREHOUSE RECORDS  
AND STATEMENTS**

The statute upon which this instruction was based (K.S.A. 21-3754(a)) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.63-A MAKING FALSE PUBLIC WAREHOUSE REPORTS**

The statute upon which this instruction was based (K.S.A. 21-3754(b)) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.63-B ADDING DOCKAGE OR FOREIGN MATERIAL TO GRAIN**

The defendant is charged with adding dockage or foreign material to grain. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly added (insert description of type of dockage) or (insert description of foreign material) to (insert type of grain);

or

That the defendant knowingly recombined (insert description of type of dockage) or (insert description of foreign material) once removed from grain with (insert type of grain);

2. That the defendant intended the grain to be marketed; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3756. Adding dockage or foreign material to grain is a severity level 9, nonperson felony.

The Court must determine, as a matter of law, from the regulations promulgated by the United States Secretary of Agriculture whether the material added constitutes dockage or foreign material. Dockage means that definition given to it by the United States Secretary of Agriculture as of July 1, 1987, under the Federal Grain Quality Improvement Act of 1986. K.S.A. 21-3156 defines "foreign material" as dirt, rock, sand, sticks, or manure, or any combination of such material defined as foreign material by the United States Secretary of Agriculture as of July 1, 1987 under the Federal Grain Quality Improvement Act of 1986.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

The Secretary has provided a definition for dockage or foreign material for each of several types of grain. See 7 C.F.R. § 810 *et seq.* Official United States Standards for Grain (1988).

Subpart B barley	dockage	7 C.F.R. § 810.202(e)
	foreign material	7 C.R.F. § 810.202(f)
Subpart C corn	dockage	none
	foreign material	7 C.F.R. § 810.402(e)
Subpart D flaxseed	dockage	7 C.F.R. § 810.602(b)
	foreign material	none
Subpart F oats	dockage	none
	foreign material	7 C.F.R. § 810.1002(b)
Subpart G rye	dockage	7 C.F.R. § 810.1202(b)
	foreign material	7 C.F.R. § 810.1202(c)
Subpart H sorghum	dockage	7 C.F.R. § 810.1402(e)
	foreign material	7 C.F.R. § 810.1402(f)
Subpart I soybeans	dockage	none
	foreign material	7 C.F.R. § 810.1602(c)
Subpart J sunflower seed	dockage	none
	foreign material	7 C.F.R. § 810.1802(d)
Subpart K triticale	dockage	7 C.F.R. § 810.2002(c)
	foreign material	7 C.F.R. § 810.2002(d)
Subpart L wheat	dockage	7 C.F.R. § 810.2202(e)
	foreign material	7 C.F.R. § 810.2202(f)

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.64 COMPUTER CRIME**

The defendant is charged with computer crime. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally and without authority (gained) (attempted to gain) access to and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) ( \_\_\_\_\_ ), which is computer related property);

or

That the defendant used a (computer) (computer system) (computer network) or any other property for the purpose of (devising) (executing) a [(scheme) (artifice)] with the intent to defraud or for the purpose of obtaining (money) (property) (services) or any other thing of value by means of false or fraudulent pretense or representation;

or

That defendant intentionally exceeded the limits of authorization and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) or any other property; and

2. That defendant's computer crime caused a loss of the value of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
3. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3755(b). Computer crime which causes a loss of the value of less than \$500 is a class A, nonperson misdemeanor. Computer crime which causes a loss of the value of at least \$500 but less than \$25,000 is

## PATTERN INSTRUCTIONS FOR KANSAS 3d

a severity level 9, nonperson felony. Computer crime which causes a loss of the value of more than \$25,000 is a severity level 7, nonperson felony.

If the defendant is charged with a felony offense and the amount of loss in paragraph 2 of the instruction is in issue, PIK 3d 68.09, Lesser Included Offenses, should also be given together with PIK 3d 68.10, Verdict Form.

If warranted, PIK 3d 59.64-A, Computer Crime - Defense, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.64-A COMPUTER CRIME - DEFENSE**

**It is a defense if the defendant appropriated the property or services openly and under a claim of title made in good faith.**

**Notes on Use**

For authority, see K.S.A. 21-3755(d). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.64-B CRIMINAL COMPUTER ACCESS**

The defendant is charged with criminal computer access. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (gained) (attempted to gain) access to any (computer) (computer system) (computer network);

or

That the defendant (gained) (attempted to gain) access to any (computer software) (program) (documentation) (data) (property) contained in any (computer) (computer system) (computer network);

2. That the defendant did so intentionally, fraudulently and without authorization; and

3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3755(e). Criminal computer access is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-A VIOLATION OF THE KANSAS ODOMETER ACT  
- TAMPERING, ETC.**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (tampered with) (adjusted) (altered) (changed) (set back) (disconnected) (failed to connect) the odometer of a motor vehicle so as to reflect a lower mileage than the true mileage the motor vehicle had been driven; and  
or

That the defendant knowingly caused the odometer of a motor vehicle to (be tampered with) (be adjusted) (be altered) (be changed) (be set back) (be disconnected) (remain disconnected) by another so as to reflect a lower mileage than the true mileage driven by the motor vehicle; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(b). Violation of the Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-B VIOLATION OF THE KANSAS ODOMETER ACT  
- CONSPIRING**

The defendant is charged with the crime of conspiring to violate the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant agreed with (another person) (others) to (commit) (assist in the commission of) the crime of violation of the Kansas Odometer Act by (describe the specific violation of the Act to which the defendant conspired);
2. That the defendant did so agree with the intent that a violation of the Kansas Odometer Act be committed;
3. That the defendant or any party to the agreement acted in furtherance of the agreement by (describe the overt act); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3757(c). Violation of the Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-C VIOLATION OF THE KANSAS ODOMETER ACT  
- OPERATING A VEHICLE**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant operated a motor vehicle on a (street) (highway) knowing that the odometer was (disconnected) (nonfunctional);
2. That defendant did so with the intent to defraud; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3757(d). Violation of the Kansas Odometer Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-D VIOLATION OF THE KANSAS ODOMETER ACT  
- UNLAWFUL DEVICE**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (advertised for sale) (sold) (used) (installed on a motor vehicle) (installed on an odometer in a motor vehicle) a device which causes the odometer to register mileage other than the true mileage; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3757(e). Violation of the Kansas Odometer Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-E VIOLATION OF THE KANSAS ODOMETER ACT  
- UNLAWFUL SALE**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (offered to sell) a motor vehicle knowing that the odometer on the motor vehicle (was tampered with) (was adjusted) (was altered) (was changed) (was set back) (was disconnected) (had not been connected) so as to reflect a lower mileage than the true mileage of the motor vehicle;
2. That the defendant did so with the intent to defraud; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(f). Violation of the Kansas Odometer Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-F VIOLATION OF THE KANSAS ODOMETER ACT  
- UNLAWFUL SERVICE, REPAIR OR  
REPLACEMENT**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

The Kansas Odometer Act provides that, if in the service, repair, or replacement of an odometer, the odometer is (made) (found) incapable of registering the same mileage as before the service, repair, or replacement of the odometer, it shall be adjusted to read zero and a notice shall be attached permanently to the left door frame of the vehicle specifying the mileage prior to repair or replacement of the odometer, the date on which it was repaired or replaced, and the vehicle identification number.

To establish this charge, each of the following claims must be proved:

1. That the defendant failed to (adjust) (affix a notice regarding the adjustment of) the odometer of a motor vehicle; and

or

That the defendant (removed) (altered) the notice affixed to a motor vehicle as required by the Kansas Odometer Act; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(g). Violation of the Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.66 - 59.69    RESERVED FOR FUTURE USE.**



PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.70 VALUE IN ISSUE**

The State has the burden of proof as to the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s]) (which the defendant allegedly [obtained] [damaged] [impaired] [gave]) (over which the defendant allegedly [obtained] [exerted] unauthorized control).

The State claims that the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s]) involved herein was in the amount of

\_\_\_\_\_.

It is for you to determine the amount and enter it on the verdict form furnished.

**Notes on Use**

It is necessary to use this instruction with PIK 3d 68.11, Verdict Form - Value in Issue, when an issue exists. The appropriate alternative should be used and dollar amount inserted in the blanks.

For authority, see *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975); *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977); *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

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PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.01 TREASON**

The defendant is charged with the crime of treason.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally levied war against the State of Kansas; and  
or  
That the defendant intentionally adhered to the enemies of the State of Kansas; and  
or  
That the defendant intentionally gave aid and comfort to the enemies of the State of Kansas; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3801(a). Treason is an off-grid person felony. K.S.A. 21-3801(b) provides that no person shall be convicted of treason unless on the evidence of two witnesses to the overt act or confession in open court.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.02 SEDITION**

The defendant is charged with the crime of sedition.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and

or

That the defendant knowingly (published) (sold) (distributed) a document which advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and

or

That the defendant intentionally became the member of an organization knowing that the purpose of such organization was to advocate the overthrow or reformation of the State of Kansas by violence or unlawful means; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3802. Sedition is a severity level 7, nonperson felony.

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**60.03 PRACTICING CRIMINAL SYNDICALISM**

The statute on which this instruction was based (K.S.A. 21-3803) was repealed by L. 1992, ch. 298, § 97, effective July 1, 1993.

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**60.04 PERMITTING PREMISES TO BE USED FOR  
CRIMINAL SYNDICALISM**

The statute on which this instruction was based (K.S.A. 21-3804) was repealed by L. 1992, ch. 298, § 97, effective July 1, 1993.



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**60.05 PERJURY**

The defendant is charged with the crime of perjury. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally, knowingly and falsely (swore) (testified) (affirmed) (declared) (subscribed) to a material fact upon (his)(her) oath or affirmation legally administered by a person authorized to administer oaths; and

or

That the defendant intentionally, knowingly and falsely subscribed as true and correct under penalty of perjury a material matter in a (declaration) (verification) (certificate) (statement); and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3805. Perjury is a severity level 7, nonperson felony if the false statement is made upon the trial of a felony charge. Perjury is a severity level 9, nonperson felony if the false statement is made in a proceeding other than the trial of a felony charge or is made under penalty of perjury in any declaration, verification, certificate or statement as provided in K.S.A. 53-601.

**Comment**

In *State v. Bingham*, 124 Kan. 61, 257 Pac. 951 (1927), it was held that the question of whether false testimony is material in a perjury case is to be determined as a question of law by the trial court and not as a question of fact by the jury. In order to constitute perjury under the statute, it is essential that the false testimony be on a material matter. The false statements relied upon, however, need not bear directly on the ultimate issue to be determined; it is sufficient if they relate to collateral matters upon which evidence would have been admissible. For cases related to this subject, see *State v. Elder*, 199 Kan. 607, 433 P.2d 462 (1967); *State v. Frames*, 213 Kan. 113, 119, 515 P.2d 751 (1973); *State v. Edgington*, 223 Kan. 413, 573 P.2d 1059 (1978).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.06 CORRUPTLY INFLUENCING A WITNESS**

**Prior editions of PIK Criminal contained instruction 60.06. The statute on which such instruction was based (K.S.A. 21-3806) was repealed effective July 1, 1983. The crime of corruptly influencing a witness has been replaced with the crimes of intimidation of a witness or a victim and aggravated intimidation of a witness or victim. See PIK 3d 60.06-A and 60.06-B for instructions on these offenses.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.06-A INTIMIDATION OF A WITNESS OR VICTIM

The defendant is charged with the crime of intimidation of a (witness) (victim). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade, a (witness) (victim) \_\_\_\_\_, from attending or giving testimony at a (trial) (preliminary hearing) (other proceeding or inquiry authorized by law);

OR

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade \_\_\_\_\_, from:
  - (a) making a report of a (crime) (attempted crime) or (civil injury or loss) against an individual, \_\_\_\_\_, to any law enforcement, probation, parole, correctional, community correction services or judicial officer;  
or
  - (b) causing a complaint, indictment or information to be sought and prosecuted and assisting in its prosecution;  
or
  - (c) causing a probation or parole violation to be reported and prosecuted and assisting in its prosecution;  
or
  - (d) causing a civil action to be filed and prosecuted and assisting in its prosecution;  
or
  - (e) arresting or causing or seeking the arrest of any person in connection with a (crime) (attempted crime) or (civil injury or loss) against an individual, \_\_\_\_\_;

## PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That the defendant did so knowingly and maliciously; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Maliciously means with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

### Notes On Use

For authority, see K.S.A. 21-3832. Intimidation of a witness or victim is a class B, person misdemeanor.

Insert name of witness, victim or person acting on behalf of a victim in blank space in Element No. 1.

Insert type of "other proceeding or inquiry" in blank space in Element No. 1.  
Insert name of individual in blank spaces.

### Comment

It was held in *State v. Reed*, 213 Kan. 557, 559-562, 516 P.2d 913 (1973) that it is not necessary that an action or proceeding be pending at the time an attempt is made to deter a witness from giving evidence in order for a person to be guilty of corruptly influencing a witness under K.S.A. 21-3806 (repealed L. 1983). The expressed reasoning would appear applicable in prosecutions under K.S.A. 21-3832 and K.S.A. 21-3833.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.06-B AGGRAVATED INTIMIDATION OF A WITNESS  
OR VICTIM**

The defendant is charged with the crime of aggravated intimidation of a (witness) (victim). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade, a (witness) (victim) (person acting on behalf of a victim), \_\_\_\_\_, from ( cite appropriate violation listed in PIK 3d 60.06-A ); and
2. That the act was accompanied by an expressed or implied threat of force or violence against the (person) (property) of a (witness) (victim) (other person);  
or  
That the act was in furtherance of a conspiracy;  
or  
That the defendant had been previously convicted of \_\_\_\_\_;  
or  
That the (witness) (victim), \_\_\_\_\_, was under 18 years of age;  
or  
That the act was committed for (pecuniary gain) (other consideration) by the defendant acting upon the request of another person;
3. That the defendant did so knowingly and maliciously; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Maliciously means with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Notes On Use

For authority, see K.S.A. 21-3833. Aggravated intimidation of a witness or victim is a severity level 6, person felony.

Conspiracy should be defined when the State alleges the act was committed in furtherance of a conspiracy. See PIK 3d 55.05, Conspiracy - Defined, for definition.

Whether a prior conviction of defendant was for a crime included within the provision of subsection (a)(3) of K.S.A. 21-3833 is a question of law for the Court. Where found to be included, insert the crime in the blank space. Insert name of witness, victim or person acting on behalf of a victim in blank space.

### Comment

See Comment to PIK 3d 60.06-A.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.06-C UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION OF COMMUNICATIONS**

The defendant is charged with the crime of unlawful disclosure of authorized interception of (wire) (oral) (electronic) communications. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant communicated to a person or made public in any way the existence of an application or order for the interception of (wire) (oral) (electronic) communications;
2. That the act was done with the intent to obstruct, impede or prevent an authorized interception; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Intercept means the hearing or otherwise learning of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.

**Notes On Use**

For authority, see K.S.A. 21-3838. Unlawful disclosure of an authorized interception of communications is a severity level 10, nonperson felony.

Definitions of wire communication, oral communication and electronic communication are found in K.S.A. 22-2514.

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**60.07 COMPOUNDING A CRIME**

The defendant is charged with compounding a crime.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew \_\_\_\_\_ had committed a crime;
2. That the defendant intentionally (accepted) (agreed to accept) anything of value as consideration for a promise [not to (initiate) (aid in) the prosecution of \_\_\_\_\_] [to (conceal evidence of a crime) (destroy evidence of a crime)]; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3807. Compounding a felony is a severity level 8, nonperson felony. Compounding a misdemeanor is a class A, nonperson misdemeanor.



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**60.08 OBSTRUCTING LEGAL PROCESS**

The defendant is charged with the crime of obstructing legal process. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was authorized by law to serve \_\_\_\_\_;
2. That the defendant knowingly and intentionally (obstructed) (resisted) (opposed) \_\_\_\_\_ in the (service) (execution) of the \_\_\_\_\_;
3. That at the time the defendant knew or should have known that \_\_\_\_\_ was authorized by law to \_\_\_\_\_; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3808.

In the second blank of Element Nos. 1 and 2, the Court should insert the name of the paper or instrument involved in the particular case such as writ, warrant, or summons.

In the second blank of Element No. 3, the Court should insert the particular act the person was authorized by law to perform.

Obstructing legal process in the case of a felony, or resulting from parole or any authorized disposition for a felony, is a severity level 9, nonperson felony.

Obstructing legal process in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case is a class A, nonperson misdemeanor.

**Comment**

In *State v. Hatfield*, 213 Kan. 832, 518 P.2d 389 (1974), the Court held that obstructing legal process or official duty included any willful act which obstructs or resists or opposes an officer in the discharge of his official duty and does not necessarily require the employment of direct force or the exercise of direct means.

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This instruction should not be given if there is a uniformed and properly identified law enforcement officer. Instead, PIK 3d 60.09 should be given regardless of whether the charge is denominated obstruction of duty or obstruction of process. *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.09 OBSTRUCTING OFFICIAL DUTY**

The defendant is charged with the crime of obstructing official duty. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was authorized by law to \_\_\_\_\_;
2. That the defendant knowingly and willfully (obstructed) (resisted) (opposed) \_\_\_\_\_ in the \_\_\_\_\_ which was the official duty of \_\_\_\_\_;
3. That the act of the defendant substantially hindered or increased the burden of the officer in the performance of the officer's official duty;
4. That at the time the defendant knew or should have known that \_\_\_\_\_ was a law enforcement officer; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3808.

In the second blank of Element No. 1, the Court should insert the act or acts the person named in the first blank was authorized to perform.

In the second blank of Element No. 2, the Court should insert the act or acts the defendant obstructed, resisted or opposed.

Obstructing official duty in the case of a felony, or resulting from parole or any authorized disposition for a felony, is a severity level 9, nonperson felony.

Obstructing official duty in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case is a class A, nonperson misdemeanor.

**Comment**

In *State v. Gasser*, 223 Kan. 24, 30, 574 P.2d 146 (1977), it is held that a defendant who runs from a federal officer assisting state law enforcement officials

## PATTERN INSTRUCTIONS FOR KANSAS 3d

in an arrest for state theft charges has obstructed official duty of a law enforcement official. To sustain a conviction under K.S.A. 21-3808, it is necessary that the State prove the defendant had reasonable knowledge that the person he or she opposed was a law enforcement official.

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), it was held that K.S.A. 21-3808 encompasses illegal obstruction by any means including oral statements.

Whether underlying charge is denominated obstruction of duty or obstruction of process, if there is a uniformed and properly identified law enforcement officer, PIK 3d 60.09 should be given, not PIK 3d 60.08. *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

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**60.10 ESCAPE FROM CUSTODY**

The defendant is charged with the crime of escape from custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was being held in custody (on a written charge of a misdemeanor) (following defendant's conviction of a misdemeanor) (upon commitment to the state security hospital upon a finding of not guilty by reason of insanity of a misdemeanor offense);
2. That the defendant intentionally departed from custody without lawful authority; and  
or  
That the defendant intentionally failed to return to custody (following temporary leave lawfully granted) (following a court order authorizing temporary leave); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Custody includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (commitment to the state security hospital upon a finding of not guilty by reason of insanity of a misdemeanor offense) (here insert any other detention for law enforcement purposes).

**Notes On Use**

For authority, see K.S.A. 21-3809. Escape from custody is a class A, nonperson misdemeanor.

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The statute defining escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the Court to determine. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail.

### Comment

In *State v. Carreiro*, 203 Kan. 875, 878, 457 P.2d 123 (1969), the Court discusses and defines "escape" and states what constitutes "escape." The Court, in this case, also stated when a person is in "lawful custody."

In *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973), the Court held that in view of the specific statutory definition of the word "charge" in K.S.A. 22-2205(5), that escape statutes K.S.A. 21-3809 and 21-3810, are applicable only where a defendant escapes from lawful custody while being held on a written charge contained in a complaint, information, or indictment. This does not mean that the State is without a remedy where the defendant escapes custody prior to the filing of a formal written complaint. The Court also held that K.S.A. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where the defendant escapes from custody prior to the filing of a formal written complaint, information, or indictment.

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**60.11 AGGRAVATED ESCAPE FROM CUSTODY**

The defendant is charged with the crime of aggravated escape from custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- A. 1. That the defendant was being held in custody (on a written charge of a felony) (following conviction of a felony) (upon commitment to the state security hospital upon a finding of not guilty by reason of insanity of a felony);
2. That the defendant intentionally departed from custody without lawful authority; and

or

That the defendant intentionally failed to return to custody following (temporary leave authorized by law) (temporary leave granted by a court order); and

OR

- B. 1. That the defendant was being held in custody (on a written charge of a crime) (following conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity);
2. That the defendant intentionally departed from custody by use of violence or the threat of violence against any person; and
3. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Custody includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (commitment to the state security hospital upon a finding of not guilty

## PATTERN INSTRUCTIONS FOR KANSAS 3d

of a crime by reason of insanity) (here insert any other detention for law enforcement purposes).

### Notes On Use

For authority, see K.S.A. 21-3810 and 21-3809. Aggravated escape from custody is a severity level 6, person felony if such escape is effected or facilitated by the use of violence or the threat of violence against any person. Under all other circumstances, it is a severity level 8, nonperson felony.

The statute defining aggravated escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the Court to determine. Custody does not include general supervision of a person on probation or parole or constraint incidental to release on bail.

### Comment

See Comment to PIK 3d 60.10, Escape from Custody.



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60.12 AIDING ESCAPE

The defendant is charged with the crime of aiding escape. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- A. 1. That \_\_\_\_\_ was in lawful custody (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity);

2. That the defendant intentionally assisted \_\_\_\_\_ in escape from custody; and

OR

- B. 1. That \_\_\_\_\_ was in lawful custody (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity);

2. That the defendant supplied to \_\_\_\_\_, an object or thing adapted or designed for \_\_\_\_\_'s use in making an escape;

3. That the defendant did so with intent to assist \_\_\_\_\_ in making an escape; and

OR

- C. 1. That \_\_\_\_\_ was confined in an institution (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity);

2. That the defendant (brought) (introduced) into the institution an object or thing adapted or designed for \_\_\_\_\_'s use in making an escape;

3. That the defendant did so with intent to assist \_\_\_\_\_ in making an escape; and

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[3] or [4]. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Custody includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity) (here insert any other detention for law enforcement purposes).

Notes On Use

For authority, see K.S.A. 21-3811 and 21-3809. Aiding escape is a severity level 8, nonperson felony.

K.S.A. 21-3809(b)(1), "lawful custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail. Lawful custody is initially a question of law for the Court to determine.

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**60.13 AIDING A FELON OR PERSON CHARGED AS A FELON**

The defendant is charged with the crime of (aiding a felon) (aiding a person charged as a felon). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew \_\_\_\_\_ (had committed \_\_\_\_\_, a felony) (had been charged with having committed \_\_\_\_\_, a felony);
2. That the defendant knowingly harbored, concealed or aided \_\_\_\_\_;
3. That the defendant did so with the intent that \_\_\_\_\_ would avoid or escape from (arrest) (trial) (conviction) (punishment); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3812(a) and (b). Aiding a felon or person charged as a felon is a severity level 8, nonperson felony.

For venue, see K.S.A. 22-2607 and 22-2616.

If the person allegedly aided had not been charged at the time aid was given, an issue may arise as to whether or not the person aided had in fact committed a crime. A separate instruction should be given setting forth the elements of the crime alleged to have been committed by the person aided.

**Comment**

In *State v. Rider, Edens & Lemons*, 229 Kan. 394, 401, 625 P.2d 425 (1981), the Court held that three conditions were required to render one guilty as an accessory after the fact and the same conditions are required to render one guilty of aiding a felon under K.S.A. 21-3812(a): The felony must be complete, the accused must have knowledge that the principal committed the felony, and the

## PATTERN INSTRUCTIONS FOR KANSAS 3d

accused must act with the intent to enable the principal to avoid or escape from arrest, trial, conviction or punishment for the felony. In the same case, the Court further stated, "Generally, any assistance or relief given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to render the person giving such assistance guilty for aiding a felon."

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**60.14 AIDING A PERSON CONVICTED OF OR CHARGED WITH COMMITTING A MISDEMEANOR**

The defendant is charged with the crime of aiding a person (convicted of committing a misdemeanor) (charged with committing a misdemeanor). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew \_\_\_\_\_ (had been convicted of committing a misdemeanor) (had been charged with committing \_\_\_\_\_, a misdemeanor);
2. That the defendant knowingly harbored, concealed, or aided \_\_\_\_\_;
3. That the defendant did so with intent that \_\_\_\_\_ would avoid or escape from (arrest) (trial) (conviction) (punishment); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3812(c). Aiding a person convicted of or charged with committing a misdemeanor is a class C misdemeanor.

If an issue arises in the case being tried as to whether or not the particular misdemeanor has been committed by the person allegedly aided, an instruction should be given setting forth the elements of that offense. If the person allegedly aided has been convicted, such an instruction is not necessary.

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**60.15 FAILURE TO APPEAR OR AGGRAVATED FAILURE TO APPEAR**

The defendant is charged with the crime of (failure to appear) (aggravated failure to appear). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had been charged with a (misdemeanor) (felony) and released on an appearance bond to appear before a court;
2. That the defendant intentionally failed to appear before the court at the time requested;
3. That the defendant's appearance bond was forfeited;
4. That the defendant intentionally (failed to surrender within 30 days following the forfeiture of appearance bond) (failed to surrender within 30 days after conviction of a [misdemeanor] [felony] had become final); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3813 and 21-3814. Failure to appear is a class B, nonperson misdemeanor. Aggravated failure to appear is a severity level 10, nonperson felony.

The provisions of K.S.A. 21-3813(a) do not apply to any person who forfeits a cash bond supplied pursuant to law upon an arrest for a traffic offense.

For venue, see K.S.A. 22-2615.

The 30-day period following forfeiture is a question of law.

It is the opinion of the Committee that all the elements essential to an instruction for K.S.A. 21-3813, Failure to appear, and K.S.A. 21-3814, Aggravated failure to appear, are contained in this instruction.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

In a prosecution for aggravated failure to appear under K.S.A. 21-3814, the State is not required to notify the defendant of the forfeiture of the appearance bond as provided in K.S.A. 22-2807 in order to establish the element of willfulness in K.S.A. 21-3814. To establish willfulness, it is sufficient if the State proves the defendant failed without just cause or excuse to surrender himself within 30 days following the forfeiture of his appearance bond. See *State v. Rodgers*, 225 Kan. 242, 245, 589 P.2d 981 (1979).

Failure to appear is "aggravated" only if the charge involved is a felony. When applicable, this element should be included in the trial court's instruction. See *State v. DeAtley*, 11 Kan. App. 2d 605, 731 P.2d 318 (1987).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.16 ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER**

The defendant is charged with the crime of attempting to influence a judicial officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a judicial officer;
2. That the defendant knew \_\_\_\_\_ was a judicial officer;
3. That the defendant communicated with \_\_\_\_\_ relative to a matter which (was before) (might have been brought before) \_\_\_\_\_;
4. That such act was done by the defendant with the intent to improperly influence \_\_\_\_\_; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3815. Attempting to influence a judicial officer is a severity level 9, nonperson felony.

Judicial officer is defined in K.S.A. 21-3110(19)(c).

**Comment**

In *State v. Torline*, 215 Kan. 539, 542, 543, 527 P.2d 994 (1974), the Court stated, "The phrase with intent improperly to influence a judicial officer as it appears in K.S.A. 1973 Supp. 21-3815, encompasses a broad range of possible conduct but is limited to conduct affecting a governmental function, the administration of justice by a judicial officer in relation to any matter which is or may be brought before him as a judicial officer."

In the above-cited case, the Court held that where an assault or threat is directed against a judicial officer some months after the final termination of proceedings before such officer, the one making the threat is not guilty of attempting to improperly influence a judicial officer.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.17 INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE**

The defendant is charged with the crime of interference with the administration of justice. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew \_\_\_\_\_ was a judicial officer;
2. That the defendant (communicated a threat of violence to \_\_\_\_\_) (harassed \_\_\_\_\_ by repeated abusive and defamatory communication) (picketed, paraded or demonstrated in or near a building housing \_\_\_\_\_) (picketed, paraded or demonstrated in or near the residence or place of abode of \_\_\_\_\_);
3. That such act was done with intent to influence, impede or obstruct the findings, decision, ruling, order, judgment or decree of \_\_\_\_\_ on any matter then pending before (him)(her); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3816. Interference with the administration of justice is a class A, nonperson misdemeanor.

**Comment**

Nothing in K.S.A. 21-3816 shall limit or prevent the exercise by any court in this state of its power to punish for contempt.

Judicial officer is defined in K.S.A. 21-3110(19)(c).

The Committee believes that the words "defamatory" and "abusive" are more understandable to a jury than "vituperative" as used in this statute.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.18 CORRUPT CONDUCT BY JUROR**

The defendant is charged with the crime of corrupt conduct by a juror. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had been (summoned) (sworn) as a juror;
2. (a) That the defendant intentionally promised or agreed to give a verdict for or against a party in a (civil) (criminal) proceeding; and

OR

2. (a) That the defendant without authority of the court or officer received evidence or information relative to a case defendant (was) (would be) sworn to try;
- (b) That the defendant did not immediately disclose the evidence or information to the (court) (officer); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3817. Corrupt conduct by a juror is a severity level 9, nonperson felony.

**Comment**

See K.S.A. 22-3413, Juror's knowledge of material fact.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.19 FALSELY REPORTING A CRIME**

The defendant is charged with the crime of falsely reporting a crime. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew that \_\_\_\_\_ was a (law enforcement officer) (state investigative agency);
2. That the defendant informed \_\_\_\_\_ that a crime had been committed;
3. That the defendant knew the information given \_\_\_\_\_ was false;
4. That the defendant intended that \_\_\_\_\_ would act on the false information given; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3818. Falsely reporting a crime is a class A, nonperson misdemeanor.

Law enforcement officer is defined in K.S.A. 21-3110(10).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.20 PERFORMANCE OF AN UNAUTHORIZED  
OFFICIAL ACT**

The defendant is charged with the crime of performance of an unauthorized official act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant, knowing that (he)(she) had no lawful authority, (conducted a marriage ceremony) (certified an acknowledgement of the execution of a document which by law might be recorded); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3819. Performance of an unauthorized official act is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.21 SIMULATING LEGAL PROCESS**

The defendant is charged with the crime of simulating legal process. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sent) (delivered) to \_\_\_\_\_ a document which (he)(she) knew purported to be or simulated those used in courts;
2. That the defendant knew this document was not issued by a court;
3. That the defendant intended that this act would induce payment of a claim; and

OR

1. That the defendant printed, distributed, or offered for sale documents which (he)(she) knew purported to be or simulated those used in courts;
  2. That the defendant knew such documents would not be used by any court for any purpose; and
- [3.] or [4]. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3820. Simulating legal process is a class A, nonperson misdemeanor.

K.S.A. 21-3820 does not apply to the printing, distribution, or sale of blank forms of legal documents intended for actual use in judicial proceedings.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.22 TAMPERING WITH A PUBLIC RECORD**

The defendant is charged with the crime of tampering with a public record. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and without lawful authority (altered) (destroyed) (defaced) (removed) (concealed) a public record; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3821. Tampering with a public record is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.23 TAMPERING WITH PUBLIC NOTICE**

The defendant is charged with the crime of tampering with public notice. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and without lawful authority (altered) (defaced) (destroyed) (removed) (concealed) a public notice;
2. That the notice had been legally posted;
3. That the defendant did this act during the time the notice was required or authorized to remain posted; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3822. Tampering with public notice is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.24 FALSE SIGNING OF A PETITION**

The defendant is charged with the crime of false signing of a petition. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally affixed (a fictitious) (an unauthorized) signature to a (petition) (memorial) (remonstrance);
2. That it was intended that such (petition) (memorial) (remonstrance) be presented to the (Legislature of the State of Kansas) (House of Representatives of the State of Kansas) (Senate of the State of Kansas) (\_\_\_\_\_, [an agency] [an officer] [a political subdivision] of the State of Kansas); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3823. False signing of a petition is a class C misdemeanor.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.25 FALSE IMPERSONATION**

The defendant is charged with the crime of false impersonation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and falsely represented (himself) (herself) to be a (public officer) (public employee) (\_\_\_\_\_, licensed to practice in the State of Kansas); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3824. False impersonation is a class B, nonperson misdemeanor.

The profession or vocation which the defendant falsely represented himself or herself to be a member of should be placed in the blank space, such as attorney, medical doctor, or certified public accountant.

Public employee and public officer are defined in K.S.A. 21-3110.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.26 AGGRAVATED FALSE IMPERSONATION**

The defendant is charged with the crime of aggravated false impersonation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant falsely (impersonated) (represented [himself][herself] to be) \_\_\_\_\_ ;
2. That the defendant, while falsely (impersonating) (representing [himself][herself] to be) \_\_\_\_\_, (became bail or surety) (acknowledged any recognizance) (executed a bond or other instrument as bail or surety for a party in a proceeding before a court or person authorized to take bail or surety) (confessed a judgment) (acknowledged the execution of an instrument which by law may be recorded) (affected the rights or interests of \_\_\_\_\_ in a legal proceeding); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3825. Aggravated false impersonation is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.27 TRAFFIC IN CONTRABAND IN A CORRECTIONAL INSTITUTION**

The defendant is charged with the crime of traffic in contraband in a correctional institution. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (took) (attempted to take) (sent) (attempted to send) \_\_\_\_\_ (into) (upon the grounds of) (from) (possessed \_\_\_\_\_ in) (distributed \_\_\_\_\_ within) a correctional institution;
2. That the defendant did so without the consent of the administrator of the correctional institution; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Correctional institution means any (state correctional institution or facility) (conservation camp) (state security hospital) (state youth center) (community correction center or facility used for detention or confinement) (juvenile detention facility) (jail).

**Notes On Use**

For authority, see K.S.A. 21-3826. Traffic in contraband in a correctional institution is a severity level 6, nonperson felony.

Under this statute, any item may be considered contraband. The particular item(s) should be designated in the instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.28 CRIMINAL DISCLOSURE OF A WARRANT**

The defendant is charged with criminal disclosure of a warrant. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally disclosed the fact that a (search warrant) (warrant for arrest) had been (applied for) (issued);

or

That the defendant intentionally disclosed the content of the (affidavit) (testimony) upon which a (search warrant) (warrant for arrest) had been (applied for) (issued);

2. That such disclosure was made before the execution of the warrant and was not made at the request of a law enforcement officer for the purpose of assisting in the execution thereof; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes On Use**

For authority, see K.S.A. 21-3827. Criminal disclosure of a warrant is a class B, nonperson misdemeanor.

**Comment**

Criminal sanctions of this section may not be imposed for publishing information obtained from public records. *State v. Stauffer Communications, Inc.*, 225 Kan. 540, 541, 543, 545, 548, 592 P.2d 891 (1979).

Disclosure by personnel of a law enforcement agency for the purpose of encouraging the person named in the warrant to voluntarily surrender is not prohibited by this statute.

A 1986 legislative amendment excepted warrants issued in child abduction cases from the application of this statute, unless the Court issuing such warrant specifically prohibited such disclosure.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.29 INTERFERENCE WITH THE CONDUCT OF PUBLIC BUSINESS IN A PUBLIC BUILDING**

The defendant is charged with the crime of interference with the conduct of public business in a public building. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally engaged in conduct at or in a public building so as to deny to any (public official) (public employee) (invitee) on such premises (his)(her) right to enter, to use the facilities, or to leave such public building;

or

That the defendant intentionally impeded any (public official) (public employee) in the lawful performance of duties or activities through the use of (restraint) (abduction) (coercion) (intimidation) (force and violence) or any threat thereof;

or

That the defendant intentionally refused or failed to leave a public building upon being requested to do so by (the chief administrative officer) (one charged with maintaining order in such public building) at a time when the defendant was (committing) (threatening to commit) (inciting others to commit) any act which did or would if completed, disrupt, impair, interfere with, or obstruct the lawful functions being carried on in such public building;

or

That the defendant intentionally impeded, disrupted or hindered the normal proceedings of any meeting conducted by any (judicial body) (legislative body) (official at any public building) by any act of intrusion into the chamber or other areas designated for the use of the body, or official conducting such meeting or session by any act designed to intimidate, coerce or hinder any members of such body, or any

PATTERN INSTRUCTIONS FOR KANSAS 3d

official engaged in the performance of duties at such meeting or session;

or

That the defendant intentionally impeded, disrupted or hindered by any act of intrusion into the chamber or other areas designated for the use of any executive body or official, the normal proceedings of such body or official;

2. That the defendant did so when in possession of (a firearm) (\_\_\_\_\_, a weapon); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3828.

For authority in the case of aggravated interference with the conduct of public business in a public building, see K.S.A. 21-3829.

Interference with the conduct of public business in a public building is a class A, nonperson misdemeanor. Aggravated interference with the conduct of public business in a public building when in possession of any firearm or weapon is a severity level 6, person felony. The element of the instruction designated (2) should be deleted or included depending upon whether or not the State charges defendant with a misdemeanor or felony offense.

Weapons are restricted to those described in K.S.A. 21-4201.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.30 DEALING IN FALSE IDENTIFICATION DOCUMENTS**

The defendant is charged with the crime of dealing in false identification documents. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manufactured) (sold) (offered for sale) a \_\_\_\_\_ which (simulated) (purported to be) (was designed so as to cause others reasonably to believe it to be) an identification document;
2. That such \_\_\_\_\_ bore a fictitious name or other false information; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3830. Dealing in false identification documents is a severity level 10, nonperson felony.

The document which the defendant is charged with manufacturing, selling or offering for sale should be described with particularity in the blank spaces.

For unlawful use of fictitious or fraudulently altered driver's license, see K.S.A. 8-260.

**Comment**

The 1986 Legislature amended K.S.A. 21-3830 by expanding the definition of "identification documents" beyond those issued by a governmental agency.

## PATTERN INSTRUCTIONS FOR KANSAS 3d



PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 61.00

CRIMES AFFECTING PUBLIC TRUSTS

	PIK Number
Bribery . . . . .	61.01
Official Misconduct . . . . .	61.02
Compensation For Past Official Acts . . . . .	61.03
Compensation For Past Official Acts - Defense . . . . .	61.04
Presenting A False Claim . . . . .	61.05
Permitting A False Claim . . . . .	61.06
Discounting A Public Claim . . . . .	61.07
Unlawful Interest In Insurance Contract . . . . .	61.08
Unlawful Procurement Of Insurance Contract . . . . .	61.09
Unlawful Collection By A Judicial Officer . . . . .	61.10
Misuse Of Public Funds . . . . .	61.11
Unlawful Use Of State Postage . . . . .	61.12

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.01 BRIBERY**

The defendant is charged with the crime of bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant offered, gave, or promised to give directly or indirectly to \_\_\_\_\_ a public (officer) (employee) a benefit or consideration;
2. That \_\_\_\_\_ was not legally entitled to such benefit or consideration;
3. That the defendant did so with intent to influence \_\_\_\_\_ with respect to the performance of (his)(her) powers or duties; and

OR

1. That the defendant was a public (officer) (employee);
2. That the defendant (requested) (received) (agreed to receive) from \_\_\_\_\_ directly or indirectly a benefit or consideration;
3. That the benefit or consideration was (requested) (received) (agreed upon) with the intent that the defendant be influenced with respect to the performance of (his)(her) powers or duties; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3901. Bribery is a severity level 7, nonperson felony.

The first part of the instruction is applicable when the crime charged is that of offering or giving a bribe. The name of the officer or employee sought to be influenced should be inserted in the blanks. The second part of the instruction is applicable when the crime charged is soliciting a bribe. A public officer or employee convicted of bribery forfeits his or her office or employment and,

## PATTERN INSTRUCTIONS FOR KANSAS 3d

notwithstanding expungement, is forever disqualified from holding public office or employment. For sports bribery, see PIK 3d 66.06, Sports Bribery. Where the breach of official duty has already occurred, see PIK 3d 61.03, Compensation for Past Official Acts.

### Comment

The bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's authority to make a binding decision. *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978). The bribery statutes were held not to be unconstitutionally vague and indefinite in *State v. Campbell*, 217 Kan. 756, 780, 539 P.2d 329 (1975).

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.02 OFFICIAL MISCONDUCT

The defendant is charged with the crime of official misconduct. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a public (officer) (employee);
2. That the defendant intentionally and maliciously committed an act of misconduct as follows:  
\_\_\_\_\_;
3. That the defendant acted or appeared to act under authority of ((his)[her]) ((office)[employment]); and

OR

1. That the defendant was a public (officer) (employee);
  2. That the defendant intentionally demanded or received a fee or reward (for the execution of any official act) (for the performance of a duty imposed by law or the terms of [his][her] employment);
  3. That the defendant knew that to demand or receive the fee or reward was contrary to law;
  4. That the defendant acted or appeared to act under authority of ((his)[her]) ((office)[employment]); and
- [4.] or [5.] That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3902. Official misconduct is a class A, nonperson misdemeanor. In addition to the other penalty prescribed by law, a public officer or employee shall forfeit his or her office or employment upon conviction of official misconduct.

In Element No. 2 of the first part of the instruction, designate the act alleged to constitute "misconduct or abuse of authority."

Maliciously is defined in PIK 3d 56.04, Homicide Definitions.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

In *State v. Coburn*, 220 Kan. 743, 556 P.2d 376 (1976), it was held incumbent upon the state to prove the act of misconduct was committed while the defendant was acting in an official capacity or under color of his office. Defendant's conviction was reversed where it was alleged defendant came into possession of abandoned property as sheriff and the state's evidence would establish that he formed the intent to keep it for his own use only after he resigned from office.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.03 COMPENSATION FOR PAST OFFICIAL ACTS**

The defendant is charged with the crime of compensation for past official acts. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a public (officer) (employee);
2. That \_\_\_\_\_ gave a (decision) (opinion) (recommendation) (vote) favorable to defendant;  
or  
That \_\_\_\_\_ performed an act of official misconduct, as follows: \_\_\_\_\_;  
\_\_\_\_\_;
3. That the defendant (gave) (offered to give) to \_\_\_\_\_ any benefit, reward or consideration intending it to be compensation for the act; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3903. Compensation for past official acts is a class B, nonperson misdemeanor. See PIK 3d 61.04, Compensation for Past Official Acts - Defense.

In Element No. 2, designate the act alleged to constitute "official misconduct."

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.04 COMPENSATION FOR PAST OFFICIAL ACTS -  
DEFENSE**

**It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were conferred on account of kinship or other personal, professional or business relationships independent of the official status of the receiver.**

**OR**

**It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were trivial benefits incidental to personal, professional, or business contacts and involved no substantial risk of undermining official impartiality.**

**Notes on Use**

For authority, see K.S.A. 21-3903. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.05 PRESENTING A FALSE CLAIM**

The defendant is charged with the crime of presenting a false claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a (public officer) (public body) authorized to allow or pay a claim;
2. That the defendant knowingly presented to \_\_\_\_\_ a claim which was false in whole or in part;
3. That the defendant did so with intent to defraud;
4. That the amount of the false claim presented was (less than \$500) (more than \$500 but less than \$25,000) (more than \$25,000); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Intent to defraud means an intention to induce another by deception to assume, create, transfer, alter, or terminate a right or obligation with reference to property.

**Notes on Use**

For authority, see K.S.A. 21-3904. Presenting a false claim for \$25,000 or more is a severity level 7, nonperson felony. Presenting a false claim for at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Presenting a false claim for less than \$500 is a class A, nonperson misdemeanor.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim and PIK 3d 59.70, Value In Issue, should be given. The verdict form to be used is PIK 3d 68.11, Verdict Form - Value In Issue.

Where a claim is presented, part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

Intend to defraud is defined in K.S.A. 21-3110(9).



## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

In *State v. Wilson*, 11 Kan. App. 2d 504, 728 P.2d 1332 (1986), defendant was convicted of presenting a false claim by a state employee in violation of K.S.A. 75-3202 and presenting a false claim in violation of K.S.A. 21-3904 based upon the same transaction. The conviction under K.S.A. 21-3904 was reversed on the ground that K.S.A. 75-3202 is a specific statute controlling over K.S.A. 21-3904, a general statute.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.06 PERMITTING A FALSE CLAIM**

The defendant is charged with the crime of permitting a false claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a public (officer) (employee);
2. That the defendant (approved by audit) (allowed or paid) a claim made upon \_\_\_\_\_;
3. That the defendant knew such claim was false or fraudulent in whole or in part;
4. That the amount of the false claim presented was (less than \$500) (more than \$500 but less than \$25,000) (\$25,000 or more); and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A 21-3905. Permitting a false claim for \$25,000 or more is a severity level 7, nonperson felony. Permitting a false claim for at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Permitting a false claim for less than \$500 is a class A, nonperson misdemeanor. Upon conviction of permitting a false claim, defendant forfeits his or her public office or employment.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim, and PIK 3d 59.70, Value in Issue, should be given. The verdict form to be used is PIK 3d 68.11, Verdict Form - Value in Issue.

In Element No. 2, designate the state, subdivision, or governmental instrumentality against whom the claim is made.

Where a claim is permitted part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.07 DISCOUNTING A PUBLIC CLAIM**

The statute upon which this instruction was based (K.S.A. 21-3906) has been repealed, effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.08 UNLAWFUL INTEREST IN INSURANCE  
CONTRACT**

The statute upon which this instruction was based  
(K.S.A. 21-3907) has been repealed, effective July 1, 1983.  
See L. 1983, ch. 110, § 1.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.09 UNLAWFUL PROCUREMENT OF INSURANCE  
CONTRACT**

**The statute upon which this instruction was based  
(K.S.A. 21-3908) has been repealed, effective July 1, 1983.  
See L. 1983, ch. 110, § 1.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.10 UNLAWFUL COLLECTION BY A JUDICIAL OFFICER**

**The statute upon which this instruction was based (K.S.A. 21-3909) has been repealed, effective July 1, 1993. See L. 1992, ch. 298, § 97.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.11 MISUSE OF PUBLIC FUNDS**

The defendant is charged with the crime of misuse of public funds. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (custodian) (person having control) of public money by virtue of (his)(her) official position;
2. That the defendant (used) (lent) (permitted another to use) public money in a manner (he)(she) knew was not authorized by law; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3910. Misuse of public funds is a severity level 8, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.12 UNLAWFUL USE OF STATE POSTAGE**

The defendant is charged with the crime of unlawful use of State postage. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally used United States postage for (his)(her) personal benefit;  
or  
That the defendant intentionally permitted \_\_\_\_\_ to use United States postage for the personal benefit of \_\_\_\_\_;
2. That the postage was paid for with funds of the State of Kansas; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-3911. Unlawful use of State postage is a class C misdemeanor.



PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF  
PERSONAL RIGHTS

	PIK Number
Eavesdropping . . . . .	62.01
Eavesdropping - Defense Of Public Utility Employee . . . . .	62.02
Breach Of Privacy - Intercepting Message . . . . .	62.03
Breach Of Privacy - Divulging Message . . . . .	62.04
Denial Of Civil Rights . . . . .	62.05
Criminal Defamation . . . . .	62.06
Criminal Defamation - Truth As A Defense . . . . .	62.07
Circulating False Rumors Concerning Financial Status . . . . .	62.08
Exposing A Paroled Or Discharged Person . . . . .	62.09
Hypnotic Exhibition . . . . .	62.10
Unlawfully Smoking In A Public Place . . . . .	62.11
Failure To Post Smoking Prohibited And Designated Smoking Area Signs . . . . .	62.11-A
Unlawful Smoking - Defense Of Smoking In Designated Smoking Area . . . . .	62.12

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.01 EAVESDROPPING**

The defendant is charged with the crime of eavesdropping. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and without lawful authority:
  - (a) entered into a private place with intent to listen secretly to private conversations or to observe the personal conduct of any other person; and  
or
  - (b) installed or used a device for hearing, recording, amplifying or broadcasting sounds originating in a private place which would not ordinarily be audible or comprehensible outside, without the consent of the person entitled to privacy therein; and  
or
  - (c) installed or used a device for the interception of a (telephone) (telegraph) communication without the consent of the person in possession or control of the facilities for such communication; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Private place means a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but does not include a public place.

Notes on Use

For authority, see K.S.A. 21-4001. Eavesdropping is a class A, nonperson misdemeanor.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

For extensive comment, see 1968 Judicial Council notes following K.S.A. 21-4001.

Installation or use of an electronic device to record communications transmitted by telephone with consent of the person in possession or control of the facilities for such communication is not unlawful, and a recorded telephone conversation under these circumstances is admissible in evidence. *State v. Wigley*, 210 Kan. 472, 502 P.2d 819 (1972).

Possession and control are discussed and defined in *State v. Bowman National Security Agency, Inc.*, 231 Kan. 631, 647 P.2d 1288 (1982).

A telephone company, having reasonable grounds to suspect its billing procedures are being bypassed by electronic device, may monitor any telephone from which it reasonably believes illegal calls are being placed. *State v. Hruska*, 219 Kan. 233, 547 P.2d 732 (1976).

In *State v. Martin*, 232 Kan. 778, 658 P.2d 1024 (1983), on appeal from a trial court judgment of acquittal on the ground that the statute did not clearly proscribe defendant's actions, it was held that defendant's acts in inviting women to his attic studio to be photographed while modeling clothes and photographing them through a one-way mirror while they were changing clothes violated (1)(a) of the statute. Entry and observe are defined.

In *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984), defendant sought to suppress evidence obtained by a search warrant based on information received through use of a transmitting device concealed on the person of a police informant who entered defendant's home. It was held the use of the concealed transmitter did not violate K.S.A. 21-4001(1)(a) and (b) or 21-4002(1)(a) and (b). Any party to a private conversation may waive the right of privacy and a non-consenting party has no Fourth Amendment or statutory right to challenge that waiver. Interception of a private message requires the consent of either sender or receiver, not both.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.02 EAVESDROPPING - DEFENSE OF PUBLIC UTILITY  
EMPLOYEE**

It is a defense to the charge of eavesdropping that the defendant was (the operator of a switchboard) (an officer) (an employee) of a public utility providing telephone communication service and that (he)(she) intercepted, disclosed, or used a communication in the performance of (his)(her) legitimate duties.

**Notes on Use**

For authority, see K.S.A. 21-4001(c). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.03 BREACH OF PRIVACY - INTERCEPTING MESSAGE**

The defendant is charged with the crime of breach of privacy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and without lawful authority intercepted a message by (telephone) (telegraph) (letter) (other means of private communication);
2. That the defendant did so without the consent of either the sender or receiver; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4002. Breach of privacy is a class A, nonperson misdemeanor.

This offense does not apply to telephone party lines or telephone extensions.

**Comment**

K.S.A. 21-4002 seeks to protect private communications. It prohibits wiretapping except where authorized by court order. Tampering with private mail is prohibited, as well as unauthorized disclosures.

Privacy of communication protected hereunder not violated by electronic recording where consent of sender alone obtained; admissible evidence. *State v. Wigley*, 210 Kan. 472, 474, 476, 502 P.2d 819 (1972).

No violation hereunder by telephone company monitoring its property to protect its interests therein; search warrant based on evidence therefrom legal. *State v. Hruska*, 219 Kan. 233, 238, 240, 241, 547 P.2d 732 (1976).

See Comment to PIK 3d 62.01, Eavesdropping. *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.04 BREACH OF PRIVACY - DIVULGING MESSAGE**

The defendant is charged with the crime of breach of privacy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and without lawful authority made known to a third person the existence or contents of a message by (telephone) (telegraph) (letter) (other means of private communication);
2. That the defendant did so without the consent of either the sender or receiver;
3. That the defendant (knew the message had been illegally intercepted by another) (illegally learned of the message in the course of [his][her] employment with the transmitting agency); and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4002. Breach of privacy is a class A, nonperson misdemeanor.

The Committee is unaware of what the Legislature intended by use of the terms "illegally intercepted" or "illegally learned" as contained in K.S.A. 21-4002. The instruction should be modified to specifically identify the claimed illegality.

This offense does not apply to telephone party lines or telephone extensions.

**Comment**

K.S.A. 21-4002 seeks to protect private communications. It prohibits wiretapping except where authorized by court order. Tampering with private mail is prohibited, as well as unauthorized disclosures.

Also, see Comment citing cases under PIK 3d 62.03, Breach of Privacy - Intercepting Message.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.05 DENIAL OF CIVIL RIGHTS**

The defendant is charged with the crime of denial of civil rights. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally denied to \_\_\_\_\_ on account of the (race) (color) (ancestry) (national origin) (religion) of \_\_\_\_\_:

(a) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any institution, department or agency of (the state) (any political subdivision of the state) (any municipality); and

or

(b) the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of (any establishment which provides lodging to transient guests for hire) (any establishment which is engaged in selling food or beverages to the public for consumption upon the premises) (any place of recreation, amusement, exhibition or entertainment which is open to the public); and

or

(c) the full and equal use and enjoyment of services, privileges and advantages of any facilities for the public transportation of persons or goods; and

or

(d) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any establishment which offers personal or professional services to members of the public; and

or

PATTERN INSTRUCTIONS FOR KANSAS 3d

- (e) the full and equal exercise of the right to vote in any election held pursuant to Kansas law; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4003. Denial of civil rights is a class A, nonperson misdemeanor.

Comment

For comment, see 1968 Judicial Council notes to K.S.A. 21-4003. See annotation, Participation of Student in Demonstration on or near Campus as Warranting Expulsion or Suspension from School or College, 32 A.L.R. 864.

It was held in *State v. Barclay*, 238 Kan. 148, 708 P.2d 972 (1985) that the portion of the statute quoted in paragraph 1(d) of the instruction was not applicable under the facts to an ordained minister operating a wedding chapel who refused on grounds of his religious beliefs to perform a marriage ceremony for a black person and a white person.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.06 CRIMINAL DEFAMATION**

The defendant is charged with criminal defamation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant communicated to another person false information tending to expose \_\_\_\_\_ to public hatred, contempt or ridicule, or to deprive (him)(her) of the benefits of public confidence and social acceptance;  
or  
That the defendant communicated to another person false information tending to degrade and vilify the memory of \_\_\_\_\_, a deceased person, and to scandalize or provoke (his)(her) surviving relatives and friends;
2. That such acts were done maliciously; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

An act is done "maliciously" when it is done intentionally, wrongfully, and without just cause or excuse.

**Notes on Use**

For authority, see K.S.A. 21-4004. Criminal defamation is a class A, nonperson misdemeanor. For the instruction concerning truth as a defense to a charge of defamation, see PIK 3d 62.07, Criminal Defamation - Truth as a Defense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.07 CRIMINAL DEFAMATION - TRUTH AS A DEFENSE**

**It is a defense to the charge of criminal defamation that the alleged defamatory information communicated was true.**

**Notes on Use**

For authority, see K.S.A. 21-4004. For the instruction concerning the elements of a charge of defamation, see PIK 3d 62.06, Criminal Defamation. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.08 CIRCULATING FALSE RUMORS CONCERNING FINANCIAL STATUS**

The defendant is charged with the crime of maliciously circulating false rumors concerning financial status. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant circulated or caused to be circulated a false statement as follows: \_\_\_\_\_  
\_\_\_\_\_;
2. That the defendant did so maliciously and without reasonable grounds for believing the false statement;
3. That the defendant did so with the intent to injure the financial standing or reputation of \_\_\_\_\_  
\_\_\_\_\_;
4. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4005. Circulating false rumors concerning financial status is a class A, nonperson misdemeanor.

In the blank in Element No. 1, specify the alleged false statement. In Element No. 2, name the bank, financial or business institution, or individual alleged to be injured.

**Comment**

The Committee believes that the phrase "without reasonable grounds to believe" is synonymous with "without probable cause" and is more understandable to jurors. See *State v. Howland*, 153 Kan. 352, 110 P.2d 801 (1941).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.09 EXPOSING A PAROLED OR DISCHARGED PERSON**

The defendant is charged with the crime of exposing a paroled or discharged person. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant maliciously and intentionally (communicated) (threatened to communicate) to another an oral or written statement that \_\_\_\_\_ has been charged with or convicted of a felony;
2. That the defendant did so with the intent to interfere with the employment or business of \_\_\_\_\_; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4006. Exposing a paroled or discharged person is a class B, nonperson misdemeanor.

This offense does not apply to a person or organization furnishing such information at the request of another person or organization.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.10 HYPNOTIC EXHIBITION**

The defendant is charged with the crime of hypnotic exhibition. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant used or attempted to use a hypnotic exhibition, demonstration or performance for entertainment; and

or

That the defendant permitted (himself)(herself) to be exhibited while in a state of hypnosis; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Hypnosis means a condition of altered attention brought about by an individual through the use of certain physical or psychological manipulations of one person by another.

**Notes on Use**

For authority, see K.S.A. 21-4007. Hypnotic exhibition is an unclassified misdemeanor punishable by fine not to exceed \$50.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.11 UNLAWFULLY SMOKING IN A PUBLIC PLACE**

The defendant is charged with the crime of unlawfully smoking in a public place. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant possessed a lighted (cigarette) (cigar) (pipe) (other lighted smoking equipment) other than in a designated smoking area in (([a restaurant] [a retail store] [a public means of transportation] [a passenger elevator] [a health care institution] [a place where health care services are provided to the public] [an educational facility] [a library] [a courtroom] [a (state) (county) (municipal) building] [a restroom] [a grocery store] [a school bus] [a museum] [a theater] [an auditorium] [an arena] [a recreational facility] [other enclosed indoor area ]) ([open to the public] [used by the general public]); and

or

That the defendant possessed a lighted (cigarette) (cigar) (pipe) (other lighted smoking equipment) other than in a designated smoking area at a meeting open to the public; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4009 to 21-4012. The prior statute, K.S.A. 21-4008, (repealed L. 1987, ch. 110, § 7, July 1), prohibited smoking tobacco. The definition of "smoking" in K.S.A. 21-4009 does not identify a particular substance. Smoking in a public place is an unclassified misdemeanor punishable by a fine of not more than \$20 for each violation.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.11-A FAILURE TO POST SMOKING PROHIBITED  
AND DESIGNATED SMOKING AREA SIGNS**

The defendant is charged with the crime of failure to post signs in a (public place stating that smoking is prohibited by state law) (designated smoking area in a public place stating that smoking is permitted). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was the (proprietor) (person in charge) of ([a restaurant] [a retail store] [a public means of transportation] [a passenger elevator] [a health care institution] [a place where health care services are provided to the public] [an educational facility] [a library] [a courtroom] [a (state) (county) (municipal) building] [a restroom] [a grocery store] [a school bus] [a museum] [a theater] [an auditorium] [an arena] [a recreational facility] [other enclosed indoor area ]) ([open to the public] [used by the general public]);
2. That the defendant failed to post or cause to be posted in a conspicuous place signs stating clearly that smoking is prohibited by state law; and  
or  
That the defendant failed to post or cause to be posted in a designated smoking area signs stating that smoking is permitted in such room or area; and
3. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4009 to 21-4012. Failure to post signs stating smoking is prohibited by state law or to post signs stating smoking is permitted in a designated area is an unclassified misdemeanor punishable by a fine of not more than \$50.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**62.12 UNLAWFUL SMOKING - DEFENSE OF SMOKING  
IN DESIGNATED SMOKING AREA**

**It is a defense to the charge of unlawful smoking that defendant smoked tobacco in a public place in an area designated and posted as a smoking area by the person in control of the premises.**

**Notes on Use**

For authority, see K.S.A. 21-4008. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

For the instruction concerning the elements of unlawful smoking in a public place, see PIK 3d 62.11, Failure to Post Smoking Prohibited and Designated Smoking Area Signs.



PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 63.00

CRIMES AGAINST THE PUBLIC PEACE

	PIK Number
Disorderly Conduct . . . . .	63.01
Unlawful Assembly . . . . .	63.02
Remaining At An Unlawful Assembly . . . . .	63.03
Riot . . . . .	63.04
Incitement To Riot . . . . .	63.05
Maintaining A Public Nuisance . . . . .	63.06
Permitting A Public Nuisance . . . . .	63.07
Vagrancy . . . . .	63.08
Public Intoxication . . . . .	63.09
Giving A False Alarm . . . . .	63.10
Criminal Desecration - Flags . . . . .	63.11
Criminal Desecration - Monuments/Cemeteries/ Places of Worship . . . . .	63.12
Criminal Desecration - Dead Bodies . . . . .	63.13
Harassment By Telephone . . . . .	63.14
Harassment Of Court By Telefacsimile . . . . .	63.14-A
Desecration Of Flags . . . . .	63.15

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.01 DISORDERLY CONDUCT**

The defendant is charged with the crime of disorderly conduct. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant:
  - (a) engaged in brawling or fighting;  
or
  - (b) disturbed an assembly, meeting, procession, not unlawful in its character;  
or
  - (c) engaged in noisy conduct;
2. That the defendant acted with knowledge or reasonable cause to believe that (his)(her) conduct would alarm, anger, or disturb others or provoke an assault or other breach of the peace; and

OR

1. That the defendant used offensive, obscene or abusive language, of such a nature that it would tend to provoke the listener to an immediate assault or other breach of the peace;
2. That the defendant acted with knowledge or reasonable cause to believe that the defendant's words would tend to cause such an immediate assault or other breach of the peace; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4101. Disorderly conduct is a class C misdemeanor. This offense covers conduct formerly called disturbing the peace. The first version should be used when the charged is based on acts of the defendant and the second when only speech is involved. Under the first version, claim no. 1 should be limited to the specific conduct alleged to constitute the offense.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

In *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980), the Court found the statute as applied to conduct involving only speech was facially overbroad. It upheld the statute by authoritatively construing it to prohibit only speech amounting to "fighting words." In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942), the Court upheld a state statute which, as authoritatively construed by the state court, prohibited only words "plainly likely to cause a breach of the peace by the addressee." See also, *State v. Heiskell*, 8 Kan. App. 2d 667, 666 P.2d 207 (1983), disapproving former PIK 2d 63.01 as applied to speech.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 63.02 UNLAWFUL ASSEMBLY

The defendant is charged with the crime of unlawful assembly. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant met in a group of not less than five persons for the purpose of engaging in conduct constituting (disorderly conduct) (a riot); and  
or  
That the defendant in a lawfully assembled group of not less than five persons agreed to engage in (disorderly conduct) (a riot); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

#### Notes on Use

For authority, see K.S.A. 21-4102. Unlawful assembly is a class B, nonperson misdemeanor. A definition of disorderly conduct or riot must be given with this instruction. See PIK 3d 63.01, Disorderly Conduct or PIK 3d 63.04, Riot. For instruction involving conspiracy, see PIK 3d 55.03, Conspiracy.

#### Comment

According to the 1968 Judicial Council notes, the gist of the offense is the assembly for an unlawful purpose. Proof of the crime does not require proof of acts to carry out the agreement.

K.S.A. 21-4102 is of questionable constitutional validity because no overt act is required to constitute the offense. Traditionally, a person is punished for criminal acts which he or she commits not what he or she is thinking of committing. If an overt act is committed, the crime becomes conspiracy, K.S.A. 21-3302, PIK 3d 55.03, Conspiracy.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.03 REMAINING AT AN UNLAWFUL ASSEMBLY**

The defendant is charged with the crime of remaining at an unlawful assembly. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally failed to depart from the place of an unlawful assembly after being directed to leave by a law enforcement officer; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Unlawful assembly means a meeting of five or more persons for the purpose of engaging in conduct constituting (disorderly conduct) (a riot) or a meeting of five or more persons agreeing to engage in such conduct.

**Notes on Use**

For authority, see K.S.A. 21-4103. Remaining at an unlawful assembly is a class A, nonperson misdemeanor. See PIK 3d 63.01, Disorderly Conduct and PIK 3d 63.04, Riot, for definitions of those offenses.

**Comment**

See Comment to PIK 3d 63.02, Unlawful Assembly. This instruction applies not only to participants in the unlawful assembly but to bystanders.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.04 RIOT

The defendant is charged with the crime of riot. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- A. 1. That the defendant used force or violence which resulted in a breach of the public peace;
- 2. That the defendant acted in a group of five or more persons;
- 3. That the defendant acted without authority of law; and

OR

- B. 1. That the defendant threatened to use force or violence to produce a breach of the public peace against any person or property;
  - 2. That such threat was accompanied by power or apparent power of immediate execution;
  - 3. That the defendant acted in a group of five or more persons;
  - 4. That the defendant acted without authority of law; and
- [4] or [5]. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4104. Riot is a class A, person misdemeanor. For definition of breach of the public peace, see PIK Chapter 53.00, Definitions and Explanations of Terms.

Comment

PIK 3d 63.03 through 63.05 define crimes deemed inimical to the public peace. See 1968 Judicial Council comment for differentiation between unlawful assembly, riot and incitement to riot. The distinction between riot and incitement to riot was noted in *State v. Dargatz*, 228 Kan. 322, 326-327, 614 P.2d 430 (1980), where the Court approved the substance of PIK 2d 63.04, Riot and 63.05, Incitement to Riot.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.05 INCITEMENT TO RIOT**

The defendant is charged with the crime of incitement to riot. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant as a member of a group of five or more persons by words or conduct intentionally urged others to engage in a riot under circumstances which produced a clear and present danger of injury to persons or property or a breach of the public peace; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4105. Incitement to riot is a severity level 8, person felony. If further definition of riot is necessary, see K.S.A. 21-4104 or PIK 3d 63.04, Riot.

**Comment**

See Comment to PIK 3d 63.04, Riot. Incitement to riot is a specific intent crime. *State v. Dargatz*, 228 Kan. 322, 331, 614 P.2d 430 (1980). Hence, in a proper case, an instruction on voluntary intoxication may be appropriate. See PIK 3d 54.12, Intoxication.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.06 MAINTAINING A PUBLIC NUISANCE**

The defendant is charged with the crime of maintaining a public nuisance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally \_\_\_\_\_  
\_\_\_\_\_;
2. That this act or omission injured or endangered the public health, safety or welfare; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4106. Maintaining a public nuisance is a class C misdemeanor.

Claim No. 1 should be completed by specifying the act or omission alleged to constitute the nuisance.

**Comment**

For examples of public nuisances, see 1968 Judicial Council comment to K.S.A. 21-4106.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.07 PERMITTING A PUBLIC NUISANCE**

The defendant is charged with the crime of permitting a public nuisance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That some person or persons intentionally \_\_\_\_\_;
2. That this act or omission endangered the public health, safety or welfare;
3. That the defendant knowingly permitted this condition on property under (his)(her) control; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4107 and 21-4106. Permitting a public nuisance is a class C misdemeanor.

Claim No. 1 should be completed by specifying the act or omission alleged to constitute the nuisance. If the defendant committed the act or omission constituting the nuisance, the crime is Maintaining a Public Nuisance, PIK 3d 63.06.

**Comment**

For examples of public nuisances, see 1968 Judicial Council comment to K.S.A. 21-4106.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.08 VAGRANCY**

The statute upon which this instruction was based (K.S.A. 21-4108) was repealed, effective July 1, 1993.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.09 PUBLIC INTOXICATION**

The statute upon which this instruction was based  
(K.S.A. 21-4109) was repealed in 1977.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.10 GIVING A FALSE ALARM**

The defendant is charged with the crime of giving a false alarm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (initiated) (circulated) a report or warning of an impending (bombing) (specify other crime or catastrophe) under such circumstances that it was likely to cause (evacuation of a [building] [place of assembly] [facility of public transportation]) (public inconvenience or alarm);
2. That the defendant did so knowing that the report or warning was baseless; and

OR

1. That the defendant transmitted in any manner to the fire department of any (city) (township) (other municipality) an alarm of fire;  
or  
That the defendant made a call in any manner for (police) (fire) (medical) (specify other emergency service from K.S.A. 12-5301 et seq.) emergency service assistance;
2. That the defendant did so knowing that there was no reasonable ground to believe (a fire existed) (emergency service assistance was needed); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4110. Giving a false alarm is a class A, nonperson misdemeanor. See PIK 3d 56.23, Criminal Threat, which provides felony penalties for persons who threaten to commit violence with intent to terrorize or to cause evacuation of buildings or transportation facilities.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

*State v. Long*, 234 Kan. 580, 675 P.2d 832 (1984) distinguishes a lesser included offense from a lesser degree of the same crime. The Committee does not believe that giving a false alarm is either a lesser included offense or a lesser degree of the crime of criminal threat.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.11 CRIMINAL DESECRATION - FLAGS**

The defendant is charged with criminal desecration. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant, by means other than by fire or explosive, intentionally (damaged) (defaced) (destroyed) the (flag) (ensign) (\_\_\_\_\_, a symbol) of (the United States) (Kansas) in which another, \_\_\_\_\_, had a property interest without the consent of such other person; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4111. Criminal desecration as used herein is a class A, nonperson misdemeanor. The Committee ventures no opinion as to the significance of "ensign" or "symbol". For other kinds of criminal desecration, see PIK 3d 63.12, Criminal Desecration - Monuments/Cemeteries/Places of Worship, and 63.13, Criminal Desecration - Dead Bodies.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.12 CRIMINAL DESECRATION - MONUMENTS/  
CEMETERIES/PLACES OF WORSHIP**

The defendant is charged with criminal desecration.  
The defendant pleads not guilty.

To establish this charge, each of the following claims  
must be proved:

1. That the defendant, by means other than by fire or explosive, intentionally (damaged) (defaced) (destroyed) a (public monument or structure) (\_\_\_\_\_, property in a cemetery) (\_\_\_\_\_, a place of worship);
2. That the property was damaged to the extent of (less than \$500) (at least \$500 but less than \$25,000) (\$25,000 or more); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4111. Desecrating public monuments, property in a cemetery, and places of worship is a class A, nonperson misdemeanor if damage is less than \$500; if at least \$500 but less than \$25,000 it is a severity level 9, nonperson felony; and if \$25,000 or more, a severity level 7, nonperson felony. Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly. For other kinds of criminal desecration, see PIK 3d 63.11, Criminal Desecration - Flags, and 63.13, Criminal Desecration - Dead Bodies.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.13 CRIMINAL DESECRATION - DEAD BODIES**

The defendant is charged with criminal desecration. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (obtained) (attempted to obtain) unauthorized control of (a dead body) (the remains of any human being) (a coffin, urn or other article containing a dead body or the remains of any human being); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4111. Criminal desecration as described herein is a class A, nonperson misdemeanor. For other kinds of criminal desecration, see PIK 3d 63.11, Criminal Desecration - Flags, and PIK 3d 63.12, Criminal Desecration - Monuments/Cemeteries/Places of Worship.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.14 HARASSMENT BY TELEPHONE**

The defendant is charged with the crime of harassment by telephone. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (used a telephone) (knowingly permitted a [telephone] [telefacsimile communication machine] under [his][her] control to be used) (knowingly transmitted a telefacsimile communication) to:
  - (a) (make) (transmit) any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent; and  
or
  - (b) intentionally abuse, threaten or harass any person at the called number, whether or not conversation ensues; and  
or
  - (c) cause the telephone of another to ring repeatedly with intent to harass any person at the called number; and  
or
  - (d) make repeated (telephone calls during which conversation ensued) (transmissions of telefacsimile communications), solely to harass any person at the (called) (receiving) number; and  
or
  - (e) play any recording on a telephone, except recordings such as weather information or sports information, when the number thereof is dialed, unless the person or group playing the recording be identified and state that it is a recording; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Notes on Use

For authority, see K.S.A. 21-4113. Harassment by telephone is a class A, nonperson misdemeanor. The statute provides that "telephone communication" includes telefacsimile communication. For a criminal charge of refusal to yield a party line, see PIK 3d 64.13. For criminal threat, see PIK 3d 56.23.

### Comment

Identification of the voice of defendant over the telephone was mentioned in *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.14-A HARASSMENT OF COURT BY TELEFACSIMILE**

The defendant is charged with the crime of harassment of court by telefacsimile communication. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly used electronic equipment to transmit a copy of a document via a telephone line to a court in the State of Kansas for a use other than court business; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3839. Harassment of court by telefacsimile communication is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.15 DESECRATION OF FLAGS**

**The statute upon which this instruction was based  
(K.S.A. 21-4114) was repealed, effective July 1, 1993.**

**See PIK 3d 63.11, Criminal Desecration - Flags.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

	PIK Number
Criminal Use Of Weapons - Felony . . . . .	64.01
Criminal Use Of Weapons - Misdemeanor . . . . .	64.02
Criminal Discharge Of A Firearm . . . . .	64.02-A
Criminal Discharge Of A Firearm - Affirmative Defense . . . . .	64.02-B
Aggravated Weapons Violation . . . . .	64.03
Criminal Use Of Weapons - Affirmative Defense . . . . .	64.04
Criminal Disposal Of Firearms . . . . .	64.05
Criminal Possession Of A Firearm - Felony . . . . .	64.06
Criminal Possession Of A Firearm - Misdemeanor . . . . .	64.07
Possession Of A Firearm (In)(On the Grounds Of) A State Building Or In A County Courthouse . . . . .	64.07-A
Defacing Identification Marks Of A Firearm . . . . .	64.08
Failure To Register Sale Of Explosives . . . . .	64.09
Failure To Register Receipt Of Explosives . . . . .	64.10
Definition - Explosive . . . . .	64.10-A
Criminal Disposal Of Explosives . . . . .	64.11
Criminal Possession Of Explosives . . . . .	64.11-A
Criminal Possession Of Explosives - Defense . . . . .	64.11-B
Carrying Concealed Weapons . . . . .	64.12
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Unlawfully Obtaining Prescription-Only Drug . . . . .	64.16
Unlawfully Obtaining Prescription-Only Drug For Resale . . . . .	64.17
Selling Beverage Containers With Detachable Tabs . . . . .	64.18

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.01 CRIMINAL USE OF WEAPONS - FELONY**

The defendant is charged with criminal use of weapons.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (sold) (manufactured) (purchased) (carried) [a shotgun with a barrel less than 18 inches in length] [a firearm (designed to discharge) (capable of discharging) automatically more than once by a single function of the trigger];

or

That the defendant knowingly (possessed) (manufactured) (caused to be manufactured) (sold) (offered for sale) (lent) (purchased) (gave away) any cartridge which can be fired by a handgun and which has a plastic-coated bullet that has a core of less than 60% lead by weight;

or

That the defendant knowingly possessed a device or attachment of any kind (designed) (used) (intended for use) in silencing the report of any firearm; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

Authority for the first alternative under claim no. 1 is found in K.S.A. 21-4201(a)(7); authority for the second alternative under claim no. 1 is found in K.S.A. 21-4201(a)(8); and authority for the third alternative is found in K.S.A. 21-4201(a)(6). The offenses of criminal use of weapons under subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201 are severity level 9, nonperson felonies.

**Comment**

K.S.A. 21-4201(a)(7) applies to machine guns and also to a shotgun with a barrel less than 18 inches long. It should be noted that the offense under

## PATTERN INSTRUCTIONS FOR KANSAS 3d

K.S.A. 21-4201(a)(8) does not apply to a governmental laboratory or to solid plastic bullets. The provisions of K.S.A. 21-4201(b) provide that the offense contained in K.S.A. 21-4201(a)(7) does not apply to law enforcement officers or other designated persons.

In *State v. Kulper*, 12 Kan. App. 2d 301, 744 P.2d 519 (1987), the Court held evidence that the defendant possessed all the pieces of a disassembled shotgun is sufficient to support a conviction. PIK 2d 64.01 is cited with approval.

**64.02 CRIMINAL USE OF WEAPONS - MISDEMEANOR**

The defendant is charged with criminal use of weapons.  
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) a (bludgeon) (sand-club) (metal knuckles) (throwing star) (switchblade knife); and

or

That the defendant knowingly (carried concealed on defendant's person) (possessed with the intention to use the same unlawfully against another) a (dagger) (dirk) (billy) (blackjack) (slung shot) (dangerous knife) (straight-edged razor) (stiletto) (any dangerous or deadly weapon or instrument); and

or

That the defendant knowingly carried (on defendant's person) (in a [land] [water] [air] vehicle) a (tear gas bomb) (smoke bomb) (projector or object containing a noxious [liquid] [gas] [substance]) with the intent to use the same unlawfully; and

or

That the defendant knowingly carried a (pistol) (revolver) (other firearm) concealed on defendant's person when not on defendant's own land or abode or fixed place of business; and

or

That the defendant knowingly set a spring gun; and

or

That the defendant knowingly ([possessed] [transported]) ([incendiary] [explosive]) (material) (liquid) (solid) (mixture) equipped with a (fuse) (wick) (any other detonating device) commonly known as a (molotov cocktail) (pipe bomb); and



## PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, in \_\_\_\_\_ County, Kansas.

### Notes on Use

For authority, see K.S.A. 21-4201(a)(1) through (5) and (a)(9). The instruction presents several alternative situations and only the appropriate one should be used.

If the weapon is a switchblade knife, the definition given in subsection (a)(1) of the statute should be inserted after the numbered paragraphs of the instruction.

Likewise, under subsection (a)(2), an ordinary pocket knife with no blade more than 4 inches in length shall not be construed to be a dangerous knife, weapon or instrument. If applicable, this exclusionary definition should be included after the numbered paragraphs of the instruction.

It should also be noted under this statute, possession of a shotgun with a barrel less than 18 inches in length is a felony. See PIK 3d 64.01, Criminal Use of Weapons - Felony.

See also, PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defenses, if an affirmative defense that the defendant was acting within the scope of authority is applicable.

### Comment

In *City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975), it was held that a municipal ordinance which prohibited the use of certain weapons was not in conflict with the state statute (21-4201), even though the municipal ordinance was more restrictive.

Under K.S.A. 21-4201(a)(2), the intentional carrying of a concealed weapon upon the person of the accused constitutes in itself a complete criminal offense, irrespective of the purpose or motive of the accused, unless the accused occupies an exempt status expressly recognized in the statute. *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976). In *Lassley*, the Court also held that where the defendant is charged with carrying a concealed weapon, under 21-4201(a)(2), a separate instruction defining general criminal intent is not necessary if an instruction on the elements of the crime requires the State to prove that the proscribed act was done willfully or knowingly.

*State v. Hoskins*, 222 Kan. 436, 565 P.2d 608 (1977), held that the crime of carrying a concealed weapon under 21-4201(a)(4) is not a lesser included offense of unlawful possession of a firearm under 21-4201(a)(2). PIK 64.02 is cited.

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In *State v. Hargis*, 5 Kan. App. 2d 608, 609, 611, 620 P.2d 1181 (1980), the Court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of (his)(her) commission as a special deputy or school security guard.

In *City v. Junction City v. Mevis*, 226 Kan. 526, 530, 601 P.2d 1145 (1979), the Court held that a city ordinance prohibiting anyone from carrying firearms within the city limits was unconstitutionally broad.

*State v. Hunt*, 8 Kan. App. 2d 162, 164, 651 P.2d 967 (1982), held that a scalpel is a dangerous weapon within the meaning of K.S.A. 21-4201(a)(2).

In *State v. Doile*, 7 Kan. App. 2d 722, 648 P.2d 262 (1982), the constitutionality of subsection (a)(4) was upheld as not an unreasonable exercise of police power or overbroad.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.02-A CRIMINAL DISCHARGE OF A FIREARM**

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- A. 1. That the defendant intentionally discharged a firearm;
2. That the act occurred upon (land) (a non-navigable body of water) of another;
- or
- That the act occurred (upon) (from) any (public road) (public road right-of-way) (railroad right-of-way) that adjoins land of another;
3. That the defendant did not have the permission of the owner or person in possession of such land to discharge a firearm; and

OR

- B. 1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an unoccupied dwelling; and

OR

- C. 1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (railroad car) (designate other means of conveyance of person or property);
2. That the person(s) therein (was)(were) not placed in immediate apprehension of bodily harm; and

OR

- D. 1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (railroad car) (designate other means of conveyance of persons or property);

## PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That this act resulted in bodily harm to a person; and  
[2.][3.] or [4.] That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

### Notes on Use

Authority for section [A] is K.S.A. 21-4217, a class C misdemeanor. Authority for section [B] is K.S.A. 21-4219(a), a severity level 8, nonperson felony. Authority for section [C] is K.S.A. 21-4219(b), a severity level 7, person felony. Authority for section [D] is K.S.A. 21-4219(b), a severity level 5, person felony.

The provisions of K.S.A. 21-4219 were enacted to address the so-called "drive by shootings" and presumably fill a perceived need not provided under K.S.A. 21-3410 and 21-3414.

See PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense, if the evidence supports the giving of an instruction that the defendant was acting within the scope of authority.

See PIK 3d 56.04, Homicide Definitions, for a definition of maliciously.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.02-B CRIMINAL DISCHARGE OF A FIREARM -  
AFFIRMATIVE DEFENSE**

It is a defense to the charge of criminal discharge of a firearm that at the time of the commission of the act defendant was a \_\_\_\_\_ and discharged the firearm while acting (within the scope of [his][her] authority) (in the performance of duties of [his][her] office or employment).

Notes on Use

For authority, see K.S.A. 21-4217(b). Insert in the blank space the applicable description of an exempt person under the applicable statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Ordinarily, whether a person falls within an exempt category is a question of law for the court. This instruction is provided for use in the event a question of fact is presented.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.03 AGGRAVATED WEAPONS VIOLATION**

The defendant is charged with the crime of aggravated weapons violation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (allege any of the violations listed in PIK 3d 64.01 and 64.02);
2. That the defendant was (convicted of \_\_\_\_\_, a felony) (released from imprisonment for \_\_\_\_\_, a felony) within five years prior to the commission of such act; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4202. Aggravated weapons violation is a severity level 9, nonperson felony for a violation of subsections (a)(1) through (a)(5) or subsection (a)(9) of K.S.A. 21-4201. Aggravated weapons violation is a severity level 8, nonperson felony for a violation of subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201.

**Comment**

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), the Court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

*State v. Hoskins*, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of aggravated weapons violation under K.S.A. 21-4202 is not a lesser included offense of unlawful possession of a firearm under K.S.A. 21-4204(1)(b).

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### 64.04 CRIMINAL USE OF WEAPONS - AFFIRMATIVE DEFENSE

It is a defense to the charge of (criminal use of weapons) (aggravated weapons violation) that at the time of the commission of the act the defendant was a \_\_\_\_\_ and (used) (possessed) the weapon while acting within the scope of (his)(her) authority.

#### Notes on Use

For authority, see K.S.A. 21-4201 (b) through (f) which lists persons exempt from the application of the act. There should be inserted in the blank space of the instruction a description of an exempt person under the statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

#### Comment

In *State v. Braun*, 209 Kan. 181, 495 P.2d 1000 (1972), which involved a charge of possession of marijuana in violation of K.S.A. 65-2502, it was held that the accused had the burden of introducing evidence as a matter of defense that he was within an exception or exemption in the statute.

*State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), holds that a construction worker who carried a six-inch knife which he used as a tool of his trade did not come within the exempt status expressly recognized in K.S.A. 21-4201(2). The fact that the knife may have been used in his trade was not a defense to the prescribed act of knowingly carrying a dangerous knife concealed on his person.

In *State v. Hargis*, 5 Kan. App. 2d 608, 620 P.2d 1181 (1980), the Court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of his commission as a special deputy or school security guard.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.05 CRIMINAL DISPOSAL OF FIREARMS

The defendant is charged with criminal disposal of firearms. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than 12 inches long to \_\_\_\_\_;
2. That \_\_\_\_\_ was a person under 18 years of age; and

OR

1. That the defendant knowingly (sold) (gave) (transferred) a firearm to \_\_\_\_\_;
2. That \_\_\_\_\_ was both addicted to and an unlawful user of \_\_\_\_\_, a controlled substance; and

OR

1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than 12 inches long to \_\_\_\_\_;
2. That \_\_\_\_\_ had, within the preceding five years, been (convicted of \_\_\_\_\_, a felony) (released from imprisonment for \_\_\_\_\_, a felony); and

OR

1. That the defendant knowingly (sold) (gave) (transferred) a firearm to \_\_\_\_\_;
2. That \_\_\_\_\_ had, within the preceding 10 years, been (convicted of \_\_\_\_\_, a crime) (released from imprisonment for \_\_\_\_\_, a crime, and had not had the conviction of the crime [expunged] [pardoned]); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.



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### Notes on Use

For authority, see K.S.A. 21-4203. Criminal disposal of firearms is a class A, nonperson misdemeanor. The appropriate alternative situation should be used. Under the fourth alternative, claim no. 2, the applicable bracketed occurrence and crime under K.S.A. 21-4203(b) should be stated.

K.S.A. 21-4203(b) provides that subsection (a)(4) shall apply to a felony under K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony.

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**64.06 CRIMINAL POSSESSION OF A FIREARM - FELONY**

The defendant is charged with criminal possession of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly had possession of a firearm with a barrel less than 12 inches long;
2. That the defendant within five years preceding such possession had been (convicted of \_\_\_\_\_, a felony) (released from imprisonment for \_\_\_\_\_, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony); and

OR

1. That the defendant knowingly had possession of a firearm;
2. That the defendant within 10 years preceding such possession had been (convicted of \_\_\_\_\_, a felony) (released from imprisonment for \_\_\_\_\_, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony);
3. That the defendant (did not have the conviction of such crime expunged) (had not been pardoned for such crime); and

[3.] or [4.] That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ in \_\_\_\_\_, County, Kansas.

Notes on Use

Authority for the first alternative is K.S.A. 21-4204(a)(2). Authority for the second alternative is K.S.A. 21-4204(a)(3). Each crime is a severity level 8, nonperson felony.

K.S.A. 21-4204(b) provides that subsection (a)(3) shall apply to a felony under K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-

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3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony.

### Comment

K.S.A. 21-4204 makes "possession" of a firearm by a convicted felon an offense. The word "knowingly" is not used in the statute. The Committee in preparing this instruction has added the requirement that the possession of the firearm be "knowingly." This construction of the word "possession" is consistent with many Kansas cases which recognize that the elements of possession require a mental attitude that the possessor intended to possess the property in question and to appropriate it to himself or herself. For example, see *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920), and *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). In reaching this conclusion the Committee considered K.S.A. 21-3201 which provides that a criminal intent is an essential element of every crime defined by the code. Willful conduct is conduct that is purposeful and intentional and not accidental. An exception is made in K.S.A. 21-3204 which provides for an absolute criminal liability without criminal intent if the crime is a misdemeanor and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described. In view of the case law set forth above and the statutes just cited, it seems clear that in order to establish the offense of criminal possession of a firearm, it must be proved that the possession was knowing and intentional.

K.S.A. 21-2611, which was superseded in K.S.A. 21-4204, was held to be constitutional under the attack that it was a denial of equal protection of the laws. *State v. Weathers*, 205 Kan. 329, 469 P.2d 292 (1970).

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**64.07 CRIMINAL POSSESSION OF A FIREARM - MISDEMEANOR**

The defendant is charged with criminal possession of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was both addicted to and an unlawful user of \_\_\_\_\_, a controlled substance;
2. That the defendant knowingly had possession of a firearm; and

OR

1. That the defendant knowingly had possession of a firearm and was not a law enforcement officer;
2. That the defendant was [in or on school (property) (grounds) upon which was located a (building) (structure) used by (a unified school district) (an accredited nonpublic school) for student (instruction) (attendance) (extracurricular activities) for pupils enrolled in (kindergarten) (any of the grades 1 through 12)] [at a regularly scheduled school sponsored activity or event]; and

OR

1. That the defendant knowingly had possession of a firearm;
2. That the defendant refused to (surrender) (immediately remove) the firearm (from school [property] [grounds]) (at a regularly scheduled school sponsored activity or event) when (requested) (directed) by a (duly authorized school employee) (law enforcement officer); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ in \_\_\_\_\_ County, Kansas.

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### Notes on Use

Authority for the first alternative is K.S.A. 21-4204(a)(1). Authority for the second alternative is K.S.A. 21-4204(a)(4). A violation of the first or second alternatives is a class B, nonperson select misdemeanor. Authority for the third alternative is K.S.A. 21-4204(a)(5), a class A, nonperson misdemeanor.

Felony criminal possession of a firearm is proscribed under subsections (a)(2) and (a)(3) of K.S.A. 21-4204 and it is the subject of PIK 3d 64.06. See Comment to PIK 3d 64.06, Criminal Possession of a Firearm - Felony.

As commonly defined, a person is addicted when he or she has a compulsive need for a habit forming drug and has lost the power of self control with reference to this addiction. Black's Law Dictionary 37 (6th Ed. 1990).

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**64.07-A POSSESSION OF A FIREARM (IN) (ON THE GROUND OF) A STATE BUILDING OR IN A COUNTY COURTHOUSE**

The defendant is charged with the crime of possession of a firearm ((in) [on the grounds of] a state building) (in a county courthouse). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly had possession of a firearm;
2. That the defendant was ((in) [on the grounds of] the [ set forth the name and address of the statutorily named building ]) (within the governor's residence) ((on the grounds of] [in a building on the grounds of] the governor's residence) (within [ describe building ]), a [state-owned] [state-leased] building, so designated by the secretary of administration by rules and regulations and with conspicuously placed signs that clearly stated that firearms were prohibited within the building) (within the courthouse of \_\_\_\_\_ County, Kansas); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4218. Possession of a firearm on the grounds of or in state buildings or county courthouses is a class B, nonperson select misdemeanor.

Subsection (a) of K.S.A. 21-4218 provides that possession of a firearm on the grounds of or in such state buildings does not apply to certain law enforcement officers, or to any person summoned by any such officer to assist in making arrests or preserving the peace while actually engaged in assisting such officer, or to members of military of this state or the United States, when such officers are performing and carrying out official duties. Subsection (a) further provides that the firearms are prohibited in county courthouses, unless by resolution, the

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county commissioners authorize the possession of a firearm in the courthouse.

Subsection (b) of K.S.A. 21-4218 provides that it is not a violation of the statute for the governor, the governor's immediate family, or specifically authorized guests of the governor to possess a firearm on the grounds of or in any building on the grounds of the governor's residence.

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**64.08 DEFACING IDENTIFICATION MARKS OF A FIREARM**

The defendant is charged with the crime of defacing identification marks of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (changed) (altered) (removed) (obliterated) the (name of the maker) (model) (manufacturer's number) (mark of identification) of a firearm; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4205. Defacing identification marks of a firearm is a class B, nonperson misdemeanor.

**Comment**

It should be noted that under K.S.A. 21-4205(b) possession of any firearm upon which an identification mark shall have been intentionally altered is *prima facie* evidence that the possessor altered the same. This section does not create a presumption but only a rule to be applied in determining the sufficiency of the evidence; hence, an instruction covering this is not required.



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**64.09 FAILURE TO REGISTER SALE OF EXPLOSIVES**

The defendant is charged with the crime of failure to register sale of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was the seller of an explosive or detonating substance;
2. That the defendant failed to register the sale or disposition of such explosive; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The register of sales must contain the dates of the sale or other disposition; the name, address, age, and occupation of the person to whom the explosive is sold or delivered; the kind and amount of explosive delivered; the place at which it is to be used; and for what purpose it is to be used.

Notes on Use

For authority, see K.S.A. 21-4207. Failure to register sale of explosives is a class B, nonperson misdemeanor.

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**64.10 FAILURE TO REGISTER RECEIPT OF EXPLOSIVES**

The defendant is charged with the crime of failure to register receipt of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That a quantity of explosives or detonating substance was delivered to the defendant;
2. That the defendant failed to sign (his)(her) name in the register of sales of explosives on the page where the record of such delivery is entered; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4208. Failure to register receipt of explosives is a class C misdemeanor.

For form of register of sales, see K.S.A. 21-4207 and PIK 3d 64.09, Failure to Register Sale of Explosives.

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**64.10-A DEFINITION - EXPLOSIVE**

The term "explosive" is defined as any chemical compound, mixture, or device, of which the primary purpose is to function by explosion, and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.

**Notes on Use**

For authority, see K.S.A. 21-4209b.

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64.11 CRIMINAL DISPOSAL OF EXPLOSIVES

The defendant is charged with criminal disposal of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly ([sold] [gave] [transferred]) ([an explosive substance] [a detonating substance]) to \_\_\_\_\_;
2. That \_\_\_\_\_ was (a person under 18 years of age) (a person who was both addicted to and an unlawful user of a controlled substance, \_\_\_\_\_) (a person who, within the preceding five years, had been convicted of a felony) (a person who, within the preceding five years, had been released from imprisonment for a felony); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4209. Criminal disposal of explosives is a class A, nonperson misdemeanor. The applicable bracketed reference in each parentheses mentioned in claim no. 1 should be selected.

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**64.11-A CRIMINAL POSSESSION OF EXPLOSIVES**

The defendant is charged with criminal possession of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly had possession of any explosive or detonating substance;
2. That the defendant within five years preceding such possession had been (convicted of \_\_\_\_\_, a felony) (released from imprisonment for \_\_\_\_\_, a felony); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4209a. Criminal possession of explosives is a severity level 9, nonperson felony.

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**64.11-B CRIMINAL POSSESSION OF EXPLOSIVES -  
DEFENSE**

**K.S.A. 21-4209a(b) was amended by L. 1992, ch. 298,  
§ 72 by repealing under the statute the defense of  
possession of explosives in the course of a person's lawful  
employment.**

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**64.12 CARRYING CONCEALED EXPLOSIVES**

The defendant is charged with the crime of carrying concealed explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly carried (an explosive substance) (a detonating substance) on (his)(her) person in a wholly or partly concealed manner; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4210. Carrying concealed explosives is a class C misdemeanor.

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### 64.13 REFUSAL TO YIELD A TELEPHONE PARTY LINE

The defendant is charged with the crime of refusal to yield a telephone party line. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant willfully refused to surrender immediately the use of a party line when informed that the line was needed for (an emergency call to a [fire department] [police department]) (medical aid or ambulance); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Party line means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

Emergency means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential.

#### Notes on Use

For authority, see K.S.A. 21-4211. Refusal to yield a telephone party line is a class C misdemeanor.

Harassment by telephone is covered by PIK 3d 63.14, Harassment by Telephone.



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**64.14 CREATING A HAZARD**

The defendant is charged with the crime of creating a hazard. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (stored) (abandoned) in a place accessible to children a container having a compartment of more than 1½ cubic feet capacity and a (door) (lid) which (locks) (fastens) automatically when closed and which cannot be easily opened from the inside, and did fail to remove the (door) (lock) (lid) (fastening device) on such container; and  
or

That the defendant (was the owner) (had possession) of property upon which a (cistern) (well) (cesspool) was located, and knowingly failed to cover the same with protective covering of sufficient strength and quality to exclude human beings and domestic animals therefrom; and

or

That the defendant ([exposed] [abandoned] [left]) ([an explosive substance] [a dangerous substance]) in a place accessible to children; and

2. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4212. Creating a hazard is a class B, nonperson misdemeanor.

The appropriate alternative situation should be used. For a similar offense, see maintaining a public nuisance covered by K.S.A. 21-4106 and PIK 3d 63.06, Maintaining a Public Nuisance.

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**64.15 UNLAWFUL FAILURE TO REPORT A WOUND**

The defendant is charged with the crime of unlawful failure to report a wound. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant treated \_\_\_\_\_ for a (bullet wound) (gunshot wound) (powder burn) caused by the discharge of a firearm;  
or  
That the defendant treated \_\_\_\_\_ for a wound likely to result in death and apparently inflicted by a (knife) (ice pick) (sharp or pointed instrument);
2. That the defendant failed to report the treatment of the wound to the office of the chief of police of \_\_\_\_\_ or to the office of the sheriff of \_\_\_\_\_ County, Kansas; and
3. That this act or omission occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4213. Unlawful failure to report a wound is a class C misdemeanor. The appropriate alternative situation should be used.

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**64.16 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG**

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally made, altered or signed a prescription order and the defendant was not a practitioner at the time of the commission of the act;

or

That the defendant delivered a prescription order, knowing it to have been made, altered or signed by a person other than a practitioner;

or

That the defendant possessed a prescription order with intent to deliver it and knowing it to have been made, altered or signed by a person other than a practitioner;

or

That the defendant possessed a prescription-only drug knowing it to have been obtained pursuant to a prescription order made, altered or signed by a person other than a practitioner;

or

That the defendant provided false information to a practitioner for the purpose of obtaining a prescription-only drug; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Pharmacist means any natural person registered to practice pharmacy.

Practitioner means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered

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or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

**Prescription-only drug means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription."**

**Prescription order means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order.**

### Notes on Use

For authority, see K.S.A. 21-4214. Obtaining a prescription-only drug by fraudulent means is a class A, nonperson misdemeanor for the first offense and a severity level 9, nonperson felony for a second or subsequent offense.

Note that if a prosecution may be brought under the provisions of K.S.A. 65-4127a or 65-4127b of the Uniform Controlled Substances Act, prosecutions may not be brought under this section.

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**64.17 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG FOR RESALE**

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means for resale. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally obtained a prescription-only drug by (making) (altering) (signing) a prescription order at a time when defendant was not a practitioner;

or

That the defendant intentionally obtained a prescription-only drug by delivering a prescription order, knowing it to have been (made) (altered) (signed) by a person other than a practitioner;

or

That the defendant intentionally obtained a prescription-only drug by providing false information to a practitioner;

2. That the defendant (intentionally sold the prescription-only drug so obtained) (intentionally offered for sale the prescription-only drug so obtained) (intentionally possessed with intent to sell the prescription-only drug so obtained); and

3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Pharmacist means any natural person registered to practice pharmacy.

Practitioner means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

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**Prescription-only drug means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription."**

**Prescription order means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order.**

### Notes on Use

For authority, see K.S.A. 21-4215. Obtaining a prescription-only drug by fraudulent means for resale is a severity level 6, nonperson felony. The appropriate alternative situation should be used.

The provisions of this section are not applicable to prosecutions involving prescription-only drugs which could be brought under the Uniform Controlled Substances Act and to which the provisions of K.S.A. 65-4127a or 65-4217b, and amendments thereto, would be applicable. See PIK 3d 67.13-67.16.

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**64.18 SELLING BEVERAGE CONTAINERS WITH  
DETACHABLE TABS**

The defendant is charged with the crime of selling beverage containers with detachable tabs. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally sold or offered for sale at retail in this State a metal beverage container designed and constructed so that a part of the container was detachable in opening the container; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Beverage container means any sealed can containing beer, cereal malt beverages, mineral waters, soda water, and similar soft drinks intended for human consumption.

Notes on Use

For authority, see K.S.A. 21-4216. Selling beverage containers with detachable tabs is a class C misdemeanor.

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CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

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**65.01 PROMOTING OBSCENITY**

The defendant is charged with the crime of promoting obscenity. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly or recklessly (manufactured) (issued) (sold) (gave) (provided) (lent) (mailed) (delivered) (transmitted) (published) (distributed) (circulated) (disseminated) (presented) (exhibited) (advertised) obscene material or an obscene device; and

or

That the defendant knowingly or recklessly possessed (obscene material) (an obscene device) with intent to (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) such (material) (device); and

or

That the defendant knowingly or recklessly (offered) (agreed) to (manufacture) (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) obscene material or an obscene device; and

or

That the defendant knowingly or recklessly (produced) (presented) (directed) an obscene performance or participated in a portion thereof which was obscene or which contributed to its obscenity; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ in \_\_\_\_\_ County, Kansas.

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### Notes on Use

For authority, see K.S.A. 21-4301. Promoting obscenity is a class A, nonperson misdemeanor for the first offense. For the second and subsequent offenses, this offense is a severity level 9, person felony. For affirmative defenses, see PIK 3d 65.05. For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

### Comment

For definition of "recklessness", see K.S.A. 21-3201(c).

The statutory definition of obscenity as originally contained in K.S.A. 21-4301 was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct. 1304 (1957). In June of 1973, the United States Supreme Court decided *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), which substantially altered the obscenity standards which both state and federal courts must apply. In *Miller*, the Supreme Court held that state statutes designed to regulate obscene material must be limited to works which depict or describe *sexual* conduct. The prohibited conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." Furthermore, *Miller* held that statutes prohibiting obscenity must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller* rejected the standard that the work must be utterly without redeeming social value. Additionally, the Court rejected a national standard for obscene material within the context of the First Amendment.

In March, 1976 in *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), the Kansas Supreme Court, following *Miller*, upheld the constitutionality of the then existing obscenity statute by construing the word "obscenity" as a word of constitutional meaning. In 1976, the Kansas Legislature amended K.S.A. 21-4301 and 21-4301a to change the statutory definition of obscenity to comply with the judicial definition of obscenity as contained in these cases. The 1976 statute, however, did not change the basic elements of the offense of promoting obscenity other than redefining the term "obscenity" itself.

In *State v. Allen & Rosebaugh*, 1 Kan. App. 2d 32, 562 P.2d 445 (1977), the Kansas Court of Appeals overturned the 1974 convictions of two defendants charged under K.S.A. 21-4301 because the definition of "obscene" prior to 1976 was found to be unconstitutionally overbroad. It held that the decision in *State v. Motion Picture Entitled "The Bet"*, supra, redefining the word "obscenity" could not be applied retroactively to the conduct of the defendants in 1974.

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In *State v. Loudermilk*, 221 Kan. 157, 160, 557 P.2d 1229 (1976), the Court referred to 21-4301 and 21-4301a (promoting obscenity) as crimes in which a previous conviction is not an element of the substantive crime but serves only to enhance punishment.

In *New York v. Ferber*, 458 U.S. 747, 73 L.Ed 2d 1113, 102 S.Ct. 3348 (1982), which upheld a New York criminal statute prohibiting the knowing promotion of sexual performances by children under 16, by distribution of material depicting such performances, the Court followed the obscenity standards of *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973). *Ferber* held that the states are entitled to greater leeway in the regulation of pornographic depictions of children than in the case of adults.

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301 was upheld against allegations that the statute was unconstitutional as a violation of due process, because the definition of "obscenity" was vague and overbroad and the statute was an invalid exercise of the police power.

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office.

In 1993, the Kansas Legislature amended K.S.A. 21-4301(c)(3) to exclude from the definition of "obscene device" such devices "disseminated or promoted for the purpose of medical or psychological therapy."

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.02 PROMOTING OBSCENITY TO A MINOR**

The defendant is charged with the crime of promoting obscenity to a minor. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and recklessly (allege any of the four violations listed in PIK 3d 65.01, Promoting Obscenity);
2. That \_\_\_\_\_ (the recipient of the obscene [material] [device]) (a member of the audience of such obscene performance) was a minor child under the age of 18 years; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4301a. Promoting obscenity to a minor is a class A, nonperson misdemeanor, for the first offense. For the second and subsequent offenses, this offense is a severity level 8, person felony. For affirmative defenses, see PIK 3d 65.05-A.

For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

Comment

See Comment to PIK 3d 65.01, Promoting Obscenity, in regard to the statutory changes made in 21-4301 and 21-4301a by the 1976 Legislature as a result of the decision of the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), and the decision of the Supreme Court of Kansas in *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), which redefine the term "obscenity." The Legislature amended K.S.A. 21-4301a to conform to the new definition mandated by those decisions.

**65.03 PROMOTING OBSCENITY - DEFINITIONS**

Certain terms used in the preceding instructions are defined as follows:

**(a) Obscene.**

Any material or performance is "obscene" if the average person, applying contemporary community standards, would find that the material or performance, taken as a whole, appeals to the prurient interest; that the material or performance has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy, or masturbation, excretory functions, sadomasochistic abuse, or lewd exhibition of the genitals; and the material or performance, taken as a whole, lacks serious literary, educational, artistic, political, or scientific value.

**(b) Material.**

Material means any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or other manner.

**(c) Obscene.**

Obscene device means a device, including a dildo or artificial vagina, designed or marketed to be used primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy.

**(d) Performance.**

Performance means any play, motion picture, dance, or other exhibition performed before any audience.

**(e) Sexual intercourse.**

Sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ or

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any object. Any penetration, however slight, is sufficient to constitute sexual intercourse. Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of performance of generally recognized health care practices, or a body cavity search conducted by law enforcement officers.

(f) **Sodomy.**

Sodomy means oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal. It does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices, or a body cavity search conducted by law enforcement officers.

(g) **Wholesaler.**

Wholesaler means a person who sells, distributes or offers for sale or distribution obscene materials or devices only for resale and not to the consumer, and who does not manufacture, publish or produce such materials or devices.

(h) **Prurient interest.**

Prurient interest means an unhealthy, unwholesome, morbid, degrading, and shameful interest in sex.

### Comment

See Comment to PIK 3d 65.01, Promoting Obscenity, and 65.02, Promoting Obscenity to a Minor. This instruction, which defines the term "obscene", complies with the definition of the word "obscenity" as required by *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), and *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 71, 547 P.2d 760 (1976). The statutory definition has been expanded somewhat to include the language used in



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the cases.

A jury may not understand the meaning of the term "prurient interest." The definition of prurient interest is adopted from *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980).

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office.

In 1993, the Kansas Legislature amended K.S.A. 21-4301(c)(3) to exclude from the definition of "obscene device" such devices "disseminated or promoted for the purpose of medical or psychological therapy."

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**65.04 PROMOTING OBSCENITY - PRESUMPTION OF  
KNOWLEDGE AND RECKLESSNESS FROM  
PROMOTION**

If you find that defendant promoted obscene materials or devices by emphasizing their prurient appeal or sexually provocative aspects or if you find the defendant is not a wholesaler, and promoted the materials or devices in the course of (his)(her) business, there is a presumption that the defendant did so knowingly or recklessly. This presumption may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the required criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-4301(b) and 21-4301a.

In the statute, the words "prurient appeal or sexually provocative aspects" are used. See *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980), where the use of the word "prurient" is discussed.

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**65.05 PROMOTING OBSCENITY - AFFIRMATIVE DEFENSES**

It is a defense to the charge of promoting obscenity that the persons to whom the allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, or governmental justification for possessing or reviewing the same.

or

It is a defense to the charge of promoting obscenity that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.

or

It is a defense to the charge of promoting obscenity that the allegedly obscene material or obscene device was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material was either sold, leased, distributed or disseminated by a teacher, instructor, professor or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.

or

It is a defense to the charge of promoting obscenity that the defendant was a projectionist, or assistant projectionist, having no financial interest in the show or in the place of presentation other than regular employment as a projectionist, or assistant projectionist, and had no personal knowledge of the contents of the motion picture and the motion picture was shown commercially to the general public.

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### Notes on Use

For authority, see K.S.A. 21-4301 and 21-4301a.

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 3d 58.02, Affirmative Defenses - Burden of Proof, should be given.

### Comment

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

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**65.05-A PROMOTING OBSCENITY TO A MINOR -  
AFFIRMATIVE DEFENSES**

It is a defense to the charge of promoting obscenity to a minor that the defendant had reasonable cause to believe that the minor involved was 18 years old or over and such minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that such minor was 18 years old or more.

or

It is a defense to the charge of promoting obscenity to a minor that the allegedly obscene material or obscene device was purchased, leased, or otherwise acquired by a public, private, or parochial school, college or university, and that such material was either sold, leased, distributed, or disseminated by a teacher, instructor, professor, or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.

or

It is a defense to the charge of promoting obscenity to a minor that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.

or

It is a defense to the charge of promoting obscenity to a minor that an exhibition in a state of nudity was for a bona fide scientific or medical purpose or for an educational or cultural purpose for a bona fide school, museum, or library.

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### Notes on Use

For authority, see K.S.A. 21-4301 and 21-4301a.

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 3d 58.02, Affirmative Defenses - Burden of Proof, should be given.

### Comment

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

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**65.06 GAMBLING**

The defendant is charged with the crime of gambling.  
The defendant pleads not guilty.

To establish this charge, each of the following claims  
must be proved:

1. That the defendant (made a bet) (entered or remained in a gambling place with intent to [make a bet] [participate in a lottery] [play a gambling device]); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4303. Gambling is a class B, nonperson misdemeanor. PIK 3d 65.07, Gambling-Definitions, should be given with this instruction.

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65.06-A ILLEGAL BINGO OPERATION

The defendant is charged with the crime of illegal bingo operation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (managed) (operated) (conducted) a game of bingo;
2. That the defendant did so in violation of a (statute) (regulation) which provides as follows: (list the specific statute or regulation with which the State contends the defendant failed to comply); and
3. That the act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Bingo means a game in which each participant must pay a charge and a prize or prizes are awarded to the winner or winners in which each participant receives one or more cards each of which is marked off into 25 squares arranged in five horizontal rows of five squares each, and five vertical rows of five squares each, with each square being designated by number, letter or combination of numbers and letters, and only the center square designated with the word "free" with no 2 cards being identical, with the players covering squares as the operator of such game announces a number, letter or combination of numbers and letters appearing on an object selected by chance, either manually or mechanically from a receptacle in which have been placed objects bearing numbers, letters, or combinations of numbers and letters corresponding to the system used for designating the squares, with the winner of each game being the player or players first properly covering a predetermined and announced pattern of squares upon the card being used by such player or players.



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### Notes on Use

For authority, see K.S.A. 21-4303a. An illegal bingo operation is a class A, nonperson misdemeanor. The definition of bingo set forth in the instruction is that contained in K.S.A. 79-4701(a).

### Comment

An illegal bingo operation could include any violation of a statutory provision pertaining to bingo as contained in K.S.A. 79-4701 through 79-4711 or of any regulation adopted pursuant to K.S.A. 79-4708. In a prosecution under this section, Element No. 2 of the instruction should include a statement describing the specific statute or regulation with which the defendant failed to comply.

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), the Kansas Supreme Court construed K.S.A. 79-4701 *et seq.*, to permit a class A private club to fall within the definition of a bona fide fraternal organization, thereby making the club eligible for a bingo license.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.07 GAMBLING - DEFINITIONS**

Certain terms used in the preceding instructions are defined as follows:

**Bet** is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.

**Lottery** is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance. As used in this definition, a lottery does not include a lottery operated by the State pursuant to the Kansas Lottery Act.

**Consideration** means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration.

**Gambling device** is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device.

**Gambling place** is any place, room, building, vehicle, tent or location which is used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries, or playing gambling devices.

**Notes on Use**

For authority, see K.S.A. 21-4302. This instruction contains the statutory

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definitions applicable to gambling offenses. All statutory definitions are provided, any of which may be used in an appropriate case.

K.S.A. 21-4302(1)(a), (b), (c), (d), (e), and (f) set forth what a bet does not include. A bet does not include: bona fide business transactions which are valid under the law of contracts including but not limited to contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation for loss caused by the happening of the chance including, but not limited, to contracts of indemnity or guaranty and life or health and accident insurance; offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such a contest; a lottery as defined in this section; any bingo game by or for participants managed, operated or conducted in accordance with the laws of the State of Kansas by an organization licensed by the State of Kansas to manage, operate or conduct games of bingo; a lottery operated by the State pursuant to the Kansas Lottery Act; and any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas Parimutuel Racing Act.

K.S.A. 21-4302(2) states a lottery does not include a lottery operated by the State pursuant to the Kansas Lottery Act.

K.S.A. 21-4302(3) declares that the term "consideration" shall not include sums of money paid by or for participants in any bingo game managed, operated, or conducted in accordance with the laws of the State of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate or conduct bingo games under the laws of the State of Kansas and it shall be conclusively presumed that such sums paid by or for said participants were intended by said participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations; sums of money paid by or for participants in any lottery operated by the State pursuant to the Kansas Lottery Act; and sums of money paid by or for participants in any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas Parimutuel Racing Act. Where such excluded transactions are involved in the particular case, they usually raise pure questions of law to be determined by the Court. Hence, the matters excluded have not been set forth directly in the instruction containing gambling definitions. If issues of fact should arise on these matters, an additional appropriate instruction could be given.

K.S.A. 21-4302(5) provides that evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places, is admissible on the issue of whether it is a gambling place.

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### Comment

A television give-away program in which persons were called from the telephone directory and given a prize if they knew a code number and the amount of the jackpot which had been related on a television program does not involve valuable consideration coming directly or indirectly from participants and this is not a "lottery" within the constitutional and statutory provisions. *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, 473 P.2d 97 (1970).

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), K.S.A. 49-4701 was construed to bring a class A private club within the definition of a bona fide fraternal organization; thus, making the club eligible for a bingo license.

In *State v. Thirty-six Pinball Machines*, 222 Kan. 416, 565 P.2d 236 (1977), the Court construed the term "gambling devices" in K.S.A. 21-4302(4) and held that a pinball machine which is played by means of a spring-loaded plunger and metallic balls and which "pays off" only in free replays is capable of innocent use and is not a gambling device *per se*. The Court stated that it is the actual use to which a pinball machine is put which determines whether it is possessed and used as a gambling device.

In *Games Management, Inc. v. Owens*, 233 Kan. 444, 662 P.2d 260 (1983), the Court named three requirements for "gambling devices" in K.S.A. 21-4302(4) and held that the video games known as "Double-Up" and "Twenty-One" which gave only free replays as a prize were not gambling devices. The replays, as they could not be exchanged for money or property, were not considered something of value. The Court did state that the games were games of chance and thus represented gambling devices if something of value were received as a reward for winning.

See also, *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), where the same principle was applied to electronic video card games.

In *Lambeth v. Levens*, 237 Kan. 614, 623, 702 P.2d 320 (1985), K.S.A. 25-3108, providing for breaking a tie vote in an election by lot, was held not a form of an unconstitutional lottery because campaign expenses were not included in the definition of "consideration" contained in K.S.A. 21-4302(3).

K.S.A. 21-4302(5) "contains no requirement that the premises must have been used previously as a gambling place before it is rendered a gambling place. The statute does not expressly require that the place have as 'one of its principal uses' the making and settling of bets." *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

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**65.08 COMMERCIAL GAMBLING**

The defendant is charged with the crime of commercial gambling. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (operated) (received all or part of the earnings of) a gambling place; and  
or  
That the defendant intentionally (received, recorded, or forwarded bets or offers to bet) (possessed facilities with intent to receive, record, or forward bets); and  
or  
That the defendant, for gain, intentionally became a custodian of anything of value bet or offered to be bet; and  
or  
That the defendant intentionally (conducted a lottery) (possessed facilities with intent to conduct a lottery); and  
or  
That the defendant intentionally (set up for use) (collected the proceeds of) a gambling device; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4304. Commercial gambling is a severity level 8, nonperson felony. Appropriate definitions in PIK 3d 65.07, Gambling-Definitions, should be given with this instruction.

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**65.09 PERMITTING PREMISES TO BE USED FOR  
COMMERCIAL GAMBLING**

The defendant is charged with the crime of permitting premises to be used for commercial gambling. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally granted the use or allowed the continued use of a place as a gambling place; and

or

That the defendant intentionally permitted another to set up a gambling device for use in a place under the defendant's control; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4305. Permitting premises to be used for commercial gambling is a class B, nonperson misdemeanor. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

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**65.10 DEALING IN GAMBLING DEVICES**

The defendant is charged with the crime of dealing in gambling devices. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manufactured) (transferred) (possessed with intent to transfer) a gambling device or sub-assembly or essential part thereof; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4306. Dealing in gambling devices is a severity level 8, nonperson felony. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

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**65.10-A DEALING IN GAMBLING DEVICES - DEFENSE**

It is a defense to this charge that:

- (1) The gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950;  
or
- (2) The gambling device or sub-assembly or essential part thereof was manufactured, transferred or possessed by a manufacturer registered under the Federal Gambling Devices Act of 1962 (15 U.S.C. 1171 *et seq.*) or a transporter under contract with such manufacturer with intent to transfer for use:
  - (a) By the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission;
  - (b) By a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission;  
or
  - (c) In a state other than the State of Kansas.

Notes on Use

For authority, see K.S.A. 21-4306(d). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.



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**65.11 DEALING IN GAMBLING DEVICES -  
PRESUMPTION FROM POSSESSION**

If you find that the defendant had possession of any device designed exclusively for gambling purposes, which was not set up for use or which was not in a gambling place, there is a presumption that the defendant had possession with the intent to transfer the same. The presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-4306(b).

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**65.12 POSSESSION OF A GAMBLING DEVICE**

The defendant is charged with the crime of possession of a gambling device. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly possessed or had custody or control as (owner) (lessee) (agent) (employee) (bailee) of a gambling device; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4307. Possession of a gambling device is a class B, nonperson misdemeanor. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

In *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), the State sought to sell or destroy confiscated electronic video card games. The Kansas Supreme Court held the State may not seek sale or destruction of property under K.S.A. 22-2512 without a notice or hearing for those having a property interest in the machines.

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**65.12-A POSSESSION OF A GAMBLING DEVICE -  
DEFENSE**

It is a defense to this charge that:

- (1) The gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950.  
or
- (2) The gambling device is possessed or under custody or control of a manufacturer registered under the Federal Gambling Devices Act of 1962 (15 U.S.C. 1171 *et seq.*) or a transporter under contract with such manufacturer with intent to transfer for use:
  - (a) By the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission;
  - (b) By a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission;  
or
  - (c) In a state other than the State of Kansas.

Notes on Use

For authority, see K.S.A. 21-4307. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.13 INSTALLING COMMUNICATION FACILITIES FOR GAMBLERS**

The defendant is charged with the crime of installing communication facilities for gamblers. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant installed communication facilities in a place which the defendant knew was a gambling place; and

or

That the defendant installed communication facilities knowing that they would be used principally for the purpose of transmitting information to be used in making or settling bets; and

or

That the defendant, knowing that communication facilities were being used principally for the purpose of transmitting information to be used in making or settling bets, allowed their continued use; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4308. Installing communication facilities for gamblers is a severity level 8, nonperson felony. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.14 FALSE MEMBERSHIP CLAIM**

The defendant is charged with the crime of false membership claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally misrepresented (himself) (herself) to be a member of \_\_\_\_\_, a (fraternal) (veteran's) organization; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4309. False membership claim is a class C misdemeanor.

Insert the name of the organization in which the defendant claimed membership in the blank space in the first element of this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.15 CRUELTY TO ANIMALS

The defendant is charged with the crime of cruelty to animals. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant:

(a) intentionally (killed) (injured) (maimed) (tortured) (mutilated) (the animal); and

or

(b) (abandoned) (left) \_\_\_\_\_ without making provisions for its proper care; and

or

(c) had physical custody of \_\_\_\_\_ and failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) as needed for the health or well-being of that kind of animal; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4310. Cruelty to animals is a class B, nonperson misdemeanor. The act or acts of cruelty specified in (1)(a), (b) or (c) appropriate to the case, should be used in the instruction.

Comment

K.S.A. 21-4313 defines "animal." K.S.A. 21-4311 provides for the taking into custody and disposition of a mistreated animal.

It was held in *State, ex rel. v. Claiborne*, 211 Kan. 264, 505 P.2d 732 (1973), that cockfighting does not constitute cruelty to animals under the former statute K.S.A. 21-4310.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.16 CRUELTY TO ANIMALS - DEFENSE**

**The statute making cruelty to animals a criminal offense is not applicable to (list here any relevant exceptions contained in K.S.A. 21-4310 ).**

Notes on Use

K.S.A. 21-4310(b) provides eight specific exceptions to the crime of cruelty to animals which may be available as a defense, if relevant. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.17 UNLAWFUL DISPOSITION OF ANIMALS**

The defendant is charged with the crime of unlawful disposition of animals. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (raffled) (gave as a prize or premium) (used as an advertising device or promotional display) living (rabbits) (chickens) (ducklings) (goslings); and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Unlawful disposition of animals does not include the giving of the described animals to minors for use in agricultural projects under the supervision of commonly recognized youth farm organizations.

**Notes on Use**

For authority, see K.S.A. 21-4312. Unlawful disposition of animals is a class C misdemeanor. In each case, the appropriate act and animal should be selected depending on the facts. The exception is contained in the statute and, if applicable, should be included in the instruction.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.18 UNLAWFUL CONDUCT OF DOG FIGHTING**

The defendant is charged with the crime of unlawful conduct of dog fighting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant caused for (amusement) (gain) a dog to (fight with) (injure) another dog; and

or

That the defendant knowingly permitted a dog to (fight with) (injure) another dog for (amusement) (gain) on premises under the defendant's (ownership) (charge) (control); and

or

That the defendant (trained) (owned) (kept) (transported) (sold) any dog (for the purpose) (with the intent) of having it fight with or injure another dog; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4315. Unlawful conduct of dog fighting is a severity level 10, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.19 ATTENDING THE UNLAWFUL CONDUCT OF DOG FIGHTING**

The defendant is charged with the crime of attending the unlawful conduct of dog fighting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly attended a dog fight;  
and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Dog fighting means an event, conducted for gain or amusement, at which a dog fights with or injures another dog.**

**Notes on Use**

For authority, see K.S.A. 21-4315. Attending the unlawful conduct of dog fighting is a class B, nonperson misdemeanor.

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**65.20 ILLEGAL OWNERSHIP OR KEEPING OF A DOG**

The defendant is charged with the crime of illegal ownership or keeping of a dog. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (owned) (kept) on (his)(her) premises a dog;
2. That the defendant has been convicted of unlawful conduct of dog fighting under K.S.A. 21-4315 and amendments thereto within the last five years; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4317. Illegal ownership or keeping of a dog is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.21 to 65.29 RESERVED FOR FUTURE USE.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.30 CONFLICTS OF INTEREST - COMMISSION MEMBER OR EMPLOYEE**

The defendant is charged with the crime of conflicts of interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was (the executive director) (a member of the commission) (an employee) (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery;
2. That the defendant had either directly or indirectly an interest in a business knowing that such business contracts with the Kansas Lottery for a major procurement, whether such interest is as (a natural person) (partner) (member of an association) (a stockholder or director or officer of the corporation); and

or

That the defendant (accepted) (agreed to accept) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of \$20 or more in any calendar year from a person knowing that such person contracts or seeks to contract with the State to supply (gaming equipment) (materials) (tickets) (consulting services) for use in the lottery or is a lottery retailer or an applicant for lottery retailer; and

3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes On Use

For authority, see K.S.A. 74-8716(a). Conflicts of interest is a class A

## PATTERN INSTRUCTIONS FOR KANSAS 3d

misdemeanor and is treated as a nonperson crime for purposes of determining criminal history under L. 1992, ch. 239, § 10.

### Comment

In addition to the provisions of K.S.A. 74-8716(a), all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas Lottery. K.S.A. 74-8716(e).

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**65.31 CONFLICTS OF INTEREST - RETAILER OR CONTRACTOR**

The defendant is charged with the crime of conflicts of interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant is (a lottery retailer) (an applicant for lottery retailer) (a person who contracts or seeks to contract with the State to supply [gaming equipment] [materials] [tickets] [consulting services] for use in the lottery);
2. That the defendant (offered) (paid) (gave) (made) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of \$20 or more in any calendar year to a person knowing such person is (the executive director) (a member of the commission) (an employee) of the Kansas Lottery (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 74-8716(b). Conflicts of interest is a class A misdemeanor and is treated as a nonperson crime for purposes of determining criminal history under L. 1992, ch. 239, § 10.

**Comment**

In addition to the provisions of K.S.A. 74-8716(b), all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas Lottery. K.S.A. 74-8716(e).

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**65.32 FORGERY OF A LOTTERY TICKET**

The defendant is charged with the crime of forgery of a lottery ticket. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a lottery ticket issued or purported to have been issued by the Kansas Lottery;

or

That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a share or receipt for the purchase of a lottery ticket issued or purported to have been issued by the Kansas Lottery;

2. That the defendant did this act with the intent to defraud; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 74-8717. Forgery of a lottery ticket is a severity level 8, nonperson felony.



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**65.33 UNLAWFUL SALE OF A LOTTERY TICKET**

The defendant is charged with the crime of unlawful sale of a lottery ticket. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

1. That the defendant sold a lottery ticket or share at a price other than the price fixed by the rules and regulations adopted pursuant to the Kansas Lottery Act; and

or

That the defendant (sold) (resold) a lottery ticket or share and was not a lottery retailer as authorized by the Kansas Lottery Act; and

or

That the defendant sold a lottery ticket or share to \_\_\_\_\_ knowing that \_\_\_\_\_ was a person under 18 years of age; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 74-8718. Unlawful sale of a lottery ticket is a class A, nonperson misdemeanor upon conviction of the first offense, and a severity level 9, nonperson felony upon conviction of a second or subsequent offense.

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**65.34 UNLAWFUL PURCHASE OF A LOTTERY TICKET**

The defendant is charged with the crime of unlawful purchase of a lottery ticket. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) \_\_\_\_\_ knowing \_\_\_\_\_ was (the executive director) (a member of the commission) (an employee) of the Kansas Lottery; and

or

That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) \_\_\_\_\_ knowing \_\_\_\_\_ was an (officer) (employee) of a business which was currently engaged in supplying equipment, supplies or services used directly in the operations of any lottery conducted pursuant to the Kansas Lottery Act; and

or

That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) \_\_\_\_\_ knowing \_\_\_\_\_ was a (spouse) (child) (stepchild) (brother) (stepbrother) (sister) (stepsister) (parent or stepparent) of (the executive director) (a member of the commission) (an employee) of the Kansas Lottery; an (officer) (employee) of a business which was currently engaged in supplying (equipment) (supplies or services) used directly in the operations of any lottery conducted pursuant to the Kansas Lottery Act; and

or

That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) \_\_\_\_\_ knowing \_\_\_\_\_ was a person who resided in the same household as (the executive

## PATTERN INSTRUCTIONS FOR KANSAS 3d

- director) (a member of the commission) (an employee) of the Kansas Lottery; an (officer) (employee) of a business which was currently engaged in supplying (equipment) (supplies or services) used directly in the operation of any lottery conducted pursuant to the Kansas Lottery Act; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in \_\_\_\_\_ County, Kansas.

### Notes on Use

For authority, see K.S.A. 74-8719. Unlawful purchase of a lottery ticket is a class A, nonperson misdemeanor upon conviction of the first offense, and a severity level 9, nonperson felony upon conviction of a second or subsequent offense.

For applicable definitions, see PIK 3d 65.35, Lottery Definitions.

### Comment

K.S.A. 74-8719(f) states that each person who purchases a lottery ticket or share thereby agrees to be bound by the rules and regulations adopted by the commission and the provisions of the Kansas Lottery Act.

It is a defense to a charge of unlawful purchase of a lottery ticket that the executive director of the Kansas Lottery authorized, in writing, any employee of the Kansas Lottery and any employee of a lottery vendor to purchase a lottery ticket.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 65.35 LOTTERY DEFINITIONS

Certain terms used in the preceding instructions are defined as follows:

**Commission** means the Kansas Lottery Commission.

**Executive Director** means the executive director of the Kansas Lottery.

**Gaming Equipment** means any electric, electronic or mechanical device or other equipment unique to the Kansas Lottery used directly in the operation of any lottery and in the determination of winners pursuant to this Act.

**Kansas Lottery** means the state agency created by the Kansas Lottery Act to operate a lottery or lotteries pursuant to this Act.

**Lottery Retailer** means any person with whom the Kansas Lottery has contracted to sell lottery tickets or shares, or both, to the public.

**Lottery or State Lottery** means the lottery or lotteries operated pursuant to the Kansas Lottery Act.

**Major Procurement** means any gaming product or service including, but not limited to, facilities, advertising and promotional services, annuity contracts, prize payment agreements, consulting services, equipment, tickets and other products and services unique to the Kansas Lottery, but not including materials, supplies, equipment and services common to the ordinary operations of state agencies.

**Person** means any natural person, association, corporation or partnership.

**Prize** means any prize paid directly by the Kansas Lottery pursuant to its rules and regulations.

**Returned ticket** means any ticket which was transferred to a lottery retailer, which was not sold by the lottery retailer and which was returned to the Kansas Lottery for refund by issuance of a credit or otherwise.

**Share** means any intangible manifestation authorized by the Kansas Lottery to prove participation in a lottery

## PATTERN INSTRUCTIONS FOR KANSAS 3d

**game.**

**Ticket means any tangible evidence issued by the Kansas Lottery to prove participation in a lottery game.**

**Vendor means any person who has entered into a major procurement contract with the Kansas Lottery.**

### Notes on Use

For authority, see K.S.A. 74-8702.

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**65.36 - 65.50 RESERVED FOR FUTURE USE.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.51 VIOLATION OF THE KANSAS PARIMUTUEL RACING ACT**

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (status of the defendant, if applicable);  
[1.] or [2.] That the defendant (describe the prohibited act); and  
[2.] or [3.] That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 74-8810 which covers a multitude of prohibited acts involving persons having varying status under the provisions of the Kansas Parimutuel Racing Act.

K.S.A. 74-8810(a) applies to members of the Racing Commission, certain directors and members of an organization licensee. Violation of 74-8810(a) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(b) applies to any member, employee or appointee of the Racing Commission, including stewards and racing judges. Violation of 74-8810(b) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(c) applies to any members, employees or appointees of the Racing Commission, and certain of their relatives. Violation of 74-8810(c) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(d) applies to any officers, directors and members of organizational licensees. Violation of 74-8810(d) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(e) applies to facility owners or manager licensees. Violation of 74-8810(e) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(f) applies to licensees and officers, directors, members or employees of licensees. Violation of 74-8810(f) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(g), (h) and (i) apply to any person. Violation of 74-8810(g)

## PATTERN INSTRUCTIONS FOR KANSAS 3d

is a class B, nonperson misdemeanor. Violation of 74-8810(h) is a class A, nonperson misdemeanor. Violation of 74-8810(i) is a severity level 8, nonperson felony.

K.S.A. 74-8810(j) applies to any person less than 18 years of age. Violation of 74-8810(j) makes the person subject to adjudication as a juvenile offender pursuant to the Kansas Juvenile Offenders Code.

The suggested pattern instruction should be completed to show the status of the defendant, if applicable, and the particular act which is prohibited by the statute as set forth in the complaint or information. Element No. 1 is not applicable and need not be used when the prohibited act can be committed by any person under subsections (g), (h) and (i) of K.S.A. 74-8810.

The following is a sample instruction which assumes a member of the Racing Commission is charged with placing a wager on an entry in a horse race conducted by an organization licensee:

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a member of the Kansas Racing Commission;
2. That the defendant knowingly placed a wager on an entry in a horse race conducted by an organization licensee; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

For applicable definitions, see PIK 3d 65.52, Parimutuel Racing Act - Definitions.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.52 PARIMUTUEL RACING ACT - DEFINITIONS**

Certain terms used in the preceding instructions are defined as follows:

**Breakage** means the odd cents by which the amount payable on each dollar wagered in a parimutuel pool exceeds:

1. A multiple of \$.10, for parimutuel pools from races conducted in this state; and
2. a multiple of such other number of cents as provided by law of the host jurisdiction, for interstate combined wagering pools.

**Commission** means the Kansas Racing Commission created by this Act.

**Concessionaire licensee** means a person, partnership, corporation or association licensed by the commission to utilize a space or privilege within a racetrack facility to sell goods.

**Dual racetrack facility** means a racetrack facility for the racing of both horses and greyhounds or two immediately adjacent racetrack facilities, owned by the same licensee, one for racing horses and one for racing greyhounds.

**Executive Director** means the executive director of the commission.

**Facility manager licensee** means a person, partnership, corporation or association licensed by the commission and having a contract with an organization licensee to manage a racetrack facility.

**Facility owner licensee** means a person, partnership, corporation or association, or the State of Kansas or any political subdivision thereof, licensed by the commission to construct or own a racetrack facility but does not mean an organization licensee which owns the racetrack facility in which it conducts horse or greyhound racing.

**Financial interest** means an interest that could result directly or indirectly in receiving a pecuniary gain or sustaining a pecuniary loss as a result of ownership or

## PATTERN INSTRUCTIONS FOR KANSAS 3d

interest in a business entity or activity or as a result of a salary, gratuity or other compensation or remuneration from any person.

**Greyhound** means any greyhound breed of dog properly registered with the National Greyhound Association of Abilene, Kansas.

**Horsemen's association** means any association or corporation:

1. All officers, directors, members and shareholders of which are licensed owners of horses or licensed trainers of horses, or both;
2. which is applying for or has been issued a facility owner license authorizing ownership of Eureka Downs; and
3. none of the officers, directors, members or shareholders of which holds another facility owner license or is an officer, director, member or shareholder of another facility owner licensee.

**Horsemen's nonprofit organization** means any nonprofit organization:

1. All officers, directors, members or shareholders of which are licensed owners of horses or licensed trainers of horses, or both; and
2. which is applying for or has been issued an organization license authorizing the conduct or horse races at Eureka Downs.

**Host facility** means the racetrack at which the race is run or, if the race is run in a jurisdiction which is not participating in the interstate combined wagering pool, the racetrack or other facility which is designated as the host facility.

**Host jurisdiction** means the jurisdiction where the host facility is located.

**Interstate combined wagering pool** means a parimutuel pool established in one jurisdiction which is combined with comparable parimutuel pools from one or more racing jurisdictions for the purpose of establishing the amount of money returned on a successful wager in the participating

## PATTERN INSTRUCTIONS FOR KANSAS 3d

jurisdictions.

**Intertrack wagering** means wagering on a simulcast race at a licensed racetrack facility or at a facility which is licensed in its racing jurisdiction to conduct live races.

**Intrastate combined wagering pool** means a parimutuel pool which is combined with comparable parimutuel pools from one or more racetrack facilities for the purpose of establishing the amount of money returned on a successful wager at the participating racetrack facilities.

**Kansas-whelped greyhound** means a greyhound whelped and raised in Kansas for the first six months of its life.

**Minus pool** means a parimutuel pool in which, after deducting the takeout, not enough money remains in the pool to pay the legally prescribed minimum return to those placing winning wagers, and in which the organization licensee would be required to pay the remaining amount due.

**Nonprofit organization** means:

1. A corporation which is incorporated in Kansas as a not-for-profit corporation pursuant to Kansas general corporation code and the net earnings of which do not inure to the benefit of any shareholder, individual member or person; or
2. a county fair association organized pursuant to K.S.A. 2-125 *et seq.*, and amendments thereto.

**Occupation licensee** means a person licensed by the commission to perform an occupation or provide services which the commission has identified as requiring a license pursuant to this Act.

**Off-track wagering** means wagering on a simulcast race at a facility which is not licensed in its jurisdiction to conduct live races.

**Organization licensee** means a nonprofit organization licensed by the commission to conduct races pursuant to this Act and, if the license so provides, to construct or own a racetrack facility.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

**Parimutuel pool** means the total money wagered by individuals on one or more horses or greyhounds in a particular horse or greyhound race to win, place or show, or combinations thereof, as established by the commission, and held by the organization licensee pursuant to the parimutuel system of wagering. There is a separate parimutuel pool for win, for place, for show and for each of the other forms of betting provided for by the rules and regulations of the commission.

**Parimutuel wagering** means a form of wagering on the outcome of horse and greyhound races in which those who wager purchase tickets of various denomination on one or more horses or greyhounds and all wagers for each race are pooled and the winning ticket holders are paid prizes from such pool in amounts proportional to the total receipts in the pool.

**Race meeting** means the entire period of time for which an organization licensee has been approved by the commission to hold horse or greyhound races at which parimutuel wagering is conducted or to hold horse races at which parimutuel wagering is not conducted, including such additional time as designated by the Commission for the conduct of official business before or after the races.

**Racing jurisdiction or jurisdiction** means a governmental authority which is responsible for the regulation of live or simulcast racing in its jurisdiction.

**Racetrack facility** means a racetrack within Kansas used for the racing of horses or greyhounds, or both, including the track surface, grandstands, clubhouse, all animal housing and handling areas, other areas in which a person may enter only upon payment of an admission fee or upon presentation of authorized credentials and such additional areas as designated by the commission.

**Recognized greyhound owners' group** means the duly recognized group elected by a majority of the Kansas licensed greyhound owners at the racetrack facility.

**Recognized horsemen's group** means the duly recognized group, representing the breeds of horses

## PATTERN INSTRUCTIONS FOR KANSAS 3d

running at a racetrack facility, elected by a majority of the licensed owners and trainers at the racetrack facility. If the licensee does not have a recognized horsemen's group, the Commission shall designate as the recognized horsemen's group one that serves another organization licensee, but not one that serves a county fair association organization licensee.

Simulcast means a live audio-visual broadcast of an actual horse or greyhound race at the time it is run.

Takeout means the total amount of money withheld from each parimutuel pool for the payment of purses, taxes and shares to be kept by the organization licensee. Takeout does not include the breakage. The balance of each pool less the breakage is distributed to the holders of winning parimutuel tickets.

Totalisator licensee means any person, partnership, corporation or association licensed by the Commission to provide totalisator equipment or services to an organization licensee.

### Notes on Use

For authority, see K.S.A. 74-8802.

**PATTERN INSTRUCTIONS FOR KANSAS 3d**

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PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 66.00

CRIMES AGAINST BUSINESS

	PIK Number
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PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.01 RACKETEERING**

The defendant is charged with the crime of racketeering. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was (the owner of) (the proprietor of) (a person having a financial interest in) a business;
2. That the defendant (demanded) (solicited) (received) from \_\_\_\_\_ a thing of value by means of a (threat) (promise) that the defendant would (cause the competition of \_\_\_\_\_ to be diminished or eliminated) (cause the price of goods or services [purchased] [sold] in the business of \_\_\_\_\_ to be increased, decreased, or maintained at a stated level) (protect the [property used in the business of \_\_\_\_\_] [person of \_\_\_\_\_] [family of \_\_\_\_\_] from injury by violence or other unlawful means); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

(The threat or promise may be express or implied.)

**Notes on Use**

For authority, see K.S.A. 21-4401. Racketeering is a severity level 7, nonperson felony. The name of the victim should be placed in the blank spaces in paragraphs (1) and (2). Where there is an issue as to the making of a "threat" or "promise" the jury should be informed that the threat or promise may be express or implied.



PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.02 DEBT ADJUSTING**

The defendant is charged with the crime of debt adjusting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant engaged in the business of making contracts with a debtor whereby said debtor agreed to pay defendant a certain amount of money periodically; and
2. That the defendant agreed for a consideration to distribute such money among (his)(her) creditors; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4402. Debt adjusting is a class B, nonperson misdemeanor.

The provisions of this statute do not apply to debt adjusting incidental to the lawful practice of law in the State of Kansas. The contracts with a debtor may be express or implied.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.03 DECEPTIVE COMMERCIAL PRACTICES**

The defendant is charged with the crime of deceptive commercial practices. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (used deception) (knowingly misrepresented a material fact) in connection with the sale of merchandise as follows: \_\_\_\_\_  
\_\_\_\_\_;
2. That the defendant intended that \_\_\_\_\_  
\_\_\_\_\_ should rely on such false representations whether or not such person was misled, deceived or damaged thereby; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_  
County, Kansas.

Merchandise means any object, wares, goods, commodities, intangibles, real estate or services.

Sale means any sale, offer for sale, or attempt to sell any merchandise for any consideration.

**Notes on Use**

For authority, see K.S.A. 21-4403. Deceptive commercial practices is a class B, nonperson misdemeanor.

The term "person" is defined in section (b)(2) of the statute and has not been included in the instruction since the status of the person deceived would normally be a question of law. The section excludes application of the act to owners or publishers of newspapers, magazines, or other printed matter or owners or operators of radio or television stations where they had no knowledge of the intent, design or purpose of the advertisement.

In paragraph (1), the deceptive commercial practice should be described with particularity.

In paragraph (2), the name of the victim should be placed in the blank space.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

It was held in *State v. Kliever*, 210 Kan. 820, 504 P.2d 580 (1972), that where a person is charged with unlawfully turning back the odometer on a motor vehicle as defined in K.S.A. 8-611(b), he cannot also be charged with a deceptive commercial practice under K.S.A. 21-4403 for the same wrongdoing.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.04 TIE-IN MAGAZINE SALE**

The defendant is charged with the crime of tie-in magazine sale. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a wholesaler of magazines or other periodicals;
2. That the defendant (sold) (delivered on consignment for sale) magazines or other periodicals to a retailer;
3. That such (sale) (delivery) was conditioned on the requirement that such retailer agree to (purchase) (receive on consignment for sale) magazines or periodicals of another kind or name; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Retailer means a person who sells magazines or periodicals at retail.

Wholesaler means a person who sells or distributes or delivers on consignment for sale or who offers to sell or distribute or deliver on consignment for sale magazines or other periodicals to a retailer.

Sell, in addition to its ordinary meaning, means offer to sell, distribute, deliver or sell on consignment.

**Notes on Use**

For authority, see K.S.A. 21-4404. Tie-in magazine sale is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.05 COMMERCIAL BRIBERY

The defendant is charged with the crime of commercial bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was (an agent or employee of \_\_\_\_\_) (a person acting in a fiduciary capacity as \_\_\_\_\_) ([a lawyer] [a physician] [an accountant] [an appraiser] [a professional advisor] employed by \_\_\_\_\_) (an [officer] [director] [partner] [manager] of \_\_\_\_\_, a [corporation] [partnership] [unincorporated association]) (an [arbitrator] [adjudicator] [referee]);
2. That the defendant (conferred) (offered or agreed to offer) (solicited) (accepted or agreed to accept) a benefit as consideration for (knowingly violating) (agreeing to violate) a duty of fidelity or trust; and
3. That this act occurred on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4405. Commercial bribery is a severity level 8, nonperson felony.

The instruction presents alternative situations, the appropriate one of which should be used in the instruction in a particular case.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.06 SPORTS BRIBERY**

The defendant is charged with the crime of sports bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That \_\_\_\_\_ was a (sports participant) (sports official);
2. That the defendant (conferred) (offered or agreed to confer) a benefit upon \_\_\_\_\_ with the intent to influence (him)(her) not to give (his)(her) best efforts as a sports participant in a sports contest; and  
or  
That the defendant (conferred) (offered or agreed to confer) a benefit upon \_\_\_\_\_ with the intent to influence (him)(her) to improperly perform (his)(her) duties as a sports official; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4406. Sports bribery is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.07 RECEIVING A SPORTS BRIBE**

The defendant is charged with the crime of receiving a sports bribe. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant, a sports participant (accepted) (agreed to accept) (solicited) a benefit from \_\_\_\_\_ upon an understanding that defendant would thereby be influenced not to give (his)(her) best efforts in a sports contest; and  
or  
That the defendant, a sports official, (accepted) (agreed to accept) (solicited) a benefit from \_\_\_\_\_ upon an understanding that the defendant would improperly perform (his)(her) duties as a sports official; and
2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4407. Receiving a sports bribe is a class A, nonperson misdemeanor. The definitions contained in the instruction are the same as those in K.S.A. 21-4406 as set forth in PIK 3d 66.06, Sports Bribery.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.08 TAMPERING WITH A SPORTS CONTEST**

The defendant is charged with the crime of tampering with a sports contest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sought to influence \_\_\_\_\_, a [sports participant] [sports official]) (tampered with an animal or equipment involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages governing such contest);
2. That the defendant had the intent to influence the outcome of such contest; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

**Notes on Use**

For authority, see K.S.A. 21-4408. Tampering with a sports contest is a severity level 9, nonperson felony.



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**66.09 KNOWINGLY EMPLOYING AN ALIEN ILLEGALLY  
WITHIN THE TERRITORY OF THE UNITED  
STATES**

The defendant is charged with the crime of knowingly employing an alien illegally within the territory of the United States. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant employed \_\_\_\_\_ who performed work for the defendant within the State of Kansas;
2. That during the time \_\_\_\_\_ was so employed (he)(she) was an alien illegally within the territory of the United States;
3. That during the time of the employment the defendant knew \_\_\_\_\_ was illegally within the territory of the United States; and
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

(The statute making the employment of an alien illegally within the territory of the United States an offense is not applicable to aliens who have entered the United States illegally and thereafter have been permitted to remain within the United States, temporarily or permanently, pursuant to federal law.)

**Notes on Use**

For authority, see K.S.A. 21-4409. Knowingly employing an alien illegally within the territory of the United States is a class C misdemeanor.

If it becomes applicable under the evidence, the last paragraph may be given.

The statute does not state what constitutes permission to remain within the United States. The Committee is of the opinion that the statute should be liberally construed to include cases where an alien has been permitted to remain within the United States by inaction of federal immigration authorities in addition to cases where the immigration authorities have affirmatively acted to permit the alien to remain in the United States.

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**66.10 EQUITY SKIMMING**

The defendant is charged with the crime of equity skimming. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant engaged in (a pattern) (the practice) of (purchasing) (acquiring an interest in) one family to four family dwellings (including condominiums and cooperatives) which are subject to a loan secured by a mortgage;
2. That the loan was (in default at the time of purchase) (in default within one year subsequent to the purchase);
3. That the defendant failed to deliver to the (holder of the mortgage) (holder of the certificate of purchase) all rent proceeds received from rental of the property not to exceed the monthly payment of principal and interest required by the note and mortgage;
4. That the defendant (applied) (authorized the application of) rents from such dwellings for the defendant's own use; and
5. That the defendant did so with the intent to defraud; and
6. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 21-4410. Equity skimming is a class A, nonperson misdemeanor.

The statute requires that the rent proceeds be delivered to the holder of the mortgage before sheriff's sale or, after sheriff's sale during the period of redemption, to the holder of a certificate of purchase.

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CHAPTER 67.00

CONTROLLED SUBSTANCES

	PIK Number
REPEALED . . . . .	67.01 - 67.12
Narcotic Drugs And Certain Stimulants . . . . .	67.13
Controlled Substances - Sale Defined . . . . .	67.13-A
Possession Of Controlled Stimulants, Depressants and Hallucinogenic Drugs Or Anabolic Steroids With Intent To Sell . . . . .	67.14
Selling, Offering To Sell, Cultivating, Or Dispensing Controlled Stimulants, Depressants, and Hallucinogenic Drugs Or Anabolic Steroids . . . . .	67.15
Possession Of Controlled Stimulants, Depressants, Hallucinogenic Drugs Or Anabolic Steroids . . . . .	67.16
Simulated Controlled Substances And Drug Paraphernalia - Use Or Possession With Intent To Use . . . . .	67.17
Possession Or Manufacture Of Simulated Controlled Substance Or Drug Paraphernalia . . . . .	67.18
Promotion Of Simulated Controlled Substances Or Drug Paraphernalia . . . . .	67.19
Representation That A Noncontrolled Substance Is A Controlled Substance . . . . .	67.20
Unlawfully Manufacturing A Controlled Substance . . .	67.21
Unlawful Use Of Communication Facility To Facilitate Felony Drug Transaction . . . . .	67.22
Selling, Offering To Sell, Possessing With Intent To Sell Or Dispensing Controlled Substances Designated Under K.S.A. 65-4113 To Person Under 18 Years Of Age . . . . .	67.23
Possession By Dealer - No Tax Stamp Affixed . . . . .	67.24
Receiving Or Acquiring Proceeds Derived From A Violation Of The Uniform Controlled Substances Act . . . . .	67.25

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**67.01 - 67.12**

The first edition of *PIK Criminal* contained instructions 67.01 through 67.12. The statutes on which those instructions were based were repealed effective July 1, 1972. Thus, they are not included in this third edition.

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.13 NARCOTIC DRUGS AND CERTAIN STIMULANTS

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to a (narcotic drug) (stimulant) known as \_\_\_\_\_. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (possessed) (had under [his] [her] control) (possessed with the intent to sell, deliver or distribute) (offered for sale with the intention to sell) (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) a (narcotic drug) (stimulant) known as \_\_\_\_\_;
2. That the defendant did so intentionally; and
- [3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
4. That the defendant was over 18 years of age;] and
- [3.] or [5.] That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

[School means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 65-4127a. A first conviction under K.S.A. 65-4127a is a drug severity level 4 felony if the conviction is for a violation of subsection (a). A first conviction under K.S.A. 65-4127a is a drug severity level 3 felony if the conviction is for a violation of subsection (b). Upon conviction for a second offense under K.S.A. 65-4127a, such person shall be guilty of a drug severity level 2 felony and upon conviction for a third or subsequent offense, such person shall be guilty of a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used

## PATTERN INSTRUCTIONS FOR KANSAS 3d

to increase an offender's punishment.

Under K.S.A. 65-4127a(d), upon a conviction of a first offense under subsection (b) the defendant is guilty of a drug severity level 2 felony if the defendant was over 18 years of age and the substances involved were possessed with intent to sell, possessed with intent to deliver or distribute, sold or offered for sale within 1,000 feet of school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

The statute specifically relates to "any opiates, opium, or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto." Such stimulants are amphetamine, methamphetamine and their immediate precursors.

K.S.A. 65-4101 defines the terms "administer" in paragraph (a), "deliver" or "delivery" in paragraph (g), "dispense" in paragraph (h), "distribute" in paragraph (j), and "person" in paragraph (s).

If a definition of "possession" is necessary, see PIK 3d Chapter 53.00 or the instruction defining possession approved in *State v. Galloway*, 16 Kan. App. 2d 54, 63, 817 P.2d 1124 (1991).

A sale under the Uniform Controlled Substances Act has a broader meaning than "sale" usually has. Sale under the Act means selling for money, and also includes barter, exchange, or gift, or any offer to do any of these things. It is not necessary that the prohibited substance be the property of the defendant or in his or her physical possession. K.S.A. 65-4127a; *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974).

The Uniform Controlled Substances Act, which in 1972 replaced the Uniform Narcotic Drug Act, specifically defines the term "narcotic drug" in K.S.A. 65-4101(p). The section includes "opium and opiate" under the definition and K.S.A. 65-4101(q) presents a detailed definition of "opiate". The Committee believes that for convenience a Court should refer to the substance in question under the generic term "narcotic drug" and insert the name of the specific drug in the appropriate blank. There will be occasions when a Court should include the definitions, either in the same or in additional instructions.

### Comment

When a defendant is in nonexclusive possession of the premises upon which drugs are found it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991).

Possession of cocaine and possession of drug paraphernalia are two independent crimes. Where the only cocaine possessed is the residue on the drug paraphernalia, both crimes may be charged. *State v. Hill*, 16 Kan. App. 2d 280, 823 P.2d 201 (1991).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

Possession is not a lesser included offense of sale. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

Presence of a controlled substance in an accused's blood is not possession or control of the substance within K.S.A. 65-4127a. *State v. Flinchbaugh*, 232 Kan. 831, 835, 659 P.2d 208 (1983).

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App. 2d 364, 657 P.2d 1136 (1983).

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

K.S.A. 65-4127a qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." And K.S.A. 65-4136 provides that in any complaint, information, indictment, or other pleading, or in any trial, hearing, or other proceeding under the act it is unnecessary to negate any exemption or exception contained in the act. The section further provides that the burden of proof of any exemption or exception rests with the person claiming it. It also states that in the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the act, the person is presumed not to be the holder. Accordingly, the person must shoulder the burden of proof to rebut the presumption.

The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101(e)), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

The Committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense instruction, together with appropriate comment relative to a similar procedural setting, see PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense.

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**67.13-A CONTROLLED SUBSTANCES - SALE DEFINED**

A sale under the Uniform Controlled Substances Act has a broader meaning than "sale" usually has. Sale under the Act means selling for money, and also includes barter, exchange, or gift, or an offer to do any of these things. It is not necessary that the prohibited substance be the property of the defendant or in his or her physical possession.

Notes on Use

For authority, see *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974).



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**67.14 POSSESSION OF CONTROLLED STIMULANTS,  
DEPRESSANTS AND HALLUCINOGENIC DRUGS  
OR ANABOLIC STEROIDS WITH INTENT TO SELL**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) known as \_\_\_\_\_. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant possessed (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) known as \_\_\_\_\_;
  2. That the defendant did so with the intent to sell, deliver or distribute it;
  3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
  4. That the defendant was over 18 years of age;] and
- [3.] or [5.] That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

[School means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 65-4127b(b). The subsection refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are included. For example, it refers to K.S.A. 65-4105(d) and 65-4107(g) relative to the hallucinogenic drugs involved, which

## PATTERN INSTRUCTIONS FOR KANSAS 3d

include such substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among others. K.S.A. 65-4127b(b)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants and hallucinogenic drugs. When the violation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and Element No. 1 of the instruction.

Generally, a violation of K.S.A. 65-4127b(b) is a drug severity level 3 felony. If the defendant was over 18 years of age and the substances involved were possessed with intent to sell within 1,000 feet of school property upon which was located a school structure, the violation is a drug severity level 2 felony. K.S.A. 65-4127b(d). If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

The Committee notes that possession with intent to deliver or distribute is not included in the more serious offense of subsection (d).

### Comment

Possession of a drug prohibited by K.S.A. 65-4127b(b) is a lesser included offense of possession with intent to sell and when the evidence warrants it, PIK 3d 67.16 should be given. The accused cannot be convicted of both possession and possession with intent to sell when the sale is of the possessed, controlled substance. K.S.A. 21-3107; *State v. Hagan*, 3 Kan. App. 2d 558, 598 P.2d 550 (1979). Possession with intent to sell would appear to be a lesser included offense of possession with intent to sell within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 167, 836 P.2d 11 (1992).

The Committee notes that the only substance incorporated under K.S.A. 65-4127b(b) that is defined in the "definitions" section of the Uniform Act is "marijuana." See K.S.A. 65-4101(o), where marijuana is defined in terms of the plant *cannabis*.

K.S.A. 65-4127b(b) qualifies the acts specified as unlawful with the premise, "[e]xcept as authorized by the uniform controlled substances act." And K.S.A. 65-4136 provides that in any trial, hearing, or other proceeding under the act, it is unnecessary to negate any exemption or exception contained in the act. The section further provides that the burden of proof of any exemption or exception rests with the person claiming it. It also states that in the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the act, the person is presumed not to be the holder. Accordingly, the accused must shoulder the burden of proof to rebut the presumption.

The Uniform Controlled Substances Act contains a number of provisions under which controlled substances (defined in K.S.A. 65-410(e)) may be manufactured,

## PATTERN INSTRUCTIONS FOR KANSAS 3d

sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

An instruction that is "substantially" in the form of PIK 2d 67.14 correctly sets out the elements of the offense. *State v. Guillen*, 218 Kan. 272, Syl. ¶ 1, 543 P.2d 934 (1976).

A definition of "intent to sell" is not necessary, as the phrase "was not used in any technical sense nor in any way different from its ordinary use in common parlance." *State v. Guillen*, supra.

The Committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense pattern, together with appropriate comment relative to a similar procedural setting, see PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense.

When a defendant is in nonexclusive possession of the premises upon which drugs are found, it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991).

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**67.15 SELLING, OFFERING TO SELL, CULTIVATING,  
OR DISPENSING CONTROLLED STIMULANTS,  
DEPRESSANTS, AND HALLUCINOGENIC DRUGS  
OR ANABOLIC STEROIDS**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) known as \_\_\_\_\_. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant [(sold) (offered to sell with the intent to sell) (cultivated) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded)] [(a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid)] known as \_\_\_\_\_;
  2. That the defendant did so intentionally;
  - [3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
  4. That the defendant was over 18 years of age;] and
- [3.] or [5.] That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

[School means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 65-4127b(b). The section refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are involved. For example, it refers to K.S.A. 65-4105(d) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such

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substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among many others. K.S.A. 65-4127b(b)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants, and hallucinogenic drugs. When the violation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and Element No. 1 of the instruction.

Generally, a violation of K.S.A. 65-4127b(b) is a drug severity level 3 felony. If the defendant was 18 or more years of age and the substances involved were sold or offered for sale within 1,000 feet of school property upon which was located a school structure, the violation is a drug severity level 2 felony. K.S.A. 65-4127b(d). If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

See Notes on Use to PIK 3d 67.13, Narcotic Drugs and Certain Stimulants.

K.S.A. 65-4101 defines the term "administer" in paragraph (a), "deliver" or "delivery" in paragraph (g), "dispense" in paragraph (h), "distribute" in paragraph (j), "person" in paragraph (s) and "cultivate" in paragraph (aa). When appropriate, definitions should be given.

### Comment

See Comment to PIK 3d 67.14, Possession of Controlled Stimulants, Depressants and Hallucinogenic Drugs or Anabolic Steroids with Intent to Sell.

Delivery is not a lesser included offense of sale. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976).

Possession is not a lesser included offense of sale. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App. 2d 364, 657 P.2d 1136 (1983).

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

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**67.16 POSSESSION OF CONTROLLED STIMULANTS,  
DEPRESSANTS, HALLUCINOGENIC DRUGS OR  
ANABOLIC STEROIDS**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) known as \_\_\_\_\_. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant [(possessed) (had under [his][her] control)] [(a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid)] known as \_\_\_\_\_;
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 65-4127b(a). The subsection refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are included. For example, it refers to K.S.A. 65-4105(d) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among many others. K.S.A. 65-4127b(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants, and hallucinogenic drugs. When the violation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and Element No. 1 of the instruction.

A violation of K.S.A. 65-4127b(a) is a class A, nonperson misdemeanor except if a person has a prior conviction under 65-4127b or a conviction for a substantially similar offense from another jurisdiction, the person is guilty of a drug severity level 4 felony. "Prior conviction of possession of narcotics is not

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an element of the class B felony defined by K.S.A. 65-4127a, but serves only to establish the class of the felony and, thus, to enhance the punishment. Proof of prior conviction, unless otherwise admissible, should be offered only after conviction and prior to sentencing." *State v. Loudermilk*, 221 Kan. 157, Syl. ¶ 1, 557 P.2d 1229 (1975).

### Comment

Presence of a controlled substance in an accused's blood is not possession or control of the substance within K.S.A. 65-4127a. *State v. Flinchpaugh*, 232 Kan. 831, 835, 659 P.2d 208 (1983).

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**67.17 SIMULATED CONTROLLED SUBSTANCES AND  
DRUG PARAPHERNALIA - USE OR POSSESSION  
WITH INTENT TO USE**

The defendant is charged with the crime of (using) (possession with intent to use) any (simulated controlled substance) (drug paraphernalia). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (used) (possessed with the intent to use) any (simulated controlled substance) (drug paraphernalia);
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 65-4152. A violation of K.S.A. 65-4152 is a class A misdemeanor and is treated as a nonperson crime for purposes of determining criminal history under L. 1992, ch. 239, § 10.

An instruction defining "drug paraphernalia" should be given. K.S.A. 65-4150(c). Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in the instruction.

An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

An instruction defining "simulated controlled substance" should be given. K.S.A. 65-4150(e).

**Comment**

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the Court determined a less restrictive Overland Park act to be constitutional on an attack of its being



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overbroad, or vague, or an infringement on the right of commercial speech. The Court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 65-4156.

Possession of cocaine and possession of drug paraphernalia are two independent crimes. Where the only cocaine possessed is the residue on the drug paraphernalia, both crimes may be charged. *State v. Hill*, 16 Kan. App. 2d 280, 823 P.2d 201 (1991).

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**67.18 POSSESSION OR MANUFACTURE OF SIMULATED CONTROLLED SUBSTANCE OR DRUG PARAPHERNALIA**

The defendant is charged with the crime of (delivering) (possession with intent to deliver) (manufacturing with the intent to deliver) (causing to be delivered within the State of Kansas) any (simulated controlled substance) (drug paraphernalia). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (delivered) (possessed with the intent to deliver) (manufactured with the intent to deliver) (caused to be delivered within the State of Kansas):
  - (a) a simulated controlled substance; and
  - or
  - (b) drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or introduce into the human body a controlled substance; and
2. That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 65-4153. A violation of K.S.A. 65-4153 is a class A, nonperson misdemeanor, except that "any person who violates this section by delivering or causing to be delivered within this State of Kansas drug paraphernalia or a simulated controlled substance to a person under 18 years of age is guilty of a nondrug severity level 9, nonperson felony." K.S.A. 65-4153(c).

An instruction defining "drug paraphernalia" should be given. K.S.A. 65-

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4150(c). Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in this instruction.

An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

An instruction defining "simulated controlled substance" should be given. K.S.A. 65-4150(e).

When Element No. 1(b) is given, any inapplicable words should be stricken.

### Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the Court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The Court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 65-4156.

When defendant fails to present substantive evidence concerning reasonable legitimate uses for items of drug paraphernalia, an inference is raised that defendant is aware items will be used for illegal purposes and intends to sell them for such purposes. *State v. Dunn*, 233 Kan. 411, 430-431, 662 P.2d 1286 (1983).

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**67.19 PROMOTION OF SIMULATED CONTROLLED  
SUBSTANCES OR DRUG PARAPHERNALIA**

The statute upon which this instruction was based  
(K.S.A. 65-4154) has been repealed effective July 1, 1993.  
See L. 1992, ch. 298, § 97.

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**67.20 REPRESENTATION THAT A NONCONTROLLED  
SUBSTANCE IS A CONTROLLED SUBSTANCE**

The defendant is charged with the crime of knowingly delivering or causing to be delivered a noncontrolled substance under circumstances that it would appear to be (name the controlled substance). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly delivered or caused to be delivered in the State of Kansas a substance which was not (name the controlled substance); and
2. (a) That the defendant made an express representation that the substance delivered was (name the controlled substance); and  
or  
(b) That the substance delivered was of such nature or appearance that the recipient would be able to distribute it as (name the controlled substance); and  
or  
(c) That the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was (name the controlled substance); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4155. Violation of K.S.A. 65-4155 is a class A, nonperson misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered in this State of Kansas a substance to a person under 18 years of age and who is at least three years older than the person under

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18 years of age to whom the delivery is made is guilty of a nondrug severity level 9, nonperson felony. "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto. K.S.A. 65-4150. The appropriate controlled substance should be inserted in the instruction.

If applicable, an instruction should be given covering the presumption arising by virtue of K.S.A. 65-4155(b).

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the Court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The Court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 65-4156.

A conviction for violation of K.S.A. 65-4155(a)(2) "requires proof of knowing delivery, but does not require proof of knowledge the delivered substance was not a controlled substance or proof of specific intent to deliver a noncontrolled substance." *State v. Marsh*, 9 Kan. App. 2d 608, 613, 684 P.2d 459 (1984).

The *Marsh* Court also found that K.S.A. 65-4155 was not unconstitutionally vague and that the jury must be instructed that K.S.A. 65-4155(b)(3) does not shift the burden of proof to the defendant.

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**67.21 UNLAWFULLY MANUFACTURING A  
CONTROLLED SUBSTANCE**

The defendant is charged with the crime of unlawfully manufacturing a controlled substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant manufactured a controlled substance known as \_\_\_\_\_;
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 65-4159. A violation of K.S.A. 65-4159 is a drug severity level 3 felony, a drug severity level 2 felony for a second offense and a drug severity level 1 felony for a third or subsequent offense and the sentence for which shall not be subject to statutory provisions for suspended sentence, community work service or probation.

Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments to these sections. See K.S.A. 65-4101(e).

For purposes of clarity, the Court should refer to the substance involved in the case as a "controlled substance" and insert the name of the specific drug in the appropriate blank.

There will be cases when a court should include the definitions, either in the same or similar instructions.

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**67.22 UNLAWFUL USE OF COMMUNICATION FACILITY  
TO FACILITATE FELONY DRUG TRANSACTION**

The defendant is charged with the crime of unlawful use of a communication facility (in committing) (in causing or facilitating the commission of) (in an attempt to commit) (in a conspiracy to commit) (in the solicitation of) the felony of \_\_\_\_\_. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally used a \_\_\_\_\_ in (committing) (causing the actual commission of) (facilitating the actual commission of) \_\_\_\_\_; and

or

That the defendant intentionally used a \_\_\_\_\_ in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the felony of \_\_\_\_\_; and

2. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

(Conspiracy means an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all the facts and circumstances.)

(Solicitation means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.)

(Facilitate means to aid, assist, or make easier fulfillment of a goal.)



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The elements of \_\_\_\_\_ are (set forth in Instruction No. \_\_\_\_\_) (as follows: \_\_\_\_\_).

### Notes on Use

For authority, see K.S.A. 65-4141. A violation of K.S.A. 65-4141 is a nondrug severity level 8, nonperson felony.

The particular communication facility used should be inserted in the first blank of Element No. 1. K.S.A. 65-4141(b) defines "communication facility" to mean any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes telephone, wire, radio, computer, computer networks, beepers, pagers and all other means of communication. The appropriate felony violation of K.S.A. 65-4127a, 65-4127b, or 65-4159 should be inserted in the second blank of Element No. 1 and the elements of the appropriate felony violation should be referred to or set forth in the concluding portion of the instruction.

### Comment

In *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993), the Court held that in a prosecution under K.S.A. 65-4141 charging a defendant with having used a communication facility to facilitate a felony violation of K.S.A. 65-4127a and K.S.A. 65-4127b, the State is required to prove the actual commission of the underlying felony violation. Proof of the actual commission of the underlying felony is not required in a prosecution under K.S.A. 65-4141 based upon conspiracy or solicitation. *State v. Garrison*, 252 Kan. 929, 850 P.2d 244 (1993).

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**67.23 SELLING, OFFERING TO SELL, POSSESSING WITH INTENT TO SELL OR DISPENSING CONTROLLED SUBSTANCES DESIGNATED UNDER K.S.A. 65-4113 TO PERSON UNDER 18 YEARS OF AGE**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to a (material) (compound) (mixture) (preparation) containing a (narcotic drug) (stimulant) known as \_\_\_\_\_. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (prescribed) (administered) (delivered) (distributed) (dispensed) (sold) a (material) (compound) (mixture) (preparation) containing a (narcotic drug) (stimulant) known as \_\_\_\_\_ (for) (to) \_\_\_\_\_;

or

That the defendant (offered for sale) (possessed) a (material) (compound) (mixture) (preparation) containing a (narcotic drug) (stimulant) known as \_\_\_\_\_ with the intent to sell it to \_\_\_\_\_;

2. That \_\_\_\_\_ was a person under 18 years of age; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4127b(c). The subsection covers unlawful acts relating to medicinals with a lower potential for abuse designated in K.S.A. 65-4113.

A violation of K.S.A. 65-4127b(c) is a drug severity level 4 felony if the

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intended recipient of the controlled substance was a child under 18 years of age.

K.S.A. 21-3202(2) states, "Proof of criminal intent does not require proof that the accused had knowledge of the age of the minor, even though age is a material element of the crime with which he is charged."

### Comment

K.S.A. 65-4127b(c) qualifies the acts specified as unlawful with the premise, "except as authorized by the Uniform Controlled Substances Act." See Comment to PIK 3d 67.13 or 67.14 in regard to this qualification.

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App. 2d 364, 657 P.2d 1136 (1983).

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**67.24 POSSESSION BY DEALER - NO TAX STAMP  
AFFIXED**

The defendant is charged with the crime of possession of \_\_\_\_\_, (a controlled substance) (marijuana), without Kansas tax stamps affixed. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly possessed more than \_\_\_\_\_ (grams) (dosage units) of \_\_\_\_\_, a controlled substance without affixing official Kansas tax stamps or other labels showing that the tax has been paid; and
2. That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 79-5201 *et seq.* Upon conviction, the defendant may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000 or both.

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**67.25 RECEIVING OR ACQUIRING PROCEEDS DERIVED FROM A VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT**

The defendant is charged with the crime of (receiving) (acquiring) (engaging in a transaction involving) proceeds derived from a violation of the Uniform Controlled Substances Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (received or acquired proceeds) (engaged in a transaction involving proceeds) known to be derived from \_\_\_\_\_, a violation of the Controlled Substances Act;

or

That the defendant (gave) (sold) (transferred) (traded) (invested) (concealed) (transported) (maintained an interest in) (made available) \_\_\_\_\_, a thing of value which defendant knew was intended to be used for the purpose of furthering the commission of \_\_\_\_\_, a violation of the Controlled Substances Act;

or

That the defendant (directed) (planned) (organized) (initiated) (financed) (managed) (supervised) (facilitated) the (transportation) (transfer) of proceeds known to be derived from \_\_\_\_\_, a violation of the Controlled Substances Act;

or

That the defendant conducted a financial transaction involving the proceeds derived from \_\_\_\_\_, a violation of the Controlled Substances Act which was designed (to conceal or disguise the [nature] [location] [source] [ownership] [control]) of the proceeds (known to be derived from \_\_\_\_\_, a violation of the Controlled Substances Act) (to avoid \_\_\_\_\_, a

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transaction reporting requirement under [state]  
[federal] law);

2. That the defendant did so knowingly or intentionally; and
3. That the defendant did so on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4142. A violation of K.S.A. 65-4142 is a severity level 7, nonperson felony.

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CHAPTER 68.00

CONCLUDING INSTRUCTIONS AND VERDICT FORMS

	PIK Number
Concluding Instruction . . . . .	68.01
Concluding Instruction - Murder In The First Degree - Mandatory Minimum 40 Year Sentence . . .	68.01-A
Guilty Verdict - General Form . . . . .	68.02
Not Guilty Verdict - General Form . . . . .	68.03
Punishment - Class A Felony . . . . .	68.04
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Verdict Form - Value In Issue . . . . .	68.11
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Post-Trial Communication With Jurors . . . . .	68.13
Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 15 Years . . . . .	68.14
Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 40 Years . . . . .	68.14-A
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 40 Years (Alternative Sentencing Verdict) . . . . .	68.14-B
Murder In The First Degree - Premeditated Murder and Felony Murder In The Alternative - Verdict Instruction . . . . .	68.15
Murder In The First Degree - Premeditated Murder and Felony Murder In The Alternative - Verdict Form	68.16

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**68.01 CONCLUDING INSTRUCTION**

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

\_\_\_\_\_  
District Judge

\_\_\_\_\_, 19\_\_\_\_



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**68.01-A CONCLUDING INSTRUCTION - MURDER IN  
THE FIRST DEGREE - MANDATORY MINIMUM  
40 YEAR SENTENCE**

**Your Presiding Juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in Court and will sign the verdict upon which you agree.**

**Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.**

**Your agreement upon a verdict must be unanimous.**

\_\_\_\_\_, 19\_\_\_\_  
District Judge

**Notes on Use**

For authority, see K.S.A. 21-4624(2) which provides in part that ". . . The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable."

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68.02 GUILTY VERDICT - GENERAL FORM

We, the jury, find the defendant guilty of \_\_\_\_\_.

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Presiding Juror

Notes on Use

The form should be completed by the Court by specifying the particular offense with which defendant is charged. If two or more defendants are tried jointly, separate verdict forms must be provided by adding the name of each defendant to the form. For forms for separate counts, see PIK 3d 68.08, Multiple Counts - Verdict Forms. For forms for lesser included offenses, see PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

K.S.A. 22-3421 provides that the verdict shall be written, signed by the presiding juror, and read by the clerk, and inquiry made as to whether it is their verdict. If the verdict is defective in form only, it may be corrected by the Court with the assent of the jury.

Comment

A typewritten verdict form which merely requires that it be signed and dated by the presiding juror must conform to the evidence and the offense charged. *State v. Cox*, 188 Kan. 500, 363 P.2d 528 (1961).

If a verdict is not in proper form when returned by the jury, the Court may direct the jury to correct the verdict and may send them back to the jury room for that purpose. *State v. Carrithers*, 79 Kan. 401, 99 Pac. 614 (1909).

In *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973), the Supreme Court considered the question of whether or not special questions could be submitted to the jury in a criminal case. The Court held that in view of the differences in our civil and criminal statutes relating to verdicts, it is apparent that the Legislature intended to preserve the power of a jury to return a verdict in a criminal prosecution in the teeth of the law and the facts. The case held that special questions may not be submitted to the jury in a criminal prosecution. The only proper verdicts are "guilty" or "not guilty" of the charges.

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 64, 785 P.2d 963 (1990), that "[w]hen an accused is charged in one count of an information with

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both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilty based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose.'" To the same effect, see *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); and *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989).

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**68.03 NOT GUILTY VERDICT - GENERAL FORM**

We, the jury, find the defendant not guilty of

\_\_\_\_\_.

\_\_\_\_\_  
**Presiding Juror**

**Notes on Use**

See Notes on Use and Comment to PIK 3d 68.02, Guilty Verdict - General Form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.04 PUNISHMENT - CLASS A FELONY**

**Comment**

The jury choice of a sentence of death or life imprisonment in a class A felony under K.S.A. 21-4501(a) is no longer constitutionally permissible. *State v. Randol*, 212 Kan. 461, 513 P.2d 248 (1973).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.05 VERDICTS - CLASS A FELONY**

**Comment**

See PIK 3d 68.14, 68.14-A, 68.14-B, 68.15 and 68.16 for verdict forms that are applicable when the mandatory minimum 40 year sentence is sought for premeditated murder.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.06 NOT GUILTY BECAUSE OF INSANITY**

**We, the jury, find the defendant not guilty because of insanity.**

---

**Presiding Juror**

**Notes on Use**

For authority, see K.S.A. 22-3428 in regard to acquittal on the ground of insanity at the time of the commission of the alleged crime, and commitment of defendant to the state security hospital.

See K.S.A. 22-3302 concerning proceedings to determine competency to stand trial. See also, PIK 3d 54.10, Insanity - Mental Illness or Defect, and PIK 3d 54.10-A, Insanity - Commitment.

**Comment**

Mental competency at the time of the commission of an offense -- if raised -- is to be determined by the trier of facts upon a trial. Mental competency to stand trial -- if raised -- is another matter and is to be determined by the Court under K.S.A. 22-3302. *Nall v. State*, 204 Kan. 636, 638, 465 P.2d 957 (1970).

A jury instruction on diminished capacity is not required. See *State v. Wilburn*, 249 Kan. 678, 822 P.2d 609 (1991).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 68.07 MULTIPLE COUNTS - VERDICT INSTRUCTION

**Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding Juror.**

#### Notes on Use

This instruction should be given when separate offenses are charged in more than one count and defendant can be convicted of any one or all.

See PIK 3d 68.08, Multiple Counts - Verdict Forms.

Cited with approval in *State v. Cameron & Bentley*, 216 Kan. 644, 533 P.2d 1255 (1975).

#### Comment

The trial court erred in failing to give this pattern in *State v. Macomber*, 244 Kan. 396, 405, 406, 769 P.2d 621 (1989). However, the failure was not reversible error under the circumstances of the case because it did not prejudicially affect the substantial rights of the defendant.

In *Macomber*, the Court stated that "[a] trial court does not have the time to give the thought and do the research which has been put into the preparation of the pattern Criminal Jury Instructions by the Advisory Committee on Criminal Jury Instructions to the Kansas Judicial Council. Therefore, where 'pattern jury instructions are appropriate, a trial court should use them unless there is some compelling and articulable reason not to do so.'" *State v. Macomber*, 244 Kan. at 405. See also, *State v. Wilson*, 240 Kan. 606, 610, 731 P.2d 306 (1987).



PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.08 MULTIPLE COUNTS - VERDICT FORMS**

1. We, the jury, find the defendant guilty of (. . . crime charged Count 1 . . .).

---

**Presiding Juror**

We, the jury, find the defendant not guilty of (. . . crime charged Count 1 . . .).

---

**Presiding Juror**

2. We, the jury, find the defendant guilty of (. . . crime charged Count 2 . . .).

---

**Presiding Juror**

We, the jury, find the defendant not guilty of (. . . crime charged Count 2 . . .).

---

**Presiding Juror**

**Notes on Use**

This form may be used when the defendant is charged with multiple counts in the same information. The verdict form may be expanded for additional counts and should be completed by specifying the crime charged in each count. The Committee recommends that the verdicts as to each count be submitted on a separate form.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

Each count of an indictment is a separate offense; hence, consistency in the verdicts is not necessary. *Speers v. United States*, 387 F.2d 698 (10th Cir. 1967).

A trial court may properly retry an accused on a theft charge, where the original trial on theft and burglary charged in two separate counts in the same information resulted in an acquittal of the burglary charge and a mistrial on the theft charge due to the inability of the jury to reach a verdict; not double jeopardy; jury verdicts need not be consistent. *In re Shotwell & Grades*, 4 Kan. App. 2d 382, 607 P.2d 83 (1980).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.09 LESSER INCLUDED OFFENSES**

The offense of ( principal offense charged ) with which defendant is charged includes the lesser offense(s) of ( lesser included offense or offenses ).

You may find the defendant guilty of ( principal offense charged ) ( first lesser included offense ) ( second lesser included offense ) or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only.

Your Presiding Juror should sign the appropriate verdict form. The other verdict forms are to be left unsigned.

**Notes on Use**

For authority, see K.S.A. 21-3107(2), (3) and 21-3109.

This instruction should be given when the evidence presents circumstances from which a lesser included offense or offenses may be inferred. The instruction should be completed by specifying the principal offense and each lesser included offense. See PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

Some deviation from this form may be used as a lead-in for the elements instruction for the lesser included offenses. For example, see PIK 3d 69.01, Illustrative Sets of Instructions, Element Nos. 3, 4, and 5.

This instruction should not be used when the crime is Murder In The First Degree under the theory of premeditated murder or felony murder in the alternative. Instead, use PIK 3d 68.15, Murder In The First Degree - Premeditated Murder and Felony Murder In The Alternative - Verdict Instruction, and PIK 3d 68.16, Murder In The First Degree - Premeditated Murder and Felony Murder In The Alternative - Verdict Form.

**Comment**

Failure to instruct the jury on some lesser degree of the crime charged is not ground for reversal if the evidence at the trial excludes a theory of guilt on a lesser offense. *State v. Lott*, 207 Kan. 602, Syl. ¶ 1, 485 P.2d 1314 (1971).

The trial court has an affirmative duty to instruct on lesser included offenses where required by the evidence even in the absence of a request by counsel. The evidence requires such instruction under circumstances where the accused might

## PATTERN INSTRUCTIONS FOR KANSAS 3d

reasonably have been convicted of a lesser offense if the instruction had been given. *State v. Mason*, 208 Kan. 39, 490 P.2d 418 (1971); *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972); *State v. Deavers*, 252 Kan. 149, 843 P.2d 695 (1992); *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). Where defendant was charged with aggravated battery, it was error not to instruct on the lesser included offense of battery under the facts and circumstances shown by the evidence. *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973). However, the possession of marijuana is not a lesser included offense in a prosecution for the unlawful sale of marijuana. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

The duty of the trial court to instruct on lesser degrees of crime in homicide cases is stated and applied in *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977).

The instructions on lesser included offenses should be given in the order of severity, beginning with the offense with the most severe penalties. When instructions on lesser included offenses are given, the jury should be instructed that if there is reasonable doubt as to which of two or more degrees of an offense the defendant is guilty, he may be convicted of the lesser offense only. *State v. Trujillo*, 225 Kan. 320, 590 P.2d 1027 (1979). See "The Doctrine of Lesser Included Offense in Kansas," 15 Washburn L.J. 40 (1976).

K.S.A. 21-3107(3) requires the trial court to instruct on a lesser offense which may be a "lesser degree of the same crime" when there is evidence introduced to reasonably support a conviction of the lesser offense. *State v. Long*, 234 Kan. 580, 675 P.2d 832 (1984).

The instructions concerning lesser included offenses for the charge of felony murder should only be given if the proof of the underlying felony is inconclusive or questionable. *State v. Strauch*, 239 Kan. 203, 218, 718 P.2d 613 (1986).

In *State v. Fike*, 243 Kan. 365, 367, 368, 757 P.2d 724 (1988), the Supreme Court adopted two tests to determine whether a lesser crime is a lesser included crime under K.S.A. 21-3107. The first test is the statutory elements test. If all the statutory elements of the alleged lesser crime are among the statutory elements required to prove the crime charged, then it is a lesser included crime. If this test is not met, then the second test is applied. The second test is to examine the allegations of the indictment, complaint, or information as well as the evidence to determine whether the crime as charged would necessarily prove the lesser crime. If so, the latter is an "included crime" under the definition in K.S.A. 21-3107(2)(d).

The Court held in *Fike* that under the statutory elements test, aggravated sexual battery is not a lesser included offense of indecent liberties with a child. Neither is it a lesser included offense under the second test even though the charging document alleges a lack of actual consent, as proof of actual consent would not be required in any event to prove the greater offense of indecent liberties with a child. 243 Kan. at 373.

The *Fike* Court agreed with the reasoning in *State v. Fulcher*, 12 Kan. App. 2d 169, 170, 737 P.2d 61 (1987), which held that aggravated sexual battery

## PATTERN INSTRUCTIONS FOR KANSAS 3d

cannot be a lesser included offense of indecent liberties with a child because it requires additional proof of an absence of consent. The Supreme Court in *Fike* overruled *State v. Hutchcraft*, 242 Kan. 55, 744 P.2d 849 (1987), to the extent that it is inconsistent with *Fike*. 243 Kan. at 373.

Aggravated incest is not a lesser included offense of rape because each crime requires proof of elements not present in the other. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987).

Under K.S.A. 21-3107(2)(d), the offense of driving under the influence of alcohol is a lesser included offense of involuntary manslaughter when: (1) the underlying misdemeanor to the involuntary manslaughter complaint is the driving under the influence of alcohol, and (2) all of the elements of the DUI are required to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 858 (1987).

The trial court erred in refusing to instruct on the lesser included offenses of voluntary manslaughter and involuntary manslaughter for the crime of murder in the second degree. *State v. Hill*, 242 Kan. 68, 76, 744 P.2d 1228 (1987).

The offenses of attempted second-degree murder and attempted voluntary manslaughter are lesser included crimes of attempted first-degree murder. The trial court erred in failing to instruct the jury on the lesser included offense of attempted murder in the second degree. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second-degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 858 (1987).

It was not reversible error where the trial court failed to instruct the jury that when there is reasonable doubt as to which two or more offenses the defendant is guilty, he may be convicted of the lesser included offense only. *State v. Massey*, 242 Kan. 252, 262, 747 P.2d 802 (1987).

Examples of lesser included offenses are:

1. **First Degree Murder** - The Court's duty to instruct on the lesser offenses of second degree murder, voluntary and involuntary manslaughter depends on whether the evidence support instructions on any or all of the lesser included offenses. Generally, second degree murder is included where the issue of premeditation may be in doubt. *State v. Yarrington*, 238 Kan. 141, 708 P.2d 524 (1985). Unless there is some evidence of arguments, heat of passion or an unintentional killing, generally voluntary and involuntary manslaughter are not given as lesser included offenses.
2. **Voluntary Manslaughter** - Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
3. **Involuntary Manslaughter** - Where an unintentional homicide results from operation of a motor vehicle, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is

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- a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987).
4. **Felony Murder** - Ordinarily, there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), *cert. denied* 411 U.S. 951 (1973); *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937 (1992); *State v. Tyler*, 251 Kan. 616, 840 P.2d 413 (1992); but where there is an issue as to the felony itself, then an instruction on second-degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986).
  5. **Aggravated Kidnapping** - Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978); *State v. Hammond*, 251 Kan. 501, 837 P.2d 816 (1992). Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
  6. **Kidnapping** - Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982). Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
  7. **Aggravated Robbery** - Robbery is a lesser included offense only where there is an issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976). Aggravated battery or battery are not lesser included offenses. *State v. Grauerholz*, 232 Kan. 221, 654 P.2d 395 (1982).
  8. **Robbery** - Theft is now considered a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Holloman*, 17 Kan. App. 2d 279, 837 P.2d 826, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (1992).
  9. **Aggravated Assault** - Assault generally is a lesser included offense but if there is no issue as to use of weapon it would not be. *State v. Buckner*, 221 Kan. 117, 558 P.2d 1102 (1976); *State v. Cameron & Bentley*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).
  10. **Aggravated Battery** - Battery generally is a lesser included offense unless there is no issue as to use of weapon. *State v. Gander*, 220 Kan. 88, 551 P.2d 797 (1976). Aggravated assault is not a lesser included offense. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).
  11. **Aggravated Assault on Law Enforcement Officer** - Assault on law enforcement officer is a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).

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12. **Aggravated Battery on Law Enforcement Officer** - Battery is a lesser included offense. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
13. **Aggravated Burglary** - In an applicable circumstance, criminal trespass is a lesser included offense of aggravated burglary. See *State v. Ponds*, 18 Kan. App. 2d 231, 850 P.2d 280 (1993).
14. **Burglary** - Criminal damage to property is not a lesser included offense. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984).
15. **Theft** - Unlawful deprivation of property is a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985), reversing *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980).
16. **Sale of Narcotics** - "Delivery" is not a lesser included offense. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976). "Possession" is not a lesser included offense. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974). Overruled on other grounds, *State v. Wilbanks*, 224 Kan. 66, 579 P.2d 132 (1978). *State v. Collins, infra*.
17. **Possession With Intent to Sell** - "Possession" is a lesser included offense. *State v. Collins*, 217 Kan. 418, 536 P.2d 1382 (1975); *State v. Newell*, 226 Kan. 295, 597 P.2d 1104 (1979).
18. **Rape** - Indecent liberties with a minor is a lesser included offense. *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983). Aggravated sexual battery. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974). Aggravated incest is not a lesser included offense. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987).
19. **Indecent Liberties With a Child** - Aggravated sexual battery is not a lesser included offense. *State v. Fike*, 243 Kan. 365, 367, 757 P.2d 724 (1988); *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989).
20. **Attempted Rape** - Battery is not a lesser included offense. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).
21. **Aggravated Sodomy** - Lewd and lascivious behavior is not a lesser included offense. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).
22. **Attempted Murder** - Aggravated battery is not a lesser included offense. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977).
23. **Unlawful Possession of Firearm** - Carrying a concealed weapon and aggravated weapons violation are not lesser included offenses. *State v. Hoskins*, 222 Kan. 436, 565 P.2d 608 (1977).
24. **DUI** - Reckless driving is not a lesser included offense. *State v. Mourning*, 233 Kan. 678, 664 P.2d 857 (1983).
25. **Conspiracy** - Generally, conspiracy is not a lesser included offense of any substantive, principal crime (e.g., burglary), because conspiracy to commit (burglary) requires an agreement between two or more persons while burglary does not. *State v. Antwine*, 4 Kan. App. 2d 389, 397-398,

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607 P.2d 519 (1980); K.S.A. 21-3302.

26. **Attempt** - Generally, an attempt to commit the substantive, principal crime (e.g., murder) may be a lesser included crime where there is in issue whether the substantive crime was ever consummated. K.S.A. 21-3301, K.S.A. 21-3107(2).
27. **Theft by Deception** - Delivery of a forged check may or may not be a lesser included offense of theft by deception depending on the charging document and the evidence produced at trial. *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991).



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**68.09-A ALTERNATIVE CHARGES**

\_\_\_\_\_ is charged in the alternative with committing an act, or acts, which constitute either the crime of \_\_\_\_\_ or the crime of \_\_\_\_\_. If you find (he)(she) committed such act or acts, it is your duty to determine which crime was committed. (He)(She) cannot be found guilty of more than one crime alternatively charged, so a finding of guilty of one requires a finding of not guilty as to the other one.

**Notes on Use**

This instruction must be given whenever otherwise multiplicitous charges are made in the alternative. If a lesser included offenses instruction is required by K.S.A. 21-3107(3), clear identification should be made in the instruction as to which crime it may apply.

**Comment**

The Committee adopts the requirement that the jury report its finding as to each charge from South Dakota's pattern instructions.

In an alternative charges case, *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992), the defendant waited until his appeal to claim the instruction given constituted reversible error in that the jury was instructed to consider an alternative offense as though it was a lesser included offense of attempted first degree murder: to "first consider" if guilty of that, it "need not consider" if guilty of aggravated battery (which is not a lesser included offense).

The Court adopted the "not clearly erroneous" standard to find the instruction did not constitute reversible error, but we believe an instruction is needed so that error may not be found even if it is claimed at the time of trial.

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**68.10 LESSER INCLUDED OFFENSES - VERDICT FORMS**

**We, the jury, find the defendant guilty of ( principal offense charged ).**

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**Presiding Juror**

**We, the jury, find the defendant guilty of ( lesser included offense ).**

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**Presiding Juror**

**We, the jury, find the defendant not guilty.**

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**Presiding Juror**

**Notes on Use**

The guilty verdict forms should be completed by specifying the main charge and the lesser included offense. The Court should submit one verdict form of guilty of the main charge, one verdict form of guilty of each lesser included offense, and one form of verdict of not guilty in the event the jury fails to find defendant guilty of either the principal charge or of a lesser included offense.

The Committee recommends that each verdict be submitted on a separate form.

**Comment**

The submission of a verdict form of guilty and not guilty for the main charge and each lesser included offense is misleading to the jury and error. *State v. Schaefer*, 190 Kan. 479, 375 P.2d 638 (1962).

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68.11 VERDICT FORM - VALUE IN ISSUE

We, the jury, find the defendant guilty of \_\_\_\_\_ and find the (value of) (damage to) (amount of) the [(property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s])] [(which the defendant [obtained] [damaged] [impaired] [gave])] [(over which the defendant [obtained] [exerted] unauthorized control)] to be:

\_\_\_\_\_ dollars (\$) \_\_\_\_\_) or more   
Less than \_\_\_\_\_ dollars (\$) \_\_\_\_\_)

(Place an X in the appropriate square.)

\_\_\_\_\_  
Presiding Juror

Notes on Use

Complete the form by selecting the applicable bracketed and parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. PIK 3d 68.03, Not Guilty Verdict - General Form, must be used with this form.

See Comment to and Notes on Use to PIK 3d 59.70, Value in Issue.

Comment

In *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814 (1987), the Court held that the trial court erred by allowing the jury to consider sales tax in its determination of the value of the merchandise stolen from a retail store.

The value to be used in determining whether theft is a felony or misdemeanor is the fair market value of the property taken. *State v. Robinson*, 4 Kan. App. 2d 428, 608 P.2d 1014 (1980).

**68.12 DEADLOCKED JURY**

**This is an important case. If you should fail to reach a decision, the case is left open and undecided. Like all cases, it must be decided sometime. Another trial would be a heavy burden on both sides.**

**There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.**

**Also, there is no reason to believe that the case would ever be submitted to 12 people more intelligent or more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.**

**These matters are mentioned now because some of them may not have been in your thoughts.**

**This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.**

**This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.**

**You may be as leisurely in your deliberations as the occasion may require and take all the time you feel necessary.**

**The giving of this instruction at this time in no way means it is more important than any other instruction. On the contrary, you should consider this instruction together with and as a part of the instructions which I previously gave you.**

**You may now retire and continue your deliberations in such manner as may be determined by your good judgment as reasonable people.**

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### Notes on Use

This instruction is a modification of PIK Civil 2d 10.20 suggested for use in civil cases when there is apparent failure of a jury to reach a verdict. The instruction can be given in substance with the other instructions at the conclusion of the case. If it is used after the jury has commenced deliberations, it should be done so with caution. The Committee recommendation that PIK Civil 10.20 not be given in criminal cases in the 1968 Supplement is modified in conformity to these notes and comment.

### Comment

It was held there was no error in giving PIK Civil 10.20 in *State v. Oswald*, 197 Kan. 251, 417 P.2d 261 (1966). "However," said the Court, "as a word of caution, this instruction quite properly could have been given at the time of the original charge." The practice of lecturing a jury in a criminal case after reported disagreement was not commended. Oral comments accompanying this instruction were held to be coercive and prejudicial error in *State v. Earsery*, 199 Kan. 208, 428 P.2d 794 (1967), but their effect, standing alone in that case, was not determined. A belated instruction was criticized, but, under attending circumstances indicating that the judge's remarks had no immediate coercive effect, the instruction was held not to be reversible error in *State v. Basker*, 198 Kan. 242, 424 P.2d 535 (1967).

In *Bush v. State*, 203 Kan. 494, 454 P.2d 429 (1969), PIK Civil 10.20 was submitted to the jury after it had deliberated for some time and failed to reach a verdict. The holding in *State v. Earsery*, supra, to the effect that PIK Civil 10.20 standing alone would not constitute prejudicial error is discussed.

In *State v. Boyd*, 206 Kan. 597, 481 P.2d 1015 (1971), the Supreme Court reiterated this warning: "The practice of submitting a forcing type instruction after the jury has reported its failure to agree on a verdict is not commended and may well lead to prejudicial error. If such an instruction is to be given, trial courts would be well advised to submit the same before the jury retires, not afterward."

In *State v. Roadenbaugh*, 234 Kan. 474, 483, 673 P.2d 1166 (1983), the Court held it is not error to give the Allen charge before the jury retires.

In *State v. Poole*, 252 Kan. 108, 843 P.2d 689 (1992), the Kansas Supreme Court emphasized the need to exercise caution in giving the Allen-type instruction. The Court stressed that ". . . timing can be very important in determining prejudicial error." It observed that the defendant had failed to furnish a record that affirmatively reflected prejudicial error as to when the deliberations began, when the Allen-type instruction was given, if the trial judge

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made additional remarks, and when the jury reached its verdict. In the absence of such record, the Court acknowledged that there is a presumption that the actions of the trial court were proper.

For discussion of the Allen charge in Kansas in criminal cases, see "Criminal Law - Jury Instructions - The Allen Charge," 6 Washburn L.J. 517 (1967).

**68.13 POST-TRIAL COMMUNICATION WITH JURORS**

You have now completed your duties as jurors in this case and are discharged with the thanks of the Court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance, the Court instructs you that whether you talk to anyone is entirely your own decision. It is proper for the attorneys to discuss the case with you and you may talk with them, but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections, or becomes critical of your service either before or after any discussion has begun, please report it to me.

**Notes on Use**

See Rules of Supreme Court Rule No. 169. Under this rule, the Court shall give the substance of the above instruction upon completion of the jury trial and before discharge of the jury.

Supreme Court Rule No. 181 governs post-trial calling of jurors and provides that jurors shall not be called for hearing on post-trial motions without an order of the Court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized, if possible.

Supreme Court Rule 226 MRPC 3.5 provides that "[a] lawyer shall not: communicate or cause another to communicate with a member of a jury or the venire from which the jury will be selected about matters under consideration other than in the course of official proceedings until after the discharge of the jury from further consideration of the case."

**Comment**

Jurors shall not be called for post-trial hearings without an order of the Court after motion. The burden is upon the party seeking the order to show the necessity for the order. *Cornejo v. Probst*, 6 Kan. App. 2d 529, 630 P.2d 1202

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(1981); *Walters v. Hitchcock*, 237 Kan. 31, 697 P.2d 847 (1985); *State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985); *State v. Ruebke*, 240 Kan. 493, 731 P.2d 842 (1987).

Supreme Court Rule 169 was quoted in *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 815 P.2d 506 (1991).



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**68.14 MURDER IN THE FIRST DEGREE - MANDATORY  
40 YEAR SENTENCE - VERDICT FORM FOR LIFE  
IMPRISONMENT WITH PAROLE ELIGIBILITY  
AFTER 15 YEARS**

**SENTENCING VERDICT**

**We, the jury, impaneled and sworn, do upon our oath  
or affirmation, unanimously determine that a sentence of  
LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY  
AFTER 15 YEARS be imposed by the Court.**

\_\_\_\_\_  
Presiding Juror

\_\_\_\_\_, 19 \_\_\_\_.

**Notes on Use**

For authority, see K.S.A. 21-4624(5).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.14-A MURDER IN THE FIRST DEGREE -  
MANDATORY 40 YEAR SENTENCE - VERDICT  
FORM FOR LIFE IMPRISONMENT WITH  
PAROLE ELIGIBILITY AFTER 40 YEARS**

**SENTENCING VERDICT**

**We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and do outweigh mitigating circumstances found to exist: [The jury shall set forth here in legible print each such aggravating circumstance.]**

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**and so, therefore, unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS be imposed by the Court.**

\_\_\_\_\_  
Presiding Juror

\_\_\_\_\_, 19 \_\_\_\_.

**Notes on Use**

For authority, see K.S.A. 21-4624(5) and 21-4628.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.14-B MURDER IN THE FIRST DEGREE -  
MANDATORY MINIMUM 40 YEAR SENTENCE -  
VERDICT FORM FOR LIFE IMPRISONMENT  
WITH PAROLE ELIGIBILITY AFTER 40 YEARS  
(Alternative Sentencing Verdict)**

**SENTENCING VERDICT**

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and do outweigh mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- [That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]
- [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
- [That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]
- [That the defendant authorized or employed another person to commit the crime.]
- [That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]

PATTERN INSTRUCTIONS FOR KANSAS 3d

- [That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]
- [That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]
- [That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]

and so, therefore, unanimously determine that a sentence of **LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS** be imposed by the Court.

\_\_\_\_\_  
Presiding Juror

\_\_\_\_\_, 19\_\_\_\_.

**Notes on Use**

For authority, see K.S.A. 21-4624(5) and 21-4628.

The applicable bracketed clauses should be included in the verdict form.

This is an alternative sentencing verdict form to the form contained in PIK 3d 68.14-A that requires the Presiding Juror to print the aggravating circumstances that have been established by the evidence that outweigh the mitigating circumstances.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.15 MURDER IN THE FIRST DEGREE -  
PREMEDITATED MURDER AND FELONY MURDER  
IN THE ALTERNATIVE - VERDICT INSTRUCTION**

The defendant is charged with one offense of murder in the first degree. This verdict instruction will guide you on the verdicts you shall consider.

You may find the defendant guilty of murder in the first degree; or murder in the second degree; or voluntary manslaughter; or involuntary manslaughter; or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only. Your Presiding Juror will sign the verdict form upon which you agree. The other verdict forms are to be left unsigned.

First, you shall consider whether the defendant is guilty of murder in the first degree. If you find defendant is guilty of murder in the first degree, the Presiding Juror shall sign the applicable verdict form and, in addition, you shall then determine the alternative theory or theories contained in "Theory 1(a)", "Theory 1(b)", or "Theory 1(c)". The Presiding Juror shall sign the applicable alternative theory verdict form(s).

Second, if you do not find the defendant guilty of murder in the first degree, you should then consider the lesser offense of murder in the second degree as defined in Instruction No. \_\_\_\_.

Third, in considering whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter as defined in Instruction No. \_\_\_\_.

Fourth, if you do not find the defendant guilty of voluntary manslaughter, you should then consider the lesser offense of involuntary manslaughter as defined in Instruction No. \_\_\_\_.

Fifth, if you do not find the defendant guilty of involuntary manslaughter, you shall find defendant not guilty.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Notes on Use

For authority, see *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976). The pattern should be given along with PIK 3d 68.16, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Form, when the defendant is charged with murder in the first degree under the alternative theories of premeditated murder and felony murder.

The instruction should be used instead of an instruction under PIK 3d 68.07, Multiple Counts - Verdict Instruction and PIK 3d 68.08, Multiple Counts - Verdict Forms. In addition, the applicable lesser included offenses should be selected.

### Comment

The basic purpose of the felony murder rule is to relieve the State of the burden of proving premeditation and malice when the death of the victim is caused by the defendant in the commission of a felony. *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

As felony murder is a method of proof to support a verdict of first degree murder, the Court in *Wilson*, held that when an accused is charged in one count of an information with both premeditated murder and felony murder it ". . . matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose. In such case the verdict is unanimous and guilty of murder in the first degree has been satisfactorily established. If a verdict of first degree murder can be justified on either of two interpretations of the evidence, premeditation or felony murder, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation of the evidence and part on another." *State v. Wilson*, 220 Kan. at 345.

The holding in *Wilson* has consistently been followed by the Supreme Court. See *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991); *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); *State v. Wise*, 237 Kan. 117, 697 P.2d 1295 (1985); and *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

The enactment of the mandatory minimum 40 year sentence in premeditated murder has required, however, an instruction to determine whether the jury unanimously found the defendant guilty of premeditated murder. See K.S.A. 21-4624. The purpose of this pattern and PIK 3d 68.16, Murder in the First

## PATTERN INSTRUCTIONS FOR KANSAS 3d

Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Form, is to provide a verdict form for the jury to determine whether the defendant is guilty of first degree murder under the alternative theories of premeditated murder or felony murder. If the jury finds unanimously that the defendant is guilty of premeditated murder, the State may then proceed with its written notice for a sentence hearing before the trial jury to determine whether the mandatory minimum sentence of 40 years should be imposed. On the other hand, if the jury unanimously finds the defendant guilty of murder in the first degree from a combination of premeditated murder and felony murder, the State may not proceed with the "Hard 40" sentence hearing.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.16 MURDER IN THE FIRST DEGREE -  
PREMEDITATED MURDER AND FELONY MURDER  
IN THE ALTERNATIVE - VERDICT FORM**

**VERDICT FORM**

- 1. We, the jury, unanimously find the defendant guilty of murder in the first degree.**

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**Presiding Juror**

**Theory 1(a) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of premeditated murder.**

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**Presiding Juror**

**Theory 1(b) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of felony murder.**

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**Presiding Juror**

**Theory 1(c) We, the jury, unable to agree under Theory 1(a) or 1(b), do unanimously find the defendant guilty of murder in the first degree on the combined theories of premeditated murder and felony murder.**

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**Presiding Juror**



PATTERN INSTRUCTIONS FOR KANSAS 3d

2. We, the jury, unanimously find the defendant guilty of murder in the second degree.

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Presiding Juror

3. We, the jury, unanimously find the defendant guilty of voluntary manslaughter.

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Presiding Juror

4. We, the jury, unanimously find the defendant guilty of involuntary manslaughter.

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Presiding Juror

5. We, the jury, unanimously find the defendant not guilty.

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Presiding Juror

Notes on Use

For authority, see *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

The instruction should be given with PIK 3d 68.15, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Instruction.

The prosecuting attorney may only then ask for the "Hard 40" under the provisions of K.S.A. 21-4624, if the jury returns a unanimous verdict of guilty of first degree murder under the theory of premeditated murder.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

If the evidence of the underlying felony for felony murder is weak or if there is evidence to support the lesser included offenses, the applicable lesser offenses should be submitted to the jury.

### **Comment**

See Comment to PIK 3d 68.15, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 69.00

ILLUSTRATIVE SETS OF INSTRUCTIONS

	PIK Number
Murder In The First Degree With Lesser Included	
Offenses . . . . .	69.01
Theft With Two Participants . . . . .	69.02
Possession Of Marijuana With Intent To Sell -	
Entrapment As An Affirmative Defense . . . . .	69.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

**69.01 MURDER IN THE FIRST DEGREE WITH LESSER INCLUDED OFFENSES**

**Summary of the Facts and Issues**

Wilbur Smith was married to Winnie Smith. Winnie was having an affair with John Green. On a number of occasions, Wilbur Smith and John Green engaged in fist fights and there was "bad blood" between them. On the evening of July 5, 1993, Wilbur Smith shot and killed John Green with a .22 caliber revolver while the two were at the Deluxe Tavern in Lawrence, Kansas. Both of the men had been drinking. Some of the witnesses testified that Wilbur Smith took deliberate aim and shot John Green between the eyes. Other witnesses testified that immediately prior to the shooting Smith and Green were having a heated argument and threatening one another. Wilbur Smith testified that the shooting had been accidental and that he accidentally struck the gun against the side of a booth and the gun was discharged unintentionally and just happened to strike John Green. Wilbur Smith testified that he had the gun only to frighten John Green and he thought the trouble could be avoided if he exhibited a gun.

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**An Outline of Suggested Instructions in Sequence Follows:**

- Instruction 1.     PIK 3d 51.02, Consideration and Binding Application of Instructions.**
- Instruction 2.     PIK 3d 56.01, Murder in the First Degree.**
- Instruction 3.     PIK 3d 68.09, Lesser Included Offenses.**

## PATTERN INSTRUCTIONS FOR KANSAS 3d

- Instruction 4.** PIK 3d 56.03, Murder in the Second Degree.
- Instruction 5.** PIK 3d 56.05, Voluntary Manslaughter.
- Instruction 6.** PIK 3d 56.06, Involuntary Manslaughter.
- Instruction 7.** PIK 3d 56.04, Homicide Definitions.
- Instruction 8.** PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.
- Instruction 9.** PIK 3d 54.01, Presumption of Intent.
- Instruction 10.** PIK 3d 51.05, Rulings of the Court.
- Instruction 11.** PIK 3d 51.06, Statements and Arguments of Counsel.
- Instruction 12.** PIK 3d 52.09, Credibility of Witnesses.
- Instruction 13.** PIK 3d 68.01, Concluding Instruction.
- Verdict Forms.** PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

## TEXT OF SUGGESTED INSTRUCTIONS

### Instruction No. 1.

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying

## PATTERN INSTRUCTIONS FOR KANSAS 3d

these instructions to the facts as you find them. (PIK 3d 51.02)

### Instruction No. 2.

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed John Green;
2. That such killing was done with premeditation; and
3. That this act occurred on or about the 5th day of July, 1993, in Douglas County, Kansas.

(PIK 3d 56.01)

### Instruction No. 3.

The offense of murder in the first degree with which the defendant is charged includes the lesser offenses of murder in the second degree, voluntary manslaughter, and involuntary manslaughter.

You may find the defendant guilty of murder in the first degree, or murder in the second degree or voluntary manslaughter or involuntary manslaughter or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only.

Your Presiding Juror should then sign the appropriate verdict form. The other verdict forms are to be left unsigned. (PIK 3d 68.09)

### Instruction No. 4.

If you do not agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.

PATTERN INSTRUCTIONS FOR KANSAS 3d

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed John Green;
2. That it was not done in the heat of passion; and
3. That this act occurred on or about the 5th day of July, 1993, in Douglas County, Kansas.

(PIK 3d 56.03)

Instruction No. 5.

In considering whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter. If there is a reasonable doubt as to which of these two offenses the defendant is guilty, the defendant may be convicted of voluntary manslaughter only.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed John Green;
2. That it was done in the heat of passion; and
3. That this act occurred on or about the 5th day of July, 1993, in Douglas County, Kansas.

(PIK 3d 56.05)

Instruction No. 6.

If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.

To establish this charge, each of the following claims must be proved:

1. That the defendant unintentionally killed John Green;
2. That it was done recklessly; and

PATTERN INSTRUCTIONS FOR KANSAS 3d

3. That this act occurred on or about the 5th day of July, 1993, in Douglas County, Kansas.  
(PIK 3d 56.06)

**Instruction No. 7.**

As used in these instructions, the following words and phrases are defined as indicated:

**Premeditation means to have thought over the matter beforehand.**

**Intentionally means conduct that is purposeful and willful and not accidental. Intentional includes the terms "knowing", "willful", "purposeful" and "on purpose."**

**Heat of passion means any intense or vehement emotional excitement which was spontaneously provoked from circumstances.**

**Reckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence", "culpable negligence", "wanton negligence" and "wantonness" are included within "reckless".**  
(PIK 3d 56.04)

**Instruction No. 8.**

**The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty until you are convinced from the evidence that he is guilty.**

**The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.**

**(PIK 3d 52.02)**



## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Instruction No. 9.

Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

(PIK 3d 54.01)

### Instruction No. 10.

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 3d 51.05)

### Instruction No. 11.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 3d 51.06)

### Instruction No. 12.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified. (PIK 3d 52.09)

PATTERN INSTRUCTIONS FOR KANSAS 3d

**Instruction No. 13.**

**When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.**

**Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.**

**Your agreement upon a verdict must be unanimous.**

\_\_\_\_\_  
District Judge

\_\_\_\_\_, 19 \_\_\_\_.

**(PIK 3d 68.01)**

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

**We, the jury, find the defendant guilty of first degree murder.**

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**Presiding Juror**

**We, the jury, find the defendant guilty of second degree murder.**

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**Presiding Juror**

**We, the jury, find the defendant guilty of voluntary manslaughter.**

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**Presiding Juror**

**We, the jury, find the defendant guilty of involuntary manslaughter.**

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**Presiding Juror**

**We, the jury, find the defendant not guilty.**

---

**Presiding Juror**

**(PIK 3d 68.10)**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**69.02 THEFT WITH TWO PARTICIPANTS**

**Summary of the Facts and Issues**

Acme Department Store is located in Wichita, Kansas. On July 5, 1993, two men entered the store together. The defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store, Smith and Green proceeded to the men's department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later, John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

**Instruction 1.      PIK 3d 51.02, Consideration and  
Binding Application of Instructions.**

**PIK 3d 51.05, Rulings of the Court.**

## PATTERN INSTRUCTIONS FOR KANSAS 3d

**PIK 3d 51.06, Statements and Arguments of Counsel.**

**PIK 3d 52.09, Credibility of Witnesses.**

**Instruction 2. PIK 3d 59.01, Theft.**

**Instruction 3. PIK 3d 59.70, Value in Issue.**

**Instruction 4. PIK 3d 54.05, Responsibility for Crimes of Another.**

**Instruction 5. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.**

**Instruction 6. PIK 3d 54.01, Presumption of Intent.**

**Instruction 7. PIK 3d 68.01, Concluding Instruction.**

**Verdict Forms. PIK 3d 68.11, Verdict of Guilty and Finding of Value of Property.**

**PIK 3d 68.03, Not Guilty Verdict.**

### TEXT OF SUGGESTED INSTRUCTIONS

#### Instruction No. 1.

**It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.  
(PIK 3d 51.02)**

**At times during the trial, I have ruled upon the**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.**

**(PIK 3d 51.05)**

**Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.**

**(PIK 3d 51.06)**

**It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.**

**(PIK 3d 52.09)**

**Instruction No. 2.**

**The defendant is charged with the crime of theft of property of the value of at least \$500 but less than \$25,000. The defendant pleads not guilty.**

**To establish this charge, each of the following claims must be proved:**

- 1. That Acme Department Store was the owner of the property;**
- 2. That the defendant exerted unauthorized control over the property;**
- 3. That the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property;**
- 4. That the value of the property was at least \$500 but less than \$25,000; and**
- 5. That this act occurred on or about the 5th day of July, 1993, in Sedgwick County, Kansas.**

**(PIK 3d 59.01)**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**Instruction No. 3.**

The State has the burden of proof as to the value of the property over which the defendant allegedly exerted unauthorized control.

The State claims that the value of the property involved herein was in an amount of at least \$500 but less than \$25,000.

It is for you to determine the amount and enter it on the verdict form furnished.

(PIK 3d 59.70)

**Instruction No. 4.**

A person who, either before or during its commission, intentionally aids another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the defendant's participation, if any, in the actual commission of the crime.

(PIK 3d 54.05)

**Instruction No. 5.**

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty until you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.

(PIK 3d 52.02)

PATTERN INSTRUCTIONS FOR KANSAS 3d

**Instruction No. 6.**

**Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.**

**(PIK 3d 54.01)**

**Instruction No. 7.**

**When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.**

**Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.**

**Your agreement upon a verdict must be unanimous.**

\_\_\_\_\_  
District Judge

\_\_\_\_\_, 19\_\_\_\_\_  
(PIK 3d 68.01)



PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

**We, the jury, find the defendant guilty of theft and find the value of the property over which the defendant exerted unauthorized control to be:**

- Five hundred dollars (\$500) or more**   
**Less than Five hundred dollars (\$500)**

**(Place an X in the appropriate square.)**

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**Presiding Juror**

**(PIK 3d 68.11)**

**We, the jury find the defendant not guilty of**

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**Presiding Juror**

**(PIK 3d 68.03)**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**69.03 POSSESSION OF MARIJUANA WITH INTENT TO SELL - ENTRAPMENT AS AN AFFIRMATIVE DEFENSE**

**Summary of the Facts and Issues**

On January 3, 1993, Detective James Ware was told by a confidential informant that John Spencer was selling marijuana. Ware contacted Spencer in a bar in Wichita, Kansas, where Spencer was employed as a bartender. Ware talked with Spencer on numerous occasions.

On each of those occasions, Ware told Spencer that he was interested in buying five to ten pounds of marijuana. Ware said he was nervous but he had been told Spencer could be trusted on April 4, 1993. A price was negotiated and a meeting was set up for April 5, 1993, to complete the transaction.

When Spencer showed up for the meeting, Ware showed him the agreed amount of cash. Spencer then opened the trunk of his car to show Ware the marijuana. When Ware saw the marijuana in the trunk of the car, Spencer was arrested.

Spencer testified at trial that he had had many conversations with Ware but that he would not have agreed to sell the marijuana if Ware had not kept pressuring him.

In rebuttal testimony the confidential informant, Tyler Johnson, testified that he had been present on three occasions when Spencer had sold marijuana.

**An Outline of Suggested Instructions in Sequence Follows:**

**Instruction 1. PIK 3d 51.02, Consideration and Binding Application of Instructions.**

**PIK 3d 51.05, Rulings of the Court.**

**PATTERN INSTRUCTIONS FOR KANSAS 3d**

**PIK 3d 51.06, Statements and Arguments of Counsel.**

**PIK 3d 52.09, Credibility of Witnesses.**

- Instruction 2. PIK 3d 67.14, Possession of Marijuana With Intent to Sell.**
- Instruction 3. PIK 3d 52.08, Affirmative Defenses - Burden of Proof.**
- Instruction 4. PIK 3d 54.14, Entrapment.**
- Instruction 5. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.**
- Instruction 6. PIK 3d 54.01, Presumption of Intent.**
- Instruction 7. PIK 3d 68.01, Concluding Instruction.**
- Verdict Forms. PIK 3d 68.02, Guilty Verdict - General Form.  
PIK 3d 68.03, Not Guilty Verdict - General Form.**

**TEXT OF SUGGESTED INSTRUCTIONS**

**Instruction No. 1.**

**It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.  
(PIK 3d 51.02)**

## PATTERN INSTRUCTIONS FOR KANSAS 3d

**At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.**

**(PIK 3d 51.05)**

**Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.**

**(PIK 3d 51.06)**

**It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.**

**(PIK 3d 52.09)**

### **Instruction 2.**

**The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to an hallucinogenic drug known as marijuana. The defendant pleads not guilty.**

**To establish this charge, each of the following claims must be proved:**

- 1. That the defendant possessed an hallucinogenic drug known as marijuana;**
- 2. That the defendant did so with the intent to sell it;**
- 3. That the defendant did so on or about the 5th day of April, 1993, in Sedgwick County, Kansas.**

**(PIK 3d 67.14)**

PATTERN INSTRUCTIONS FOR KANSAS 3d

**Instruction 3.**

The defendant claims as a defense that he was entrapped. Evidence in support of this claim should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant. If the defense asserted causes you to have a reasonable doubt as to the defendant's guilt, you should find the defendant not guilty.

(PIK 3d 52.08)

**Instruction 4.**

Entrapment is a defense if the defendant is induced to commit a crime which the defendant had no previous disposition to commit. It is not a defense if the defendant originated the plan to commit the crime or when he had shown a predisposition for committing the crime or when he had shown predisposition for committing the crime and was merely afforded an opportunity to consummate the crime and was assisted by law enforcement officers.

The defendant cannot rely on the defense of entrapment if you find that in the course of defendant's usual activities the sale of marijuana was likely to occur and the law enforcement officer or his agent did not mislead the defendant into believing his conduct to be lawful.

A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the marijuana by the defendant, solicitation by defendant to make his sale, prior sales by defendant, or ease of access to the marijuana by defendant.

(PIK 3d 54.14)

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Instruction No. 5.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty until you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.

(PIK 3d 52.02)

### Instruction No. 6

Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

(PIK 3d 54.01)

### Instruction No. 7.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**Your agreement upon a verdict must be unanimous.  
(PIK 3D 68.01)**

\_\_\_\_\_, 19\_\_\_\_  
\_\_\_\_\_  
District Judge

**VERDICT FORMS**

**We, the jury, find the defendant guilty of possession of marijuana with intent to sell.**

\_\_\_\_\_  
Presiding Juror  
(PIK 3d 68.02)

**We, the jury, find the defendant not guilty of possession of marijuana with intent to sell.**

\_\_\_\_\_  
Presiding Juror  
\_\_\_\_\_, 19\_\_\_\_

(PIK 3d 68.03)

**PATTERN INSTRUCTIONS FOR KANSAS 3d**

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PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 70.00

SELECTED MISDEMEANORS

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Traffic Offense - Alcohol Concentration of .08 Or More . . . . .	70.01-A
B.A.T. .08 Or More Or DUI Charged In The Alternative . . . . .	70.01-B
Driving Under The Influence - If Chemical Test Used .	70.02
Transporting Liquor In An Opened Container . . . . .	70.03
Reckless Driving . . . . .	70.04
Violation Of City Ordinance . . . . .	70.05
Operating An Aircraft While Under The Influence Of Intoxicating Liquor Or Drugs . . . . .	70.06
Operating An Aircraft While Under The Influence - If Chemical Test Is Used . . . . .	70.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.01 TRAFFIC OFFENSE - DRIVING UNDER THE  
INFLUENCE OF ALCOHOL OR DRUGS**

The defendant is charged with the crime of operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or a combination thereof. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant drove or attempted to drive a vehicle;
2. That the defendant, while driving or attempting to drive, was under the influence of (alcohol) (a drug) (a combination of drugs) (a combination of alcohol and any drug[s]); and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

(The phrase "under the influence of alcohol" or "under the influence of a drug" means that the defendant's control of [his][her] mental or physical function was impaired to a degree that [he][she] was incapable of safely driving a vehicle.)

**Notes on Use**

For authority, see K.S.A. 8-1567(a)(3) and K.S.A. 8-1005. K.S.A. 8-1567 was amended by L.1992, ch. 298, § 1, effective July 1, 1993. If the evidence is limited to either alcohol, a drug, a combination of drugs or a combination of alcohol and any drugs, reference to the inapplicable category or categories should be deleted from the instruction.

For the definition of attempt, see PIK 3d 55.01.

**Comment**

As to what is a vehicle under similar statutes, see 66 A.L.R. 2d 1146.

It is no defense to this charge that the defendant is or has been entitled to use the drug involved and, when applicable, the jury should be so instructed. K.S.A. 8-1567(c).

## PATTERN INSTRUCTIONS FOR KANSAS 3d

The word "operate" as used in K.S.A. 8-1567(a) has been construed to require either direct or circumstantial evidence that the defendant was driving the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980).

Reckless driving is not a lesser included offense of DUI. *State v. Mourning*, 233 Kan. 678, 682, 664 P.2d 857 (1983).

The phrase "driving under the influence" is not unconstitutionally vague. *State v. Campbell*, 9 Kan. App. 2d 474, 475, 681 P.2d 679 (1984).

The instruction has been modified as suggested in *State v. Reeves*, 233 Kan. 702, 704, 664 P.2d 862 (1983).

K.S.A. 8-1567(a)(1) is not unconstitutionally vague. *State v. Larson*, 12 Kan. App. 2d 198, 201, 737 P.2d 880 (1987).

Under K.S.A. 8-1567(a)(1), "the fact of driving with an alcohol concentration of .10 or above is now a crime, even in a case . . . where the State cannot prove the driver was under the influence of alcohol to the extent he or she is incapable of driving safely." *State v. Larson*, 12 Kan. App. 2d 198, 200, 737 P.2d 880 (1987); *State v. Zito*, 11 Kan. App. 2d 432, 434, 724 P.2d 149 (1986).

In *City of Wichita v. Hull*, 11 Kan. App. 2d 441, 445, 724 P.2d 699 (1986), it was held that by omission of the element of intent in K.S.A. 8-1567, the Legislature intended driving while under the influence of alcohol or drugs to be an absolute liability *malum prohibitum* offense.

Driving while under the influence of alcohol is a lesser included offense of aggravated vehicular homicide. *State v. Woodman*, 12 Kan. App. 2d 110, 119, 735 P.2d 1102 (1987).

Driving while under the influence of alcohol under certain circumstances is a lesser included offense of involuntary manslaughter where: (1) Driving under the influence is alleged as the underlying misdemeanor in the information or complaint; and (2) all of the elements of driving under the influence are alleged in the information or complaint and are necessarily proved to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, Syl. ¶ 2, 744 P.2d 833 (1987).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.01-A TRAFFIC OFFENSE - ALCOHOL  
CONCENTRATION .08 OR MORE**

The defendant is charged with the crime of operating or attempting to operate a vehicle while the alcohol concentration in (his)(her) blood or breath is .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant drove or attempted to drive a vehicle;
2. That the defendant, while driving had an alcohol concentration in (his)(her) blood or breath of .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

The phrase "alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood) (210 liters of breath).

**Notes on Use**

For authority, see K.S.A. 8-1567(a)(1) and (a)(2) and K.S.A. 8-1005 which were amended in 1993 to change .10 to .08.

**Comment**

The Committee is of the opinion the alcohol concentration in the defendant's blood or breath must result from alcohol consumed before or while operating or attempting to operate a vehicle.

Definition of alcohol concentration in K.S.A. 8-1005 is applicable to a city ordinance. *City of Ottawa v. Brown*, 11 Kan. App. 2d 581, 584-585, 730 P.2d 364 (1986), *rev. denied* 241 Kan. 838 (1987).

To obtain a conviction for a per se violation under K.S.A. 8-1567(a)(2), the State must show the alcohol concentration was tested *within* two hours of the last time a defendant operated or attempted to operate a motor vehicle. *State v. Pendleton*, 18 Kan. App. 2d 179, 849 P.2d 143 (1993).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.01-B B.A.T. .08 OR MORE OR DUI CHARGED IN THE ALTERNATIVE**

The defendant is charged in the alternative with (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more or (operating) (attempting to operate) a vehicle while under the influence of alcohol. You are instructed that the alternative charges constitute one crime.

You should first consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more. If you find defendant guilty of that charge, you should sign the appropriate verdict form and you need not consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while under the influence of alcohol.

If you do not agree that the defendant is guilty of (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more you should then consider if defendant is guilty of (operating) (attempting to operate) a vehicle while under the influence of alcohol. If you find the defendant is guilty of that charge, you should sign the verdict form.

If you find the defendant is not guilty of both charges, you should sign the indicated verdict form.

**Notes on Use**

The Committee believes that K.S.A. 8-1567 defines a single offense. The State may, however, charge the offense in the alternative. See PIK 3d 70.01, Traffic Offense - Driving Under the Influence of Alcohol or Drugs, and PIK 3d 70.01-A, Traffic Offense - Alcohol Concentration .08 or more.

Authority for instructions in the alternative are found in *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978), and *State v. McCowan*, 226 Kan. 752, 764, 602 P.2d 1363 (1979), cert. denied 449 U.S. 844 (1980).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.02 DRIVING UNDER THE INFLUENCE - IF  
CHEMICAL TEST USED**

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) (other body substance) may be taken in order to determine the amount of the alcohol in the defendant's blood at the time the alleged offense occurred. [If a test shows there was .08 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that (he)(she) was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case.] [If a test shows there was less than .08 percent by weight of alcohol in the defendant's blood, that fact may be considered with other competent evidence to determine if the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).]

You are further instructed that evidence derived from a (blood) (breath) (urine) (other body substance) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).

**Notes on Use**

For authority, see K.S.A. 8-1005 and K.S.A. 8-1006 which were amended in 1993 to change .10 to .08. If the result of only one test is in evidence, only the applicable bracketed paragraph should be used.

**Comment**

The constitutionality of a presumption is described in the Comment to PIK 3d 54.01 and 54.01-B.

The Committee believes that "prima facie" evidence as used in K.S.A. 8-1005 creates a presumption, and the suggested instruction is worded accordingly. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973).

The above instruction has been approved in dicta in *State v. Price*, 233 Kan. 706, 711, 664 P.2d 869 (1983).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.03 TRANSPORTING LIQUOR IN AN OPENED CONTAINER**

The defendant is charged with the crime of transporting alcoholic liquor in an opened container. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant transported a container of alcoholic liquor in a vehicle upon a highway or street;
2. That the container had been opened;
3. That the container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion;
4. That the defendant knew or had reasonable cause to know (he)(she) was transporting an opened container of alcoholic liquor; and
5. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 41-804. A person convicted of this offense shall be punished by a fine of not more than \$200, or by imprisonment for not more than six months, or by both such fine and imprisonment. In addition to fine and/or imprisonment, the Court may, and in some cases must, enter an order placing conditions on the defendant's driving privileges. K.S.A. 41-804(f).

Highway and street are defined in K.S.A. 8-1424 and K.S.A. 8-1473.

**Comment**

The case of *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952), held that a defendant cannot be guilty hereunder if he does not know or have reason to know that an opened container is in the vehicle.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

K.S.A. 41-2719, which prohibits transportation of an open container of cereal malt beverage in a vehicle on the highway or street, applies to passengers as well as to the driver of the vehicle. *State v. Erbacher*, 8 Kan. App. 2d 169, 651 P.2d 973 (1982).



## PATTERN INSTRUCTIONS FOR KANSAS 3d

### 70.04 RECKLESS DRIVING

The defendant is charged with the crime of reckless driving. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was driving a vehicle;
2. That the defendant was driving in a reckless manner; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

Reckless means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger.

#### Notes on Use

For authority, see K.S.A. 8-1566. A first conviction of reckless driving shall be punishable by imprisonment for not less than five days nor more than 90 days, or by a fine of not less than \$25 nor more than \$500, or by both such fine and imprisonment. Second and subsequent convictions of reckless driving shall be punishable by imprisonment for not less than 10 days nor more than six months, or by a fine of not less than \$50 nor more than \$500, or by both such fine and imprisonment.

#### Comment

Reckless is defined as an indifference to whether or not wrong is done. To be reckless, the conduct must show disregard of or indifference to the consequences under circumstances involving danger to life or safety of others, although no harm was intended. *Montgomery v. Barton*, 212 Kan. 368, 370, 510 P.2d 1187 (1973).

See also, *Hanson v. Swain*, 172 Kan. 105, 238 P.2d 517 (1951); *Bailey v. Resner*, 168 Kan. 439, 214 P.2d 323 (1950).

"The offense of reckless driving is not a lesser included offense of driving under the influence of alcohol or drugs." *State v. Mourning*, 233 Kan. 678, 682-683, 664 P.2d 857 (1983). See also, *State v. Bruening*, 238 Kan. 429, 434-

## PATTERN INSTRUCTIONS FOR KANSAS 3d

435, 710 P.2d 1325 (1985).

Conviction of a law enforcement officer for reckless driving while on duty affirmed. Conduct not privileged under K.S.A. 8-1506. *State v. Simpson*, 11 Kan. App. 2d 666, 732 P.2d 788 (1987).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.05 VIOLATION OF CITY ORDINANCE**

The ordinance of the City of \_\_\_\_\_, Kansas, makes it unlawful for any person to (state offense charged) within the city. The defendant is charged with violating this ordinance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. (List the various elements of the offense.)
- 2.
- 3.
4. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

The elements of the applicable substantive crime should be set forth in the concluding portion of the instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.06 OPERATING AN AIRCRAFT WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS**

The defendant is charged with the crime of operating an aircraft while under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was operating an aircraft;
2. (a) That the defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug), and the control of (his)(her) mental or physical functions was thereby impaired to the extent that the defendant was incapable of safely operating an aircraft;  
or  
(b) That the defendant had .10 percent or more by weight of alcohol in (his)(her) blood as shown by chemical analysis of (his)(her) blood, breath or urine; and
3. That this act occurred on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ County, Kansas.

**Notes on Use**

For authority, see K.S.A. 3-1001 and K.S.A. 3-1002. A first conviction of this offense is punishable by imprisonment of not more than one year, or by a fine of not less than \$100 nor more than \$500, or by both such fine and imprisonment. Second and subsequent convictions shall be punishable by imprisonment for not less than 30 days nor more than one year, and, in the discretion of the Court, a fine of not more than \$500. K.S.A. 3-1003. In addition, pursuant to K.S.A. 3-1003(b), the Court may order the defendant not to operate an aircraft for any purpose.

If the blood alcohol level is .10 percent or more, the element of "under the influence of intoxicating liquor" is satisfied.

## PATTERN INSTRUCTIONS FOR KANSAS 3d

### Comment

It is no defense to this charge that the defendant is or has been entitled to use the drug involved and when applicable the jury should be so instructed. K.S.A. 3-1003.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.07 OPERATING AN AIRCRAFT WHILE UNDER THE  
INFLUENCE - IF CHEMICAL TEST IS USED**

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) may be taken to determine the amount of alcohol in the defendant's blood at the time the alleged offense occurred. If the test shows there was less than .10 percent by weight of alcohol in the defendant's blood, it shall be presumed the defendant was not under the influence of intoxicating liquor.

You are further instructed that evidence derived from a (blood) (breath) (urine) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The evidence established by the test is not conclusive, but it should be considered by you along with all the other evidence in this case.

Notes on Use

For authority, see K.S.A. 3-1004 and K.S.A. 3-1005.

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